



Law Council
OF AUSTRALIA

Revised Anti-Money Laundering and Counter Terrorism Financing Exposure Draft Bill

Attorney General's Department

28 August 2006

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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 response to the revised Anti-Money Laundering and Counter Terrorism Financing ("AML/CTF") Exposure Draft Bill ("Revised Exposure Draft Bill") and Draft AML/CTF Rules ("Rules").
2. The Law Council supports the Federal Government in its commitment to address money laundering and counter terrorism financing (AML/CTF) 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 promote efficiency, be consistent with existing laws and be compatible with Australia's justice system.
3. The Revised Exposure Draft Bill was released on 13 July 2006 for public comment together with draft AML/CTF rules.
4. While the Law Council acknowledges that there has been reasonable consultation with affected industry groups in relation to the earlier version of the Exposure Draft Bill, the Law Council considers that providing three weeks to consult with the community on the Revised Exposure Draft Bill is inadequate to achieve proper consultation and to provide stakeholders a reasonable opportunity to review the impact of the Revised Exposure Draft Bill particularly in view of the broad scope and complexity of the AML/CTF legislative reforms.
5. In the time available, the Law Council has not been able to undertake a detailed review of the provisions of the Bill and their operational impact on the financial services sector.
6. In this submission, the Law Council has considered the impact of the Revised Exposure Draft Bill on the:
 - a. Australian legal profession; and
 - b. Wider operation of the law.
7. The Law Council has previously made a detailed submission in response to the earlier Exposure Draft. The submission focussed on the impact of the earlier Exposure Draft Bill on the Australian legal profession. Attached is the earlier Law Council submission dated 2 May 2006. The issues raised by the Law Council in the earlier submission remain relevant to the Revised Exposure Draft Bill. This submission is intended to complement the earlier submission and is not intended to restate the issues and concerns.

A. Impact on the Australian Legal Profession

8. As discussed in the earlier submission, the Law Council is opposed to any laws which compromise the independence of the legal profession underpinning the administration of justice. The Law Council opposes tranche one AML/CTF law reforms to the extent that it adversely impacts lawyers.
9. Lawyers are the bastions of the justice system. They alone possess expertise in the law and provide advice to and inform clients and the public of the requirements to comply with the law. Lawyers perform an advocacy role, litigate cases and guide courts and tribunals.
10. In *Andrews v Law Society of British Columbia*¹, McIntyre J stated:

“...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”.
11. The Revised AML/CTF Exposure Draft Bill undermines the role and function of lawyers in the legal system by interfering with the relationship between lawyers and clients.
12. The relationship between lawyers and their clients is unique and underpins the very administration of justice.
13. Lord Pearce said in *Rondel v Worsley*²,

“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.”
14. Client confidentiality guarantees that clients can speak to their lawyers about their difficulties and problems in the knowledge that this information will not be disclosed to a third party. In this way the client can obtain legal advice that takes full account of the client's circumstances.
15. In this role, the lawyer is under legal and ethical obligations as a consequence. For instance, a lawyer is required to advise a client to obtain other legal representation should the client wish to plead 'not guilty' to a crime that he has confessed to the lawyer as having committed and which satisfies the elements of the crime. If the client insists that the lawyer continue to represent him, the lawyer must never mislead the court in the presentation of evidence.
16. The administration of justice needs and relies on client confidentiality. If the Revised Exposure Draft Bill is passed into law in its current form,

¹ [1989] 1 SCR 143, 187-188

² [1969] 1 AC 191, 276B-E; see also per Lord Reid at 227D-F

lawyers will be required to report the suspicious transactions of their clients to a law enforcement authority which will irretrievably damage the trust that exists between lawyers and their clients. Many people will come to feel that they cannot be completely candid with their lawyers, very probably in circumstances where they have nothing to fear. But they will not get the legal advice they need and deserve as lawyers are likely to be informed of part of the facts. From a public policy perspective, this result has far reaching consequences on the administration of justice.

17. The Law Council believes that the suspicious transaction reporting scheme will be ineffective in relation to lawyers who are complicit in an untoward transaction and persons engaged in such transactions are not likely to ask a lawyer for assistance or advice unless they are inappropriately in league with that lawyer. As a 'suspicious transaction' is broadly defined, honest lawyers on the other hand are likely to make reports that turn out to be benign.
18. In all the circumstances it would be better for the AML/CTF scheme to drop the 'shotgun' approach and adopt a focussed approach, concentrating on the existing law enforcement capabilities of the professional associations working in tandem with police in the targeting of individuals. Details of the extensive regulation of the legal profession are provided below.
19. The Revised AML/CTF Exposure Draft Bill is intended to affect the provision of financial services.
20. As mentioned in the earlier Law Council submission, 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.
21. That said, it appears that the Revised AML/CTF Exposure Draft Bill is likely to affect the provision of legal services. The Law Council believes that this is an unintended consequence and must be remedied. Refer to the Recommendations provided below.
22. The Law Council submits that legal work may fall within the scope of a designated service pursuant to clause 6 including in relation to the following circumstances.
 - Lawyers acting as trustees of estates
 - Lawyers providing custodial or depository services eg. certificate of title and items which form part of the estate
 - Lawyers accepting money on deposits from clients and placing them into their trust account in order to pay for legal fees, incidental costs

- Lawyers undertaking property settlements
- Lawyers acting in the capacity of licensed financial advisers. In such cases, lawyers may be undertaking a mixture of legal work and provision of financial services

Compliance Issues

23. The Revised AML/CTF Exposure Draft Bill currently provides that a reporting entity is not required to independently verify an “existing customer” (referred to in the Revised AML/CTF Exposure Draft Bill as a “pre-commencement customer”). The independent verification obligation only arises if the provisions of clause 39 are triggered. Clause 39(1)(d) provided the “suspicious matter reporting obligation” for a reporting entity arises if that reporting entity “suspects on reasonable grounds that the first person is not the person the first person claims to be”. Other than this statement, the Revised AML/CTF Exposure Draft Bill and Rules give no further indication as to what constitutes “reasonable grounds”, particularly in those situations where a party who previously may not have had an independent verification obligation, now comes within the definition of a reporting entity. A legal practitioner is such an example.
24. The Revised AML/CTF Exposure Draft Bill and Rules as currently drafted may well accommodate the issues faced by financial institutions in complying with the Revised AML/CTF Exposure Draft Bill. That said, there is a need for clearer focus in their application to all other parties that will now be caught by the Revised AML/CTF Exposure Draft Bill as a “reporting entity” but who previously may not have had any identification obligations equivalent to those set down by *Financial Transaction Reports Act 1988* (FTRA).
25. For instance, legal practitioners are intended to fall within the definition of a “reporting entity”. The Revised AML/CTF Exposure Draft Bill does not define “pre-commencement customer”. A dilemma will immediately arise for a legal practitioner in whether existing clients are a “pre-commencement customer”.
26. A financial institution in providing a “designated service” to a customer under the FTRA was required to undertake certain verification procedures. As far as legal practitioners were concerned, it is unlikely that any of the identification procedures under FTRA and/or the Revised AML/CTF Exposure Draft Bill would have been applied in the identification of “customers”. Is it therefore intended that providing a legal practitioner is satisfied that an existing client may qualify as a “pre-commencement customer” and that the legal practitioner has no obligation to independently verify the identity of that client? If there has been no previous verification of a customer/client by the legal practitioner, the Law Council believes that a legal practitioner will have

great difficulty in knowing whether any of the events contemplated by clause 39 have arisen that require that legal practitioner to “re-verify” their customers.

27. There are other provisions of the Revised AML/CTF Exposure Draft Bill which will apply to legal practitioners that need to be more carefully considered having regard to the reality of the existing relationship between that legal practitioner and his/her client and the circumstances that surround the relationship between a financial institution and its customer.
28. The above issues will have far wider ramifications when legal practitioners participate in the electronic conveyancing projects as discussed later.

Scope of Suspicious Reporting

29. In its earlier submission, the Law Council expressed concerns in relation to compliance with the proposed reforms. The Law Council notes that the Revised Exposure Draft Bill has expanded the scope of the reporting of suspicious transactions of clients beyond workable limits.
30. According to clause 39(f)(iii)(iv) information that may be “connected with a breach or an attempted breach of” a taxation law of the Commonwealth States and Territories should be reported.
31. The earlier version of the Revised AML/CTF Exposure Draft Bill referred to the potential evasion of taxation. “Tax evasion” has a specific meaning in taxation law jurisprudence. Tax evasion involves a person unlawfully escaping taxation liability. The acts or omissions are intentional and dishonest. A “breach” denotes any transgression with respect to taxation matters including inadvertent errors and where the perceived breach is the result of differences of opinion in the interpretation of taxation law. Taxation law recognises such differences in the appeal and review process and in the determination of audit penalties. *Taxation Ruling* TR 94/5 refers to penalties in circumstances where it can be proven that the taxpayer had a reasonably arguable position in adopting a different interpretation of the taxation law.
32. The Law Council submits that there is great ambiguity as to what information constitutes “assistance” in relation to a breach of taxation law. This is clearly over reaching the law and risks being impractical and unworkable. For instance, a practitioner is likely to be required to report transactions in which there is some information that income has been understated in a particular year or that deductions have been overstated for their client. The Law Council strongly believes that such requirements are highly impractical and should be amended to give effect to the previous wording with respect to “evasion of taxation”. After all, it is illegal tax fraud which is intended to be combatted in the proposed reforms.

33. The Law Council notes the difficulties in determining the nature of information that is “connected” with a breach of taxation law. These are complex matters for taxation lawyers which are not dealt with by lawyers in others fields of law and legal practice. For instance, it is unlikely that a conveyancing lawyer will be familiar with what constitutes a breach of taxation law and yet to require reporting of such information unfamiliar to the practitioner is highly problematic.
34. Further, the Law Council notes that taxation law incorporates separate processes in the event of a breach of taxation law. For instance, there are provisions to seek the amendment of taxation returns, or a private binding ruling with respect to the detected breach of taxation law. To require lawyers and other practitioners in the taxation industry to report such information pursuant to the Revised AML/CTF Exposure Draft Bill overlaps with taxation law.
35. The Law Council recommends that the wording in the earlier version of the Revised AML/CTF Exposure Draft Bill be reinserted into the provisions. The Law Council strongly believes that to draft legislation so widely over reaches the law and risks creating enormous compliance issues and costs for legal practioners and other practitioners in the taxation industry.
36. Similar difficulties arise in relation to clause 39(f)(vi)(vii), which requires reporting of information that may be of “assistance in the enforcement of” the Proceeds of Crime legislation of the Commonwealth, State and Territories. The Law Council believes that such ambiguities are required to be addressed given that non compliance with such provisions could result in the imposition of charges on practitioners. The wording of such provisions which raise legally enforceable obligations punishable potentially by terms of imprisonment must be clear and precise.

Existing Regulation of the Australian Legal Profession

37. Australia’s legal profession is subject to 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 the breach and could result in disciplinary action, order for compensation, suspension from practice and criminal charges leading to convictions.
38. Australian state and territory law societies and bar associations and the Legal Services Commissioners (as appropriate) are empowered under the Legal Profession legislation of each jurisdiction to regulate the legal profession.

39. State and territory law societies and bar associations have specialized departments with teams of investigators, inspectors and auditors to discharge this function. For instance, in NSW, the NSW Law Society has more than 30 staff investigating and overseeing complaints and professional conduct matters pursuant to the *Legal Profession Act 2004* (NSW). The NSW Bar Association has around 75 members in four Professional Conduct Committees whom, on behalf of the Bar Council, carry out investigations regarding the conduct of barristers. The work of the committees are supported and facilitated by the Professional Conduct Department of the Bar Association. In the Queensland Law Society, the Professional Standards Department comprising of more than 40 investigators, auditors and related service and administrative staff. In a smaller jurisdiction such as Northern Territory, the NT Law Society has a Complaints Department with two staff and a Professional Standards Committee comprising, legal practitioners and non lawyers. Spot inspections of accounts are also conducted by the Master of the NT Supreme Court. The ACT Law Society has around 25 staff and panel and committee members involved in investigations and prosecutorial action.
40. Following investigations, many prosecution actions have been initiated with respect to professional misconduct and other breaches of standards in connection with the practice of law.
41. For instance, the ACT Law Society has initiated legal action including disciplinary proceedings and prosecution action with respect to about 13 matters in 2004 and 2005.
42. In past two years, the NT Law Society has successfully prosecuted at least four matters in the Supreme Court and the Legal Practitioners Complaints Committee.
43. The Queensland Law Society has initiated more than 60 prosecutions between 2001 and 2004. Since 2004, the Legal Services Commission has been responsible for the prosecution function.
44. In the past six years, the NSW Law Society has successfully obtained 52 orders in the Supreme Court and 113 orders in the Administrative Decisions Tribunal.
45. The Law Council also notes that existing legislation empowers regulating bodies such as the Law Societies, Bar Associations and Legal Services Commissions (as appropriate) to report on legal practitioners in relation to information obtained in the course of trust account examinations, complaint investigations or compliance audits to certain law enforcement bodies including the Attorney General. For instance, section 730A of the *Legal Profession Act 2004* (NSW) states that the regulating body has a duty to report suspected offences.
46. The Law Council submits that such powers, investigations and actions of these regulatory authorities of the legal profession demonstrates that the “one size fits all” approach adopted in tranche one is unnecessary. The

legal profession is heavily regulated and should not be burdened with an additional compliance regime least of all not a regime that undermines the independence of the legal profession, erodes the client-lawyer relationship critical to the due administration of justice and the proper functioning of the legal system.

Recommendations

47. The Law Council strongly recommends that legal practitioners be removed from the reforms associated with tranche one reforms. Alternatively, the Law Council strongly recommends that the provision of legal services be excluded from the Revised AML/CTF Exposure Draft Bill.
48. The Law Council believes that tranche one of the AML/CTF law reforms which require legal practitioners to judge their client and determine whether a client's transaction is suspicious and if it is, to report it to authorities, compromises a legal practitioner's duty to the court, intrudes on the independence of the legal profession thereby impacting on the due administration of justice.
49. 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.
50. In the event that legal practitioners remain within the scope of the Revised Exposure Draft Bill, the Law Council recommends that "legal services" undertaken by legal practitioners be expressly excluded from the AML/CTF Exposure Draft Bill.
51. The Law Council's primary concern is that the legal services provided by lawyers must not be interfered with. That said, the Minister insists that only financial services limited to designated services as defined pursuant to clause 6 are affected. The Minister suggests that legal services are not targeted under the first tranche. The Law Council believes that this issue is likely to be largely addressed if a specific exclusion is inserted into the Revised Exposure Draft Bill.
52. This amendment is consistent with the intent behind the Revised Exposure Draft Bill which is to apply to certain financial services. The Law Council believes that there needs to be an express exclusion with respect to the provision of legal services due to the difficulties faced by lawyers in determining the scope of the application of the Revised AML/CTF Exposure Draft Bill to them. The Law Council believes that reference to legal professional privilege pursuant to clause 201 of the Revised Exposure Draft Bill is acknowledgement that the reforms have an impact on the provision of legal services.

53. The impact of such an amendment is that a designated service will exclude legal services. Accordingly, where a legal practitioner has a financial services license and provides a financial service to a client – the legal practitioner must comply with the Revised AML/CTF Exposure Draft Bill in relation to the provision of a financial service only. The provision of legal services will fall outside the scope of clause 6 of the Revised AML/CTF Exposure Draft Bill.

B. Impact on the Wider Operation of the Law

Constitutional Issues

54. Clause 3 of the Revised AML/CTF Exposure Draft Bill clearly attempts both to outline the objects of the Revised AML/CTF Exposure Draft Bill and to provide the constitutional basis for the legislation, ie based on the external affairs power. The Law Council notes that, in addition the Bill contains an alternative constitutional basis set out in Schedule 1.
55. It is possible that several of the international obligations and concerns listed in clause 3 are not sufficiently specific to support the exercise of the external affairs power (see for example *Victoria v Commonwealth* (1996) 187 CLR 416) and the existence of Schedule 1 appears to call into question the parliamentary faith in the ability of the listed international obligations and concerns to support that exercise.
56. Accordingly, the Law Council recommends further consideration of the constitutional basis for the Revised AML/CTF Exposure Draft Bill as presented in clause 3.
57. The Law Council also notes that, by stating that the objects of the Revised AML/CTF Exposure Draft Bill include the international obligations and matters of international concern that are listed in clause 3, the Revised AML/CTF Exposure Draft Bill provides a basis for its judicial interpretation based on the objects of those various international obligations and matters of concern, which may differ from the intended operation of any given provision.

AUSTRAC Relief Powers

58. Clause 203C of the Bill enables AML/CTF Rules to be made providing general exemptions from the Act for:
 - a designated service of a kind specified in the Rules; and
 - a designated service that is provided in circumstances specified in the Rules.
59. However, the Revised AML/CTF Exposure Draft Bill does not allow AUSTRAC to:
 - exempt a reporting entity or class of reporting entity from all or part of the Revised AML/CTF Exposure Draft Bill; or

- otherwise modify the Revised AML/CTF Exposure Draft Bill.
60. To be contrasted are the terms of section 951B of the Corporations Act, which confers broad exemption and modification powers on ASIC. Specifically, ASIC may:
- (a) exempt a person or a class of persons from all of the specified provisions of Part 7;
 - (b) exempt a financial product or class of financial products from all of the specified provisions of Part 7; or
 - (c) declare that Part 7 applies in relation to a personal or financial product or a class of either, as if a specified provision of Part 7 were omitted, modified or varied as specified in the declaration.
61. The Law Council recommends that AUSTRAC be given relief powers similar to those provided to ASIC. The Law Council also submits that there should be no need for relief to be provided only through the Rules (as is currently provided for in clause 203C).

Role of AUSTRAC

62. The legislation confers significant powers on AUSTRAC as regulator, so it is critically important that AUSTRAC understands the operational issues relevant to the commercial functioning of the industries it is to regulate. This should not be taken as a matter of course, in view of AUSTRAC's experience to date as a financial intelligence unit, rather than as an industry regulator.
63. While AUSTRAC has been provided with increased funding in the last federal Budget and is expanding its staff, it is important that there also be a focus on appropriately increasing the expertise of AUSTRAC staff. In order for AUSTRAC to be an effective regulator its staff will require much of the expertise and knowledge of the financial services sector that ASIC has acquired in recent years in the course of the implementation of financial services reform. The effort involved in this should not be underestimated and cannot be expected to be fully imported or achieved in the very short term, emphasising the need for proper industry consultation.

Guidelines

64. The Law Council appreciates that each of industry, Government and AUSTRAC need certainty of outcomes and industry needs a clear understanding of AUSTRAC's expectations of acceptable standards.

65. Whilst the Law Council welcomes the adoption of a more clearly "risk based approach", it also appreciates that this can result in industry being uncertain as to AUSTRAC's expectations for minimum compliance and evidence of this.
66. The Law Council also notes that in the December 2005 legislative package the Minister emphasised the importance of non-binding Guidelines to be issued by AUSTRAC to assist reporting entities in designing and implementing AML/CTF programs and compliance measures that will ensure that their programs and measures will be accepted as having compliant outcomes.
67. Consistently with this, any Guidelines issued by AUSTRAC should operate only as safe harbours (ie any mandatory requirements should be addressed in the Rules). Further, it may be that some Rules (ie those that articulate AUSTRAC's expectations, as distinct from its requirements) could also be expressed in terms of safe harbours, as is currently the approach adopted by the Rules regarding Identification procedures (see Rules 2.2.11 ff).
68. Accordingly, the Law Council recommends:
- that non binding Guidelines be developed by AUSTRAC to provide clear guidance on its expectations of acceptable standards and outcomes of AML / CTF Programs and compliance measures to be adopted; and
 - in respect of all "safe harbours" (ie all Guidelines and any Rules AUSTRAC chooses to express as safe harbours), reporting entities should be free to adopt other approaches or outcomes if they wish. However, if they do, the onus would then be on them to satisfy AUSTRAC that their approach is appropriate for them. Should a reporting entity adopt the approach contained within the safe harbour, then AUSTRAC will assume that this approach is appropriate.

Powers to Make Rules and Guidelines

69. The Law Council is aware that concern has been expressed in some quarters about the "untrammelled" power of AUSTRAC to determine or issue Rules under clause 191 of the Revised AML/CTF Exposure Draft Bill or to issue Guidelines pursuant to its enforcement or other powers. The Law Council notes however that the Revised AML/CTF Exposure Draft Bill includes specific powers in clauses 174 and 190 for the Minister to provide policy principles or directions respectively in this regard.

70. We also note:
- (a) the helpful provisions of clause 173 of the Revised AML/CTF Exposure Draft Bill which sets out AUSTRAC's statutory functions to "provide advice and assistance" to reporting entities in relation to their obligations and attaining compliance under the package and to promote compliance generally (clause 173(1)(c), (d) and (e)); and
 - (b) the statutory duty for AUSTRAC to consult with industry and others under clause 173(2).
71. The Law Council suggests that the Minister uses the powers under clauses 174 and 190 of the Revised AML/CTF Exposure Draft Bill to provide a set frame work for this consultative process to occur.
72. Accordingly, the Law Council recommends that appropriate policy principles and directions be developed by the Minister to be provided to AUSTRAC regarding the promulgation of Rules and Guidelines pertaining to its expectations of reporting entities AML / CTF programs. These principles and directions should be designed to supplement the consultation provisions of clause 173.
73. In this way, the Guideline making powers of AUSTRAC could be linked to a requirement that the proposed Guidelines would need to be first approved by, say, an advisory council established by the Government consisting of a majority of industry representatives. The same approach could usefully be followed also in respect of the exercise of the Rule making power in respect of any Rule (such as Rule 2.1.11 ff) which AUSTRAC chooses to develop as a safe harbour (ie reflecting its expectations rather than its mandatory requirements).
74. Therefore, the Law Council further recommends that the Ministerial directions to AUSTRAC under clauses 174 and 191:
- (a) endorse the safe harbour approach recommended above for all Guidelines and for any Rules in which AUSTRAC chooses to express its expectations, rather than its requirements; and
 - (b) include a requirement of initial approval by an advisory council with a majority of industry representatives.
75. This last recommendation would ensure that the resultant Guidelines were firmly based on actual reasonable industry practice and were not unduly aspirational and thus uncompetitive internationally. It would also encourage the development of close ties and liaison between industry and AUSTRAC and forestall the possibility that unexpectedly AUSTRAC would find industry adopting or had adopted radically different

approaches to AML/CTF compliance that necessitated costly and drastic interventions by the regulator.

76. The Law Council also notes that this approach would encourage the drafting by industry groups of suitable Guidelines for consideration by the advisory council and if approved, adoption by AUSTRAC.
77. The Law Council notes that in large measure these proposals reflect the current productive working arrangements which resulted in the current draft of the Rules. The purpose of this recommendation is to ensure that the existing framework is strengthened and encouraged going forward.

Consistency with Existing Laws

78. The new AML/CTF laws reflect a policy that gives rise to a significant tension with the policies underpinning current laws such as privacy and anti-discrimination laws. Assistance with resolving this tension would be welcome.
79. The *Privacy Act 1988 (Cth)* (Privacy Act) is, in many respects, expressed to be subject to exceptions where "required or authorised by law" (which, for convenience, is referred to in the following discussion as the legal compliance exceptions).
80. It is not entirely clear how the legal compliance exceptions would apply in circumstances where a reporting entity, in attempting to meet its AML obligations, complied with a provision of the Rules or its own AML programme that was not consistent with the Privacy Act, unless sanctioned under the legal compliance exceptions.
81. While a reporting entity is clearly obliged by the AML laws to comply with its own AML/CTF programme, there is a question as to the extent to which it should develop and implement that programme based on a risk-based assessment (which is a values-based concept capable of differing opinions). Should the reporting entity favour an effective AML outcome in developing the AML/CTF programme, if this is contrary to privacy considerations?
82. Similarly, many of the Rules are couched in terms of a risk-based approach, making it difficult to weigh their imperative force against Privacy Act imperatives that are, in their turn, expressed to be subject to the legal compliance exceptions.
83. Similar difficulties arise in the context of anti-discrimination laws. It would be useful if guidance on the precedence of the Rules and programmes in these contexts were expressed in the Revised AML/CTF Exposure Draft Bill itself.

Consistency with Existing Practices

84. The intention of the Revised AML/CTF Exposure Draft Bill is to replace those parts of the *Financial Transaction Reports Act 1988 (Cth)* (**FTRA**) to the extent of the application of FTRA's application to financial services.
85. The identification processes required under the current FTRA and, in particular, its 100 point check, have been reflected as a matter of practice in other legally relevant contexts, for example:
- digital signatures issued under Project Gatekeeper;
 - Electronic Conveyancing Victoria which is currently proposed to be the pilot project for a wider national electronic conveyancing scheme
 - National Electronic Conveyancing project; and
 - Queensland Land Titles Office requirements for mortgagor identification by mortgagees.
86. It is important that any implementation of the Revised AML/CTF Exposure Draft Bill includes an appropriately timed identification and review of all such practices. Practices based on current FTRA models should either be changed to become consistent with the new AML regime or should diverge from that regime deliberately after appropriate consideration of the ramifications of this, rather than simply inheriting an outdated "legacy" status.

Transitional Arrangements

87. Allowance must be made for implementation of the tranche one regime over appropriate timeframes to enable proper consultation, education and implementation, particularly in view of:
- The extent and novelty of the proposed AML/CTF reforms
 - The need to develop industry-based Rules
 - The core objective of achieving effective, risk-based outcomes, rather than a tick-box, process driven approach
 - The need for appropriate lead times to enable industry to amend or supplement documentation (including product disclosure statements) in an orderly fashion.
88. The Law Council also notes the issuing of the new standard of compliance by Standards Australia on the 9th March this year, namely AS3806 - 2006. Many industry participants (and regulators such as

ASIC, ACCC and Offices of Fair Trading amongst others) have previously adopted the "old standard" AS 3806 - 1998 as their benchmark to determine whether an organisation's compliance measures are adequate.

89. Clearly, the articulation of a new compliance standard with the support and imprimatur of Standards Australia and regulators such as the ACCC and ASIC has prompted many organisations who will be reporting entities to start to implement action plans to lift their compliance systems to meet this new standard.
90. Many commentators have indicated that this upgrading process alone will greatly assist organisations with the successful implementation of robust compliance systems that contain an effective AML/CTF program and AML/CTF compliance measures.
91. This "embedding" is vital to the success of any compliance program but is of even more important in a "risk based" regime. In these types of legislative regime, we observe that the training of staff and agents of organisations in identification of risk areas and their ability to quickly form correct and sound judgements is the key to the success of the legislative initiative. Further, these behavioural attributes need to be supported by and based upon sound risk based methodologies thoughtfully deployed utilising fully integrated back office support.
92. Such detailed and methodical integration of people and systems and the nurturing of a reporting entities staff's understanding of AML/CTF risk tolerances are of paramount importance and cannot be rushed.
93. In light of these considerations, the Law Council submits that a minimum 24 months implementation period is required. Any transitional period should not commence until the AML/CTF Act, any new regulations and all Rules have been finalised.
94. The Law Council supports the proposed approach of staged implementation over the transitional period, but it is essential that in identifying the relevant stages, industry views must be sought early to ensure that the chronological order of the staged implementation in fact works from a commercial and operational perspective.

Compliance Reporting

95. Clause 43B operates such that the Rules can prescribe a "reporting period". This triggers an obligation on reporting entities to give AUSTRAC a report about a reporting entity's compliance with the Act, regulations and Rules. Reports must be in a prescribed form and must contain specified information.

96. The Revised AML/CTF Exposure Draft Bill specifically invites comment on this clause. It is difficult to provide meaningful comments without knowing what the prescribed form and content of reports will be. However, we query why such a provision is seen as necessary. We understand that in the UK reports are not sent to the regulator, but rather annual internal reports are prepared by reporting entities to identify any deficiencies in their programs. We see this as a preferable approach. Further, we query how such mandatory reporting would link with the more risk based approach that is now proposed. It would be unfortunate and, indeed, undesirable if the ability of reporting entities to take a risk-based approach was compromised by requirements to provide absolute signoffs regarding compliance.
97. If the compliance reporting section is to remain, we request that there be the opportunity to consider and make submissions on the nature and extent of such reporting prior to finalisation of the Revised AML/CTF Exposure Draft Bill. It seems to us that once the Revised AML/CTF Exposure Draft Bill is passed with this section included, it could open up scope for major disagreements with AUSTRAC should the nature and extent of reporting not be agreed in advance.

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:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- The Victorian Bar Inc
- 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.