Anti-Money Laundering and Counter-Terrorism Financing Exposure Draft Bill, Draft Rules and Guidelines and Supporting Information

2 May 2006

GPO Box 1989, Canberra,
ACT 2601, DX 5719 Canberra

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

19 Torrens St Braddon ACT 2612
www.lawcouncil.asn.au

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Introduction

1. The Law Council of Australia (Law Council) is pleased to make a submission to the Attorney General's Department in relation to tranche one law reforms on Anti-Money Laundering and Counter Terrorism Financing (AML/CTF) impacting certain legal practitioners.

2. Tranche one of the AML/CTF law reforms are covered in the Exposure Draft Anti-Money Laundering and Counter-Terrorism Financing Bill 2005 (the Exposure Draft Bill) which forms part of a package of reforms intended to address the evaluation made by the International Financial Action Task Force on Money Laundering[1] of Australia's AML/CTF system and to improve and strengthen current systems.

3. The package consists of legislation, regulation and rules and will replace the *Financial Transaction Reports Act* 1988 (the FTR Act) and the Financial Transaction Reports Regulations 1990.

4. The Exposure Draft Bill establishes a proposed framework for Australia's AML/CTF system within which primary obligations would be contained in principles based legislation with operational details to be covered in AML/CTF Rules.

5. The Exposure Draft Bill covers particular services provided by the financial sector, gambling sector and bullion dealers and includes businesses and professionals in other sectors such as legal practitioners to the extent that they provide specified financial services.

6. The Government intends to consider a second tranche of reforms covering other industry sectors including legal practitioners providing specific non-financial services.

The Law Council Opposes the Application of Tranche One to Lawyers

7. The Law Council strenuously and unequivocally opposes tranche one law reforms on AML/CTF impacting legal practitioners. The Law Council cannot support new compliance arrangements which are incompatible with the independence of the legal profession underpinning the administration of justice.

8. The Law Council believes that tranche one of the AML/CTF law reforms which require legal practitioners to make a judgement about their clients, for example to determine whether a client is suspicious and if they are, to report them to authorities, compromises a legal practitioner's duty to the court, intrudes on the independence of the legal profession and impacts squarely on the due administration of justice.

9. The Law Council recognises that tranche one does not affect all legal practitioners as the reforms are intended to affect legal practitioners who provide "designated financial services". While all legal practitioners are not affected, the central feature of the Exposure Draft Bill remains at odds with the fundamental role of legal practitioners in the legal system.

[1] Financial Action Task Force on Money Laundering, *Third Mutual Evaluation Report on Anti-Money And Combating The Financing of Terrorism – Australia*, 14 October 2005.

10. Over the past two years that the anti-money laundering (AML) reforms have been considered, though not formally articulated in draft legislation, the Law Council on behalf of the Australian legal profession consistently expressed its concerns with the nature of the proposed AML/CTF law reforms requiring suspicious transactions to be reported and flagged issues which posed significant and specific concerns for the legal profession.

11. The Law Council has reviewed the Exposure Draft Bill, Sample Rules, Guidelines and Supporting Information and concludes that the reforms are at odds with the fundamental role of lawyers in the legal system and the administration of justice.

Features of the Exposure Draft Bill Impacting Legal Practitioners

Customer Identification

12. A reporting entity which includes legal practitioners who provide designated financial services to customers as defined in Table 1 of clause 6 is required to undertake procedures to verify a customer's identity.

13. These procedures are contained in Part 2 of the Exposure Draft Bill and prescribed by the AML/CTF rules and may vary with the type of customers and designated services and circumstances.

14. The document *Draft Identification Rules Excerpt – For Discussion And Further Comment* contained in the package provides the minimum customer information required to be collected and includes the customer's names, addresses, date of birth or incorporation whichever applies. Additional information for a customer that is a non natural person includes names of shareholders with substantial holdings, directors, secretary, members of the governing body eg. Board (if appropriate); trustees, partners, constituent documents evidencing formation of the entity.

15. The AML/CTF Minister's Advisory Group is currently developing the risk based approach to reporting foreshadowed in Division 3 of the Exposure Draft Bill which provides separate identification procedures for certain low risk services and elaborated in the Draft AML/CTF Rules for Discussion. Records collected are retained by the reporting entity and provided to AUSTRAC in certain circumstances including pursuant to clause 3.9.

16. Subject to legal professional privilege which may apply to customer identity in some circumstances[2], the collection and reporting of such information to verify the identity of customers of itself appears unlikely to compromise the role of lawyers.

17. The Law Council believes that the current risk based approach of collecting objective information pertaining to the client's identity pursuant to Part 2 of the Exposure Draft Bill is likely to be the least intrusive and effects minimum compliance costs. The Law Council will continue to participate in the work of the advisory group and sub-groups to identify issues and improve the risk based approach.

[2] *Commissioner of Taxation (Cth) v Coombes* (1999) 164 ALR 131 (Fed Crt)

Reporting transactions of designated services involving cash or e-currency of at least $10,000

18. Legal practitioners and other reporting entities are also required to make a report to AUSTRAC of transactions in respect of the provision of a designated service involving cash or e-currency where the total amount of the transaction is $10,000 or more. Similar arrangements currently operate and the Law Council is not opposed to providing objective information as considered appropriate and necessary and subject to legal professional privilege to authorities.

Reporting suspicious transactions

19. The Law Council has serious concerns in relation to the operation of clauses 39 and 40 in relation to legal practitioners. Clauses 39 and 40 in Division 2 of Part 3 of the Exposure Draft Bill require a reporting entity to report certain suspicious matters that are related to the provision or prospective provision of a designated service.

20. Clause 39 requires legal practitioners to report customers where there are reasonable grounds to suspect that information obtained may be relevant to:

a) The potential evasion of taxation law

b) Offences against the law of the Commonwealth or of a Territory

c) Enforcement of the *Proceeds of Crime Act* 2002

d) Preparatory to or the past commission of a financing of a terrorism offence

21. Clause 40 extends (a) (b) and (c) to foreign law and Australian state and territory law dealing with the same subject matter.

22. Where these conditions are satisfied, a legal practitioner is required to provide a report containing details specified in the AML/CTF rules to AUSTRAC within 24 hours in relation to (d) or otherwise 3 days of the reporting entity forming the relevant suspicion.

23. The document entitled *Draft AML/CTF Rules For Discussion* states that particular matters should be taken into account in determining whether there are reasonable grounds for forming a suspicion for the purposes of clause 39 including:

The Customer

- the customer's usual occupation or business or activity and income source and level
- the usual financial and business practices in the customer's field of endeavour
- the customer's history with respect to the designated service, transaction history,
- the customer's expected behaviour

The Transactions

- the size, complexity, structure and pattern of any transaction;

- the source and origin of the funds for any service or transaction including any parties involved in providing the funds, identity and occupation of any person, intermediaries or beneficiary involved in the service or transaction

- the provision of misleading information or false documents

24. Information required to be reported includes the identification of the customer and the details of the transaction and service such as the matters which triggered the suspicion and any other details that the reporting entity considers may be relevant to the subject of the suspicion.

25. The Law Council believes that the government is under the misapprehension that Tranche one does not conflict with the legal practitioners' professional obligations. Refer to the document entitled *Legal Practitioners – Questions and Answers*, page 4 of 5.

26. While the application of the Exposure Draft Bill is triggered by the provision of a financial service which falls within the categories of a "designated service", the Law Council submits that where the service is provided by a legal practitioner Division 2 of Part 3 of the Exposure Draft Bill is at odds with the role and duty of legal practitioners in the administration of justice. The operation of division 2 requires legal practitioners providing a designated service to judge their clients in relation to the provision of that service, for example to determine whether a client is suspicious and if they are, to report them to authorities. This requirement is incompatible with the role of legal practitioners and their duty to the client and to the court including but not limited to maintaining independence from the client and other parties, loyalty to the client free of any conflict of interest and client confidentiality.

Tranche One AML/CTF Law Reforms Conflict with the Role and Duty of Legal Practitioners

27. Legal practitioners' duties in the administration of justice are implied in the Australian Constitution and international instruments and recognised in Australian common law, federal, state and territory legislation and accompanying regulations.

The Right to a Fair Hearing by a Competent Independent and Impartial Tribunal

28. Relevant to the right to a fair hearing, the International Covenant on Civil and Political Rights (ICCPR) states:

"Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law….;

3 (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing…;

(d) To be tried in his presence, and to defend himself in person or through

> legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right…"

29. In *Jago v District Court* (NSW), the High Court recognised that the right of an accused to a fair trial according to law is a fundamental element of our criminal justice system.[3] In *Dietrich v The Queen*[4], Mason CJ and McHugh J in their joint judgment recognised that the right to a fair trial is embraced in Australian common law as the right manifests in rules of law and practice designed to regulate the courts of the trial.[5]

30. The Law Council submits that the right to a fair hearing by an independent and impartial tribunal depends on an independent bar. An independent bar is essential to the maintenance of an independent judiciary and for the administration of justice. Lord Pearce said in Rondel v Worsley[6],

> "The independence of counsel is of great and essential value to the integrity, the efficacy, the elucidation of truth and the despatch of business in the administration of justice."

31. In considering the issue of whether a barrister and a solicitor may be sued for damages in a civil action, McHugh J in *Ryan D'Orta-Ekenaike v Victoria Legal Aid & Anor*[7] stated that the independence of the bar largely secures the independence of the judiciary. His Honour considered that it is highly unlikely that public confidence in the administration of justice could be maintained if, for instance, the administration of justice in all its aspects was a government monopoly. [8]

32. In *Ziems v The Prothonotary of the Supreme Court of NSW*[9], Dixon CJ acknowledged that the Bar exercises a unique but indispensable function in the administration of justice. Reflecting on the unique character of the bar, Kitto J said, in the same case:

> "It has been said before, and in this case the Chief Justice of the Supreme Court has said again, that the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations. If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, he is not a fit and proper person to remain at the Bar."[10]

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[3] (1989) 168 CLR 23, 29, per Mason CJ; p. 56 per Deane J; p.72, per Toohey J, p.75 per Gaudron J.
[4] *Dietrich v The Queen* (1992) 177 CLR 292
[5] *Dietrich v The Queen* (1992) 177 CLR 292, 299-300
[6] [1969] 1 AC 191, 276B-E; see also per Lord Reid at 227D-F
[7] [2005] HCA 12,
[8] [2005] HCA 12, [106]
[9] (1957) 97 CLR 279, 286
[10] (1957) 97 CLR 279, 298

33. Notwithstanding that some of the legal issues in cases may not have turned on the feature of the independence of the bar, it is evident that courts have acknowledged the undeniable public interest in the maintenance of an independent bar in achieving an effective system of justice.

34. In *Ryan D'Orta-Ekenaike v Victoria Legal Aid & Anor*[11], Kirby J referred to the independent bar as a vital contributor to the just and efficient operation of the trial process in addition to contributing uniquely to the independence and high standing of the judiciary.

35. The AML/CTF laws were challenged the constitutional validity of the provisions of the AML laws in Canada in 2001 by the Law Society of British Columbia and the Federation of Law Societies of Canada ("petitioners") who sought interlocutory orders to exempt lawyers from the application of the Proceeds of Crime (Money Laundering) Act SC 2000 and its Regulations (AML Laws) pending a full hearing into the merits of the constitutional challenge.

36. The petitioners asserted that the relevant AML laws make it a crime for a lawyer to fail to obtain and secretly report to a government agency, any information that has raised suspicion in the course of the lawyer's dealings with his or client. The petitioners asserted that AML laws threaten the independence of the bar and creates a conflict between the lawyers' duties to their clients and their obligation to report confidential information to the government.

37. The Court held in favour of the petitioners in the interlocutory proceedings. The Court emphasised the unique role of the legal profession as articulated by McIntyre J in Andrews v Law Society of British Columbia[12]

> "…in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state".

38. The Court lauded the Canadian Government's goal of deterring and prosecuting money laundering offences. However, the Court held that this goal cannot be achieved at the cost of eroding fundamental values protected by the Constitution.

39. The Court stated:

> "…No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail"[13]

40. Similarly, the Law Council asserts that the proposed AML/CTF laws compromise the independence of the legal profession and jeopardise the proper administration of justice.

[11] [2005] HCA 12, [337]
[12] [1989] 1 SCR 143, 187-188
[13] McLachlin J in RJR – MacDonald Inc v Canada (Attorney General) [1995] 3 SCR 199, 329

Client-Lawyer Communications

41. Article 14 of the ICCPR espouses the right of a person to properly communicate with legal counsel. Confidentiality of client communications with legal practitioners fosters full and frank communications with counsel. Legal professional privilege (client legal privilege) protects confidentiality of certain communications made in connection with giving or obtaining legal advice or the provision of legal services, including representations in proceedings in a court.[14]

42. The Law Council acknowledges that Clause 201 of the Exposure Draft Bill expressly provides that client legal privilege remains effective and overrides the Exposure Draft Bill should it be enacted. However, the Law Council strongly believes that merely protecting client legal privilege is inadequate. The Law Council believes that it is essential for client confidentiality beyond legal professional privilege to be maintained and the independence of the legal profession to be protected in order to safeguard the administration of justice.

43. Requiring lawyers to judge their clients to determine whether they are suspicious and to report them to authorities undermines the independence of the legal profession and their duty to their client, to the court and to the public.

44. Protecting the independence of the legal profession is not intended for the benefit judges and lawyers and to minimise their accountability and the application of general law to the performance of their professional duties. As discussed earlier, an independent legal profession serves public interest as this is imperative for the impartial and honest administration of justice and the maintenance of the rule of law.

45. The establishment of an office of the United Nations Special Rapporteur on the Independence of Judges and Lawyers is further evidence of the international recognition given to the principle of an independent legal profession. The pursuit of an independent legal profession is not an aspiration. It is central to international human rights law.

Local Laws Regulating the Australian Legal Profession

46. The Law Council submits that establishing a legal practitioner's duty to report their clients potentially conflicts with the various Legal Profession Acts of the states and territories and the legal regulations governing professional conduct which mandates a duty of legal practitioners to their client, the court and the public. As the laws and regulations in the different Australian jurisdictions are similar, the Victorian Professional Conduct and Practice Rules 2005 (Professional Conduct Rules) have been discussed below in the context of the Exposure Draft Bill.

Legal Practitioners Duty to the Client

47. A legal practitioner has a duty to their client. According to clause 1.1 of the Professional Conduct Rules, legal practitioners must act honestly and fairly in the clients best interests and maintain their confidences.[15]

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[14] ESSO Australia Resources Limited v Commissioner of Taxation [1999] HCA 67, [35], *Baker v Campbell* (1983) 153 CLR 52, *Grant v Downs* (1976) 135 CLR 674

[15] Clause 1.1 of the Victorian Professional Conduct and Practice Rules 2005 (Professional Conduct Rules) states: "A practitioner must, in the course of engaging in legal practice, act honestly and fairly in clients' best interests and maintain clients' confidences".

48. The Professional Conduct Rules require legal practitioners to serve their clients competently and diligently. Pursuant to the rules, legal practitioners are required to be acutely aware of the fiduciary nature of their relationship with their clients requiring that they deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests. Legal practitioners should maintain the confidentiality of their clients' affairs, but give their clients the benefit of all information relevant to their clients' affairs of which they have knowledge. That said the rules are clear that legal practitioners should not provide services to their clients which "is calculated to defeat the interests of justice or that is otherwise in breach of the law."[16]

49. A legal practitioner is required to have undivided loyalty to their client– not a loyalty divided between client interests and the legal practitioners own personal interests, or those of another party.

50. The duty to have undivided loyalty to the client and to avoid conflict is designed to protect the interests of the Court itself, and to preserve public confidence in the justice system.

51. Lord Herschell reflected on the importance of the rule against conflict of duty and interest in *Bray v Ford*[17] [1896] A.C. 44. His Honour said "It is an inflexible rule of a Court of Equity that a person in a fiduciary position …is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict".

52. The relationship between client and lawyer is one of the most important fiduciary relationships known to the law: *Re Van Laun; ex-parte Chatterton* [1907] 2 KB 23 at 29; *Law Society (NSW) v Harvey* [1976] 2 NSWLR 154 at 169-170. In the capacity of a fiduciary, one considerable interest of the client which requires protection is the information given to the lawyer in confidence. The fiduciary's relationship with a client is based on good faith requires that information received from a client in confidence can only be used in a manner authorised by the client.

53. A critical problem with tranche one is that the Exposure Draft Bill imposes a liability on the legal practitioner to report suspicious transactions pertaining to the provision of designated services which gives rise to a conflict between a duty to the client and a legal practitioner's personal interest.

54. This feature weakens the independence of the legal practitioner that is necessary to act in the client's best interests. The creation of such conflicts of interest, the diminution of the legal practitioner's independence from the client erodes the client-lawyer relationship central to the justice system.

Duty to Preserve Client Confidences

55. A policy of preserving client confidences is imperative in an effective legal system as people are more likely to seek legal advice and understand their legal responsibilities and thereby comply with their legal obligations. In addition, this ethical duty facilitates the development of complete facts essential to the proper representation of the client.

[16] Professional Conduct Rules, Preamble to Relations with Clients
[17] [1896] A.C. 44, 51

56. Such a duty to the client including in relation to confidential information which is recognised in law as serving a vital public interest purpose will be significantly eroded should the Exposure Draft Bill be enacted.

57. Broadly clause 3 of the Professional Conduct Rules provides that a practitioner must never disclose to any person, who is not a partner proprietor director or employee of the practitioner's firm, any information which is confidential to a client and acquired by the practitioner's firm during the client's engagement unless for instance, the information has lost its confidentiality or the client authorizes disclosure or the legal practitioner is compelled by law to disclose the information. While clause 3 provides that legal practitioners may disclose confidential information of the client where compelled by law, the Law Council believes that the Exposure Draft Bill overreaches the bounds of good policy and significantly undermines the role and function of the legal practitioner in the proper administration of justice.

Legal Practitioners Duty to the Court and to the Public

58. A legal practitioner's duty to the court and to the public overrides the duty to the client. The duty to the court requires that legal practitioners act with competence, honesty and candour in all dealings with the court in relation to matters involved in obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate. Practitioners are required to be frank in their responses and disclosures to the Court, and diligent in their observance of undertakings which they give to the Court or their opponents.[18]

59. According to clause 12, the duty to client in relation to advocacy and litigation requires a legal practitioner to advance and protect the client's interests to the best of the practitioner's skill and diligence, uninfluenced by the practitioner's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the practitioner or any other person, and always in accordance with the law including these rules. As mentioned earlier, the Law Council believes that the Exposure Draft Bill adversely impacts on the ability of the legal practitioner to remain independent from the client.

60. Independence is an important attribute in acting for a client. It is critical to public confidence in the legal profession that clients be assured of receiving legal advice that is unbiased and independent of the client's interest. Clause 13 of the Professional Conduct Rules states that a practitioner is required not to act as the mere mouthpiece of the client or of the instructing practitioner and must exercise the forensic judgments called for during the case independently, after appropriate consideration of the client's and any instructing practitioner's wishes where practicable.

61. Where a legal practitioner is required to report their client, there is a significant risk that they may be required to give evidence against their client should the matter proceed to court. Such issues can diminish public confidence in the administration of justice. A case which highlights the issues is *Grimwade v Meagher and Ors*[19] in which Mandie J considered an application to restrain counsel from appearing in a civil case against Mr Grimwade in circumstances where that same counsel had prosecuted lengthy criminal proceedings against Mr Grimwade in respect of the same subject matters. His Honour concluded:

[18] Refer to the preamble to the Advocacy and Litigation Rules in the Professional Conduct Rules
[19] [1995] VR 446

> "... In my view it cannot be doubted that this court likewise has an inherent jurisdiction to ensure the due administration of justice and to protect the integrity of the judicial process and as part of that jurisdiction, in an appropriate case, to prevent a member of counsel appearing for a particular party in order that justice should not only be done but manifestly and undoubtedly be seen to be done."

62. In restraining the legal practitioners from appearing in the case, Mandie J considered the risk of counsel being unable to act with the objectivity and detachment which the Court expects of counsel and also the risk that the legal practitioner would be unable to properly distinguish or avoid conflict between his personal interest and his duty to his clients.[20] Mandie J also considered the real and sensible risk to a fair trial and the substantial concern for the integrity of the judicial process and the due administration of justice."[21]

63. It is evident that a legal practitioners duty to the Court requiring counsel to avoid conflicts of interests with the Court itself. The Court has its own interest in being assisted by Counsel whose duties are not divided, and who are independent: *Nangus Pty Ltd v Charles Donovan Pty Ltd* [1989] VR 184. Thomas J in *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587 at 590 said:

> "Independence is a function of counsel. The court is entitled to assume that solicitors and counsel appearing before it possess that independence. Solicitors not only owe a duty to their clients to do the best for them but also owe an overriding duty to the court. The same overriding duty is owed by counsel who have been granted a right of audience to appear in this court. As part of their professional responsibility, therefore, solicitors and counsel must ensure that they do not appear in a matter in which they have an actual or potential conflict of interest or where, by reason of their relationship with their client, their professional independence can be called in question…"

64. The court has an inherent jurisdiction to prevent counsel from representing a client if it considers that there is a real risk that counsel lacks the required independence.[22] The public interest in the administration of justice extends beyond ensuring that courts are provided with the assistance of independent counsel. It has also recognised that the public perception of the due administration of justice is an important element of consideration in *Grimwade v Meagher* [1995] 1 VR 446. Case authority highlights that justice should not only be done but should appear to be done.[23]

The Extensive Regulation of the Australian Legal Profession

65. The above discussion highlights the extensive regulation and oversight, under Federal, State and Territory legislation, common law, and under the inherent jurisdiction of the courts. This regulation is important to the continued trust and confidence of the public in the legal profession. The consequences of not complying with professional conduct rules and laws depend on the nature and seriousness of

[20] Grimwade v Meagher and Ors[1995] VR 446
[21] Also refer to Afkos Industries Pty Ltd v Pullinger Stewart (a firm) [2001] WASCA 372
[22] GE Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand*, Second Edition, LBC Information Services 2001
[23] *Marriage of Thevenaz* (1986) 86 FLR 10

the breach and could result in disciplinary action, order for compensation, suspension from practice and criminal charges leading to convictions.

66. The role and function of legal practitioners is fundamentally different to other service providers. Legal Practitioners have a duty of care to their clients imposed under common law, statute law, contract law and in equity law. This duty requires legal practitioners to act in their clients' best interests at all times with an overriding legal duty to the court and to the public as discussed above.

67. Legal practitioners also have an overriding personal duty to the courts and to the public as discussed above and no conflict of interest in performance of this duty can be permitted. For instance, any association or membership maintained by a lawyer will be invalid where it may conflict with a legal practitioner's primary duty to the court.

68. The Law Council does not support any new compliance arrangements which are incompatible with the duty to the client and court including the independence of the legal profession and client confidentiality.

69. The Exposure Draft Bill requires a legal practitioner to make a judgment about their client in relation to the commission of specific crimes and to report them to authorities. Such a proposal severs the special significance of the lawyer-client relationship. This will undermine the independence of the legal profession, compromise public faith in the confidentiality of the lawyer-client relationship and potentially place lawyers in a conflict of duty.

70. A legal practitioner has an overriding duty to the court which includes a frankness and candour in court (clause 14 of the Professional Conduct Rules). This requires that a legal practitioner should not knowingly make a misleading statement to a court and to take all necessary steps to correct any misleading statement made by the practitioner to a court as soon as possible after the practitioner becomes aware that the statement was misleading.

71. The duty of all solicitors and advocates to the court requires that they not be involved in any manner in any criminal or unethical dealings with clients. For instance, clause 15 specifically deals with a legal practitioner whose client informs the practitioner, before judgment or decision, that the client has lied in a material particular to the court or has procured another person to lie to the court or has falsified or procured another person to falsify in any way a document which has been tendered.

Practical operational issues

72. The Law Council is concerned that the Exposure Draft Bill does not take into account the practical issues associated with complying with requirements. In the first place, the breadth of matters which can require report will include lawyers who are specialist in one area being required to report on matters with which they are not familiar. Following from this, there is the issue of interpretation of matters that may or should signal a reporting obligation, and what is actually required before something crosses the reporting threshold.

73. The second issue is the repository of knowledge question. In many instances large and complex transactions will be serviced by a range of practitioners who are specialist in their particular areas, and provided with instructions relevant to their role in the transaction. This skill range may be in the one firm, or may involve

practitioners spread across a number of firms. With the benefit of hindsight and a full knowledge of relevant facts it may become apparent that a reporting obligation arose, but not for the individual practitioners engaged in a particular part of the advice.

74. The further issue is the extent to which an individual legal practitioner is required to carry out their own inquisitorial processes to ensure that no reporting obligation arises, how they deal with the issue of credibility of their client witness; and how they maintain client confidence in the attempts to do this.

75. Finally, the pieces of the relevant jigsaw may not all be in one client transaction, but may involve other transactions that are linked, directly or indirectly. In seeking to establish information relevant to a reporting obligation, how far are lawyers required to disclose information relevant to another client to discharge a reporting obligation?

Summary and Recommendations

76. The Law Council supports the Federal Government in its commitment to address money laundering and counter terrorism financing activity in the current environment of globalised criminal activity. The Law Council acknowledges the need to strengthen laws and develop effective strategies including the improvement to Australia's intelligence gathering capability. However, such reforms should not be at the expense of Australia's system of justice.

77. The Law Council recommends that the duties of legal practitioners in the administration of justice be safeguarded and protected.

78. The Law Council is opposed to any laws which compromise the independence of the legal profession and strenuously and unequivocally opposes tranche one AML/CTF law reforms to the extent that it adversely impacts lawyers.

79. As recommended in the Law Council's submission on 4 May 2004 in response to the Government's Issues Paper 5 the best way to achieve this is to consider all reforms for the legal profession separately to other business relationships including reforms affecting lawyers involved in the provision of particular financial services.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- ACT Bar Association;
- Bar Association of Queensland;
- Law Institute of Victoria;
- Law Society of the ACT;
- Law Society of NSW;
- Law Society of the Northern Territory;
- Law Society of South Australia;
- Law Society of Tasmania;
- Law Society of Western Australia;
- New South Wales Bar Association;
- Northern Territory Bar Association;
- Queensland Law Society;
- The South Australian Bar Association;
- The Victorian Bar; and
- Western Australian Bar Association.

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.