Law Council
OF AUSTRALIA

The adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime

Senate Legal and Constitutional Affairs References Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- 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 Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs References Committee (**Committee**) in response to the Inquiry into the adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime (**Inquiry**). The Law Council has previously provided comments to the Federal Government in relation to AML/CTF regulation in 2014,[1] 2015,[2] 2017,[3] 2018[4] and 2020,[5] and this submission adds to those observations.

2. This submission is in two parts. Part 1 outlines the inappropriateness of extending the AML/CTF regime to the legal profession by focusing on the following terms of reference:

> *g) the regulatory impact, costs and benefits of extending AML/CTF reporting obligations to designated non-financial businesses and professions (DNFBPs or 'gatekeeper professions'), often referred to as 'Tranche two' legislation;*
> *h) the extent to which:*
> *i. DNFBPs take account of money laundering and terrorism financing risks, and*

[1] See:
- Law Council of Australia, Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Regime (30 April 2014), available online: https://www.lawcouncil.asn.au/publicassets/55a83a37-e1d6-e611-80d2-005056be66b1/140430-Submission-2819-Statutory-Review-Anti-Money-Laundering-Counter-Terrorism-Financing-Regime.pdf
- Law Council of Australia Business Law Section, Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act (Cth) 2006 (30 April 2014), available online: https://www.lawcouncil.asn.au/publicassets/4ba83a37-e1d6-e611-80d2-005056be66b1/140430-Submission-2815-Statutory-Review-Anti-Money-Laundering-Counter-Terrorism-Financing-Act-2006.pdf

[2] Law Council of Australia Business Law Section, Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act (Cth) 2006: Response to live issues document for banking/finance sector (1 May 2015), available online: https://www.lawcouncil.asn.au/publicassets/44a0844f-e1d6-e611-80d2-005056be66b1/150501-Submission-2982-statutory-review-anti-money-laundering-counter-terrorism-financing-act-2006.pdf

[3] See:
- Law Council of Australia, Response to Consultation paper: Legal Practitioners and Conveyancers, a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime (7 February 2017), available online: https://www.lawcouncil.asn.au/publicassets/450aeeaf-c80a-e711-80d2-005056be66b1/3239%20-%20Response%20to%20Consultation%20Paper%20AML%20&%20CTFR.pdf (**Law Council 2017 Consultation response**);
- Law Council of Australia Business Law Section, Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 (12 October 2017), available online: https://www.lawcouncil.asn.au/publicassets/49f6ac87-8c51-e811-93fb-005056be13b5/3352%20-%20Anti-Money%20Laundering%20and%20Counter-Terrorism%20Financing%20Amendment%20Bill%202017.pdf

[4] Law Council of Australia Business Law Section, Draft Amendments to the AML/CTF Rules resulting from the Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017 (the Draft Rules), (27 February 2018, available online: https://www.lawcouncil.asn.au/publicassets/69214d43-d46f-ea11-9404-005056be13b5/3412%20-%20Draft%20Amendments%20to%20the%20AML%20CTF%20Rules.pdf

[5] Law Council of Australia, 'Responses to Questions on Notice: Senate Economics References Committee Inquiry into foreign investment proposals', (26 August 2020), (***Response to Senate***) available online: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreigninvestment/Additional_Documents.

ii. the existing professional obligations on DNFBPs are compatible with AML/CTF reporting obligations.

3. Whilst the Law Council recognises the importance of addressing laundering and other illegal financing risks, the submission highlights:

   a. that the Australian legal profession is currently subject to broad obligations that relate to identification verification and not facilitating illegal activities, and

   b. to the extent that the AML/CTF regime would impose more onerous obligations to those that currently apply to the Australian legal profession, those obligations:

      i. would impermissibly undermine fundamental tenets of the law, such as legal professional privilege and confidentiality, and

      ii. would impose disproportionate costs on the profession and clients at large which in turn would likely restrict the provision of, and access to, legal services.

4. As such, the position of the Law Council is that, as a general proposition, the AML/CTF should not be extended to the legal profession.

5. Part 2 of the submission addresses the application of the AML/CTF framework to financial services, including:

   a. suggestions for reducing unnecessary complexity of existing obligations, and

   b. how ineffective or arbitrary enforcement undermines the effectiveness and increases the associated regulatory burden on regulated entities.

PART 1: AML/CTF regulation and the legal profession

Regulation of the Australian legal profession and managing AML/CTF risk

6. **This section addresses paragraph (h) of the Inquiry Terms of Reference, which queries:**

   h) the extent to which:
   i. DNFBPs take account of money laundering and terrorism financing risks…

7. It has been judicially observed that the professional activities of Australian lawyers are regulated and controlled more than any other profession or vocation.[6]

8. To the extent that lawyers are at risk of being used to facilitate AML/CTF, it is the Law Council's view those risks are mitigated and offset by the comprehensive and, importantly, effective, legal profession regulatory regime. This regulatory regime operates alongside existing obligations within the criminal law where legal professionals, like everyone, are subject to punishment for offences of money laundering and terrorism financing, whether they do so knowingly, or whether their conduct is negligent or reckless in allowing or facilitating financial crime.[7]

[6] *Re Bannister (1975*) 5 ACTR 100 at 104 per Fox J.
[7] Law Council 2017 Consultation response, n 6, 7 [13].

Managing risk through legislation

9. Australia has a unique state and territory based framework of legislation which regulates the legal profession, consisting of:

    a. The *Legal Profession Uniform Law* (**the Uniform Law**)[8] - which created a common legal services market across NSW and Victoria (with Western Australia expected to join in 2022), encompassing almost three quarters of Australia's lawyers, and uniformly regulates the legal profession across these participating jurisdictions.

    b. Legal Profession Model Laws jurisdictions:[9] currently being the Australian Capital Territory, the Northern Territory, Queensland, Tasmania and Western Australia (noting that it is soon to join the Uniform Law) who enacted Legal Profession Acts based on a National Model Bill. This Model Bill was developed by the Standing Committee of Attorneys-General in 2006, following thorough consideration of the necessary checks and balances (including fraud risks) required by the updated regulatory framework.

    c. The *Legal Practitioners Act 1981* in South Australia.

10. This legislation governs matters such as practising certificates and related conditions on practice, practice management, including trust accounts, continuing professional development requirements, complaints handling processes, cost arrangements with clients and professional discipline.[10]

11. As is addressed later in this submission, the regulation of solicitors'[11] trust accounts is procedurally detailed and rigorous, subject to regular independent external examination and audit.[12] Using the Uniform Law as an example, these obligations include (but are not limited to) requirements that:

    a. trust money be dealt with in accordance with the Uniform Law and Uniform Rules (with a civil penalty of 50 penalty units);[13]
    b. trust money held by a law practice may be dealt with only by the law practice or an associate of the law practice;[14]
    c. a law practice must deposit trust money (other than cash) into the law practice's general trust account as soon as practicable after receiving it unless certain conditions in section 137 are met, such as the money is controlled money or transit money;[15]

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[8] Commenced on 1 July 2015.
[9] All states and territories bar South Australia enacted Legal Profession Acts that were based on a National Model Bill:

- *Legal Profession Act 2006* (ACT);
- *Legal Profession Act 2004* (NSW) (operative from 1 October 2005 to 30 June 2015);
- *Legal Profession Act 2006* (NT);
- *Legal Profession Act 2007* (Qld);
- *Legal Profession Act 2008* (WA);
- *Legal Profession Act 2007* (Tas);
- *Legal Profession Act 2004* (Vic) (operative from 12 December 2005 to 30 June 2015). .

[10] For more information, see: Law Council 2017 Consultation response, n6, [78].
[11] It is noted that, unlike solicitors, barristers do not operate trust accounts and do not receive money for work which is yet to be completed.
[12] Law Council 2017 consultation response, n6, 28.
[13] Section 135(1) Uniform Law.
[14] Section 135(2) Uniform Law
[15] Section 137 Uniform Law.

d. that controlled money is deposited into the account specified in the written direction (relating to the money) as soon as practicable, exclusively for the person on whose behalf it was received and (subject to a court order) must not be disbursed except as in accordance with written directions as specified in section 139 (a direction which must be kept by the law practice of 7 years);[16]
e. a law practice must not withdraw trust money from a general trust account otherwise than by cheque or electronic funds transfer;[17]
f. a law practice must not mix trust money with other money unless authorised to do so by the designated local regulatory authority, and only in accordance with any conditions the designated local regulatory authority imposes in relation to that authorisation;[18]
g. a law practice must keep in permanent form trust records in relation to trust money received by the law practice, in a way that at all times discloses the true position in relation to trust money received for or on behalf of any person, and in a way that enables the trust records to be conveniently and properly investigated or externally examined, for 7 years since the last transaction entry in the trust record;[19]
h. require law practices to maintain a register of files opened irrespective of whether the law practice receives trust money;[20]
i. a law practice must not knowingly receive money or record receipt of money in the law practice's trust records under a false name (with a higher civil penalty of 100 penalty units); [21]
j. if it is aware that a person on whose behalf trust money is received by the law practice is commonly known by more than one name, the law practice must ensure that the law practice's trust records record all names by which the person is known; [22]
k. a law practice must notify the designated local regulatory authority of the details required by the Uniform Rules of each account maintained at an ADI in which the law practice or any legal practitioner associate of the law practice holds money entrusted to the law practice or legal practitioner associate;[23]
l. lawyers, authorised deposit taking institutions and external examiners (among others) are to notify the designated local regulatory authority of any suspected irregularities of trust accounts as soon as practicable after becoming aware;[24] and
m. a law practice must once in each financial year have its trust records externally examined by a suitably qualified person appointed in accordance with the Uniform Rules as an external examiner,[25] and this is subject to review by the designated local regulatory authority.[26]

12. The designated local regulatory authorise can also, by their own motion, conduct compliance audits of legal practices at any time in relation to allegations or suspicions regarding trust money, trust property, trust accounts or any other aspect of the affairs

[16] Section 139 Uniform Law;
[17] Section 144 Uniform Law
[18] Section 146 Uniform Law
[19] Section 147(1) Uniform Law.
[20] Rule 93 of the Legal Profession Uniform General Rules 2015.
[21] Section 147(3) Uniform Law.
[22] Section 147(4) Uniform Law.
[23] Section 151 Uniform Law.
[24] Section 154 Uniform Law;
[25] Section 155 Uniform Law. The details of the external examination are also elaborated in the Uniform Rules: Section 158 Uniform Law.
[26] Section 155(2) Uniform Law.

of a law practice. In appropriate circumstances regulatory authorities can take over the management of the trust account or law practice including control of the funds (as discussed in more detail below).[27]

Managing risk through professional conduct rules

13. This legal profession legislation is augmented through professional conduct rules. It is worth noting that these professional conduct rules are implemented in accordance with the differing processes of each jurisdiction, meaning that in some jurisdictions these rules are subordinate legislation.[28]

14. These rules set out the core standards of professional ethics to be observed, and reflect ethical principles developed and settled over many years in consideration of the professional, fiduciary and other duties of lawyers and the common law. However, where the rules set a higher standard of conduct than prescribed in legislation or under the common law, a lawyer is required to comply with the higher standard set by the rules. [29] These professional conduct rules include:

    a. The Australian Solicitors' Conduct Rules (**ASCR**), which have been adopted as the professional conduct rules for solicitors in: South Australia,[30] Queensland,[31] Tasmania,[32] New South Wales and Victoria,[33] and the Australian Capital Territory;[34] and the Northern Territory continues to maintain its own solicitors' professional conduct rules- the *Rules of Professional Conduct and Practice*; [35] and

    b. The Australian Bar Association (**ABA**) professional conduct rules,[36] which have existed in various iterations since 1993. The National Conduct Rules were implemented in New South Wales and Victoria,[37] Queensland,[38] South Australia,[39] Western Australia,[40] and Tasmania;[41] and the Northern Territory has maintained earlier *Barristers' Conduct Rules*.[42]

15. These professional conduct rules include obligations to only accept lawful client instructions,[43] an obligation to avoid compromises to their integrity,[44] to comply with

[27] Section 256 Uniform Law.
[28] Law Council of Australia, Review of the Australian Solicitors' Conduct Rules (February 2018), 6-7, available online: https://www.lawcouncil.asn.au/docs/4dde1ab8-4606-e811-93fb-005056be13b5/2018%20Feb%20%2001%20ASCR%20Consultation%20Discussion%20Paper.pdf .
[29] Ibid.
[30] Effective from July 2011 as the *Law Society of South Australia, Australian Solicitors' Conduct Rules*.
[31] Effective from June 2012, as the *Australian Solicitors' Conduct Rules 2012*.
[32] Effective 1 October 2020, as the *Legal Profession (Solicitors' Conduct) Rules 2020*.
[33] Effective 1 July 2015, as the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.
[34] Effective 1 January 2016, as the *Legal Profession (Solicitors) Conduct Rules 2015*.
[35] Rules of Professional Conduct and Practice *(effective from 10 April 2002)*.
[36] While these Rules cover the same content and substance, the Uniform Law jurisdictions have a slightly different numbering sequence. For ease of reference we refer to the Uniform Law version of the Barristers' Rules (**Barristers' Rules**) in this submission.
[37] *Legal Profession Uniform Conduct (Barristers) Rules* (effective 1 July 2015).
[38] Bar Association of Queensland *Barristers' Conduct Rules* (effective 23 December 2011).
[39] South Australian Bar Association Inc *Barristers' Conduct Rules* (effective 14 November 2013).
[40] Western Australian Bar Association *Barristers' Rules* (effective 5 October 2011).
[41] *Legal Profession (Barristers) Rules* 2016 (Tas) (effective 1 October 2016).
[42] Northern Territory has the *Barristers' Conduct Rules* (effective 20 March 2003).
[43] Rule 8.1, ASCR.
[44] Rule 4.1.4 ASCR, Rule 4 Barristers' Rule.

the law,[45] and in respect of owing a paramount duty to the administration of justice.[46] Pertinently, lawyers are currently required to consider the true purpose of their client's activities and the extent to which they may be furthering or obscuring any illegal or criminal purpose.[47] Lawyers also cannot act for a client they suspect of engaging in unlawful activities,[48] and there are exceptions to the confidentiality where appropriate.[49]

Managing risk through senior management controls

16. Further and analogous to the senior management controls within the AML/CTF regime,[50] professional conduct rules and legislation contain provisions holding the principals of legal practices responsible for ensuring that their employees comply with the rules. [51]

17. These rules and provisions place the onus on senior management within law practices to properly manage the business and professional affairs of the practice, including supervision of staff (practitioner and non-practitioner employees) on an ongoing basis, noting that the retainer is with the principal(s) of the firm, not the employed solicitor. Failure to properly supervise an employed solicitor, and failing to take control of the matter when the solicitor fails to properly manage the case,[52] may result in a finding of unsatisfactory professional conduct or professional misconduct against the principals of a law practice.[53] It can also result in costs orders being made against the principals personally.

18. This was the case, for example, in *Kelly v Jowett*, where two principals of a law practice were held responsible for failing to take responsibility or control of a case poorly managed by an employed solicitor.[54] In this case, the ethical duties underpinning this principal were highlighted:

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[45] Rule 4.1.5 ASCR, Rule 4 Barristers' Rules. One law that must be complied with, for example, is Division 400 of the *Criminal Code 1995* (Cth), which prohibits the dealing with monies, whether knowingly or negligently, that are, or at risk of being, the proceeds of crime.
[46] Rule 3 ASCR, Rule 3 Barristers' Rule.
[47] For example, see Rule 8 ASCR.
[48] A lawyer that becomes aware that a client is engaging in unlawful conduct must counsel the client against such conduct without participating in the conduct- whether by assisting or being seen to be tolerating the activity. Just cause for terminating a retainer agreement may arise where a client insists on some step being taken which in the solicitor's opinion is dishonourable or where the client hinders and prevents the solicitor from continuing to act as he or she should act, or unreasonably refuses to act in accordance with the lawyer's advice. See: A. L. Smith L. J. *Underwood, Son & Piper v Lewis* (1894) 2 QB 306 at 314 In *Super 1000 Pty Ltd* 6 Gzell J also noted "where a solicitor is prevented by the client from properly carrying out the duties required by the retainer good cause for termination is established...".
[49] See for example, Rule 9.2.2 in the ASCR.
[50] See, for example, Part 8.4 of the AML/CTF Rules.
[51] See, for example:
Rule 37 of the Australian Solicitor's Conduct Rules (NSW, Vic, QLD, Tas, ACT, SA);
- Section 701 Legal Profession Act 2007 (QLD);
- Section 584 Legal Profession Act 2008 (WA);
- Section 588 Legal Profession Act 2006 (ACT);
- Section 698 Legal Profession Act (NT);
- Section 644 Legal Profession Act 2007 (Tas); and
- Section 34 Legal Profession Uniform Law.

[52] *Kelly v Jowett* [2009] NSWCA 278 (4 September 2009) at [78]- [79], [99].
[53] *Legal Services Commissioner v Mould* [2015] QCAT 440 (16 October 2015) at [10].
[54] *Kelly v Jowett [2009] NSWCA 278 (4 September 2009) at [78]- [79], [99].*

> By their failure to act, the partners of the firm allowed to emerge the very situation they were duty bound to avoid, that is, one in which the clients' interests were not only left unprotected but came into conflict with their own.[55]

19. Despite neither principal being named in the proceedings, the Court of Appeal awarded personal cost orders against both. This demonstrates the magnitude of risk facing principals operating a law practice who do not sufficiently supervise their staff.[56] There are accordingly significant incentives for law practice principals to properly supervise the work of their employees and to institute appropriate systems and controls within the law practice to facilitate that supervision.

20. Further, it is noted that the legal profession regulatory regime is tailored to the context of the profession and that many of the senior management controls outlined in the AML/CTF regime (for example, those involving a governing board or chief executive officer) are not applicable or relevant to the great majority of law practices (typically 5 partners or less).

Responding to risk through professional discipline

21. As with any effective regulatory regime, lawyers' professional obligations are enforced through a disciplinary framework that have been tailored to the unique context of the profession, and there are serious professional disciplinary consequences for lawyers who fail to comply with their obligations.

22. Using the Uniform Law as an example- practitioners who fail to comply the Uniform Law or Legal Professional Rules[57] are subject to the disciplinary framework in Chapter 5 of the Uniform Law. Such breaches can amount to '*unsatisfactory professional conduct*' or '*professional misconduct*', following the initiation and prosecution of disciplinary proceedings by the designated local regulatory authority. Depending on the severity of the conduct, such breaches can result in fines, conditions being placed on the practitioner's practising certificate, and/or the solicitor being barred from practice.

23. In addition, there is a duty imposed on independent regulators of the legal profession, including the Uniform Law Legal Services Council and designated local regulatory authorities, to report suspected offences after an investigation or otherwise. For example, if during the investigation the regulatory body suspects that the practitioner has committed a serious offence, it is required by section 465 of the Uniform Law to report the suspected offence to the police or other appropriate investigating authority.

24. In the Uniform Law these regulators also have the power to initiate investigations into legal practices suspected of falling short of their professional obligations :[58]

> **256 Compliance audits**
>
> (1) The designated local regulatory authority may conduct, or appoint a suitably qualified person to conduct, an audit of the compliance of a law practice with this Law, the Uniform Rules and other applicable professional obligations if the designated local regulatory authority considers there are reasonable grounds to do so, based on--
>
> (a) the conduct of the law practice or one or more of its associates; or

[55] *Kelly v Jowett* [2009] NSWCA 278 (4 September 2009) at [100] per Barrett J.
[56] This applies to all staff, not just employed solicitors. Please see *The Council of the Law Society of NSW v Byrnes* [2016] NSWCATOD, which concerned a failure to properly supervise an office manager at the firm.
[57] Such as the ASCR , or Barristers' Rules).
[58] Section 256 Uniform Law.

(b) a complaint against the law practice or one or more of its associates.

(2) The appointment of a suitably qualified person may be made generally, or in relation to a particular law practice, or in relation to a particular compliance audit.

(3) A report of a compliance audit is to be provided to the law practice concerned and may be provided to the designated local regulatory authority.

25. In a manner analogous to the AML/CTF regime,[59] legal profession regulation also provides for dealings with the relevant regulator. Chapter 7 of the Uniform Law sets a standard of conduct for solicitors' subject to investigation- for example: section 370 and section 371 provides that a legal practitioner must comply with any requests for documents, section 387 provides that a person must not obstruct an investigator, an section 388 provides that legal practitioners must not mislead investigators. The ASCR similarly sets a standard when dealing with the relevant regulatory authority:

> **43 Dealing with the regulatory authority**
>
> 43.1 Subject only to his or her duty to the client, a solicitor must be open and frank in his or her dealings with a regulatory authority.
>
> 43.2 A solicitor must respond within a reasonable time and in any event within 14 days (or such extended time as the regulatory authority may allow) to any requirement of the regulatory authority for comments or information in relation to the solicitor's conduct or professional behaviour in the course of the regulatory authority investigating conduct which may be unsatisfactory professional conduct or professional misconduct and in doing so the solicitor must furnish in writing a full and accurate account of his or her conduct in relation to the matter.

26. Failure to comply with these standards can have serious consequences for legal practitioners, including findings of unsatisfactory professional conduct, professional misconduct, public reprimand and fines. For example in *Legal Services Commissioner v Thurairajah*, a solicitor was found guilty of professional misconduct for her repeated failures to respond to various correspondences from the Legal Services Commissioner over a 13 month period, and of misleading the Legal Services Commissioner in her limited replies.[60] Similarly, in the recent case of *Legal Services Commissioner v Nguygen*,[61] a solicitor failed to provide any response to the Legal Service Commissioner's request for documents pursuant to section 371 of the Uniform Law or otherwise comply with section 43 of the ASCR. This resulted in a finding of professional misconduct,[62] an order to pay the Legal Service Commissioner's costs and an order that her practising certificate would not be renewed until she complied with the section 371 Notice.

27. The legal profession regulatory regime accordingly has effective controls to manage risk and sanction those individuals who fail to comply with their duties.[63] That is to

[59] See, for example, Part 8.7 of the AML/CTF Rules.
[60] *Legal Services Commissioner v Thurairajah* [2011] NSWADT 287, [169]-[171].
[61] *Legal Services Commissioner v Nguygen* [2019] NSWCATOD 88
[62] *Legal Services Commissioner v Nguygen* [37].
[63] For example, including the paramount duty the court and the administration of justice (ASCR 3, Barristers Rule 23), and/or engages in conduct that is prejudicial to, or diminishes the public confidence in, the administration of justice; brings the profession into disrepute; or otherwise demonstrates that they are not suitable for continued membership with the profession (ASCR 5, Barristers' Rule 8).

say- if the objective of the AML regime is to make lawyers effective 'gatekeepers'[64] to preventing illegal activity, the legal profession regulatory regime already addresses this risk (in addition to educational and admission requirements, addressed below) by providing for those who fail in their obligations to be removed from the available pool of 'gatekeepers'.

28. Moreover, lawyers are subject to the federal money laundering offences contained in Division 400 of the Schedule to the *Criminal Code Act 1995* (**Criminal Code**). Division 400 Criminal Code prohibits the dealing with monies, whether knowingly or negligently, that are, or at risk of being, the proceeds of crime.[65] It is drafted in very broad terms, such that the offences have criminalised activities which go beyond traditional notions of money laundering, especially when used in combination with Commonwealth revenue and financial reporting offences[66] (as predicate offences).

29. This broad scope is ostensibly mitigated by prosecutorial discretion,[67] however it is noted that criminal liability under section 400(3) and Division 400 offences of the *Criminal Code* substitute the customary element of a guilty mind (*mens rea*) with recklessness or negligence on the part of the accused. In practice, this means that lawyers who inadvertently or unwittingly allow acts of money laundering to occur (as a result of failing to make proper enquiries) are already liable to prosecution under Division 400.

Managing risk though admission standards

30. In addition to the legal profession regulatory regime having mechanisms to manage legal professionals who fail in their professional obligations, the Australian legal profession is distinguishable from many other FATF jurisdictions and other DNFBPs by also having robust safeguards built into the admission to practice.

31. For example, in section 17 of the Uniform Law a prerequisite for admission (in addition to academic and training requirements) is that the person must be *"a fit and proper person to be admitted to the Australian legal profession*."[68] The designated local regulatory authority "*may have regard to any matter relevant to the person's eligibility or suitability for admission, however the matter comes to its attention*"[69] and must have regard to the matters specified in the Legal Profession Uniform Admission Rules 2015 (**Admission Rules**).[70] The Admission Rules add an additional threshold

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[64] Noting the comments in: Australian Government Attorney-General's Department Consultation Paper: Legal Practitioners and Conveyancers: a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime (November 2016), 4. Available online: https://www.homeaffairs.gov.au/how-to-engage-us-subsite/files/amf-ctf-regime/legal-practitioners-model-regulation.pdf .

[65] In the comparable jurisdiction of the United Kingdom, cases such as these have resulted in prison terms: *R v Duff* [2002] EWCA Crim 2117; *R v Griffiths* [2006] EWCA Crim 2155.

[66] Leighton-Daly, Mathew (2015) "*Money laundering offences: Out with certainty, in with discretion*?," *Revenue Law Journal*: Vol. 24: Iss.1, Article 6 at page 3.

[67] It has been argued the scope of the regime is too broad to be consistent with the political ideal of the rule of law and that prosecutorial discretion alone is an inadequate counter measure. See: Leighton-Daly, Mathew (2015) "*Money laundering offences: Out with certainty, in with discretion*?," *Revenue Law Journal*: Vol. 24: Iss.1, Article 6 at page 1.

[68] Section 17(c) Uniform Law. For non-Uniform law states and territories, please see:
Legal Profession Act 2006 (ACT) section 26(2)(b);
Legal Profession Act 2007 (Qld) section 35(2)(a)(ii);
Legal Profession Act 2008 (WA) section 26(1)(a)(ii);
Legal Practitioners Act 1981 (SA) section 15(1)(a);
Legal Profession Act 2006 (NT) section 25(2)(b); and
Legal Profession Act 2007 (Tas) section 31(6)(b).

[69] Section 17(2)(a) Uniform Law.

[70] Section 17(2)(b) Uniform Law.

for Admitting Authorities to consider for prospective legal professionals, being whether the person is of "*of good fame and character*".[71]

32. As is explained in *Council of the Law Society of New South Wales v Parente*, the notion of 'fit and proper' flows from the application of the principles explained in *New South Wales Bar Association v Cummins*: [72]

> Honesty and integrity are important in many spheres of conduct. However, in some spheres significant public interests are involved in the conduct of particular persons and the state regulates and restricts those who are entitled to engage in those activities and acquire the privileges associated with a particular status. The legal profession has long required the highest standards of integrity.
>
> There are four interrelated interests involved. Clients must feel secure in confiding their secrets and entrusting their most personal affairs to lawyers. Fellow practitioners must be able to depend implicitly on the word and the behaviour of their colleagues. The judiciary must have confidence in those who appear before the courts. The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice. Many aspects of the administration of justice depend on the trust by the judiciary and/or the public in the performance of professional obligations by professional people.

33. With regard to 'good fame and character'[73], the High Court in *Re Davis* explained this as referring to "*the reputation and the more enduring moral qualities*" of the individual being considered for admission.[74] This was further explained in *Council of the Law Society of New South Wales v Michael Arthur Hislop:*[75]

> It is of course clear that unfitness may be manifested by conduct not directly connected with professional practice, because such conduct may show that the practitioner lacks requisite personal qualities for membership of the profession, including that a lawyer be of "good fame and character". Conviction for a serious offence, particularly if accompanied by a sentence of imprisonment, is often incompatible with "good fame and character", not only because of the underlying conduct, but also because of the public disgrace involved.

34. In addition to the disciplinary processes discussed above, legal profession legislation also provides for the disqualification of a practitioner who is no longer 'fit and proper'

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[71] *Uniform Admission Rules 2015* (NSW & Vic) Rule 10(1)(f). For non-Uniform Law states and territories, please see:

- *Legal Profession Act 2006* (ACT) section11(1)(a);
- *Legal Profession Act 2007 (Qld) section 9(1)(a);*
- *Legal Profession Act 2008 (WA) section 8(1)(a);*
- *Legal Profession Act 2006 (NT) section 11(1)(a); and*
- *Legal Profession Act 2007* (Tas) section 9(1)(a).

[72] [2019] NSWCA 33 [25]; quoting Spigelman CJ in *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279 at [19]-[20].

[73] The test of 'good fame and character' involves two aspects: 'fame' refers to a person's reputation in the relevant community and 'character' refers to the person's actual nature: see *McBride v Walton* (NSWCA 15.7.1994 per Kirby P); *Clearihan v Registrar of Motor Vehicle Dealers* (1994) 117 FLR 455, 459; *Attorney-General of the State of Queensland v Legal Services Commissioner & Anor; Legal Services Commissioner v Shand* [2018] QCA 66 [31]. The use of both 'fame' and 'character' in this context accordingly draws a distinction between an individual's actual moral qualities versus the public perception of their moral qualities, the latter which may be neither accurate nor fair: see *Re Davis* (1947) 75 CLR 409, 416 per Latham CJ; and *Real Estate and Business Agents Supervisory Board v LJW* [2011] WASCA 35 [28] per Newnes JA.

[74] *Re Davis* (1947) 75 CLR 409, 420 per Dixon J.

[75] [2019] NSWCA 302 [43].

to practise.[76] In the Uniform Law, the designated local regulatory authority can vary, suspend or cancel a practising certificate for reasons including:[77]

a. contraventions of a condition of the practising certificate;
b. failures to comply with investigations pursuant to Chapter 7;
c. following disciplinary processes pursuant to Chapter 5 (as addressed above);[78] or where
d. designated local regulatory authority reasonably believes that the holder of an Australian practising certificate is unable to fulfil the inherent requirements of an Australian legal practitioner.

35. Practising certificate holders are also required to notify the designated local regulatory authority in writing within 7 days of certain events occurring, such as being charged with a serious offence.[79] If a legal professional has been disqualified from practice through the above-mentioned processes, the legal profession laws also contain specific provisions relating to *disqualified persons*.[80]

36. For example, section 121 of the Uniform Law prohibits a law practice from having as a lay associate a person known to be a disqualified person or a person convicted of a serious offence, without specific approval by the regulatory authority. Similarly, section 122 prohibits a person who is a disqualified person or who has been convicted of a serious offence from seeking to become a lay associate without first informing the law practice of the disqualification or conviction.

Managing risk though education

37. The legal profession regulatory regime discussed above is further augmented by a robust mandatory education scheme for lawyers. Education about the aforementioned regulations and ethical principles underpinning professional practice[81] starts from tertiary education, continues through practical legal training, continuing legal education and within professional practice. As addressed above, unlike many occupations the ethical competence of lawyers is specifically considered upon admission to practice, and is a required subject for continuing legal education on an ongoing basis. In this way, practising lawyers are required in the course of their practice and continuing legal education to consider these ethical principles as a matter of course.

38. In all jurisdictions, lawyers with certain classes of practising certificate must also complete 10 hours per annum of mandatory continuing professional development (**CPD**) in order to renew their practising certificate for the following year. In each jurisdiction, practitioners are required to complete at least one hour per annum of CPD in certain core units, of which one is Ethics and Professional Responsibility. This topic spans a wide range of subject matters including those relevant to practice

[76] Noting that circumstances may change during the course of a practitioner's career.
[77] See section 82 of the Uniform Law.
[78] For example, see sections 278, 299 and 466 of the Uniform Law.
[79] See section 51 of the Uniform Law.
[80] Section 6 of the Uniform Law defines a *disqualified person* to mean a person whose name has been removed from the Supreme Court Roll; a person who has been refused the grant or renewal of a practising certificate; a person whose practising certificate is under suspension or cancellation; or a person who has been declared not entitled to apply for a practising certificate. A person who is not an Australian legal practitioner can also become a disqualified person under section 119 of the Uniform Law, on grounds which include that the person is not a fit and proper person to be employed or paid in connection with the practice of law or to be involved in the management of a law practice.
[81] These ethical standards are also set out in multiple layers of professional regulations including the Solicitors' and Barristers' conduct rules, as well as the Evidence Acts, common law and equity.

management and conduct contributing to the involvement (whether intentional or negligent) in money laundering.

Managing risk though insurance

39. Further, it is also a condition of obtaining and annually renewing their practicing certificates that Australian legal practitioners obtain Professional Indemnity Insurance cover for which they are assessed and profiled for possible involvement in fraud, negligence and other risks. Lawyers are also required under professional legislation to have professional indemnity insurance (**PII**). PII operates as a form of risk management. Some insurers specifically provide training and resources focussing on risk management to their clients. Lawcover, for example, has a Risk Management Education Program.

40. In addition, a law practice's risk management may be considered in the calculation of its premium, providing an incentive for legal practitioners to have appropriate strategies in place. For example, Lawcover considers both a law practice's claims experience and risk management in calculating premium. In relation to risk management, Lawcover says that: [82]

> Your base premium may be adjusted down depending on your law practice's principals' satisfactory attendance at Lawcover's Risk Management Education Program (RMEP) or your law practice's AS LAW 9000 – Legal Best Practice or ISO 9001 – Quality Management Systems risk management certification.

41. Many State and Territory law societies and bar associations also have a Professional Standards Scheme in force which limits the liability of participating members. These schemes also provide a regulatory framework. They '… *bind associations to monitor, enforce and improve the professional standards of their members, and protect consumers of professional services'*.[83]

42. Under State and Territory legislation, occupational associations that are members of Professional Standards Schemes are required to submit a five-year risk management strategy and report to the relevant Professional Standards Council on its progress.

Managing risk through client due diligence:

43. Lawyers operate in an environment attuned to risk. They are subject to professional and statutory obligations that are designed to ensure that they behave ethically and responsibly, and which prevent them from furthering any criminality of their clients. Legal practitioners are motivated to avoid the irreparable reputational damage of being drawn unwittingly into their clients' attempted criminality,[84] and those who do become involved in their client's unlawful acts are likely to face the prospect of civil liability, criminal culpability as well disciplinary consequences. [85]

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[82] Lawcover, 'How we calculate your premium: Professional Indemnity Insurance' (Accessed December 2019), available online: https://www.lawcover.com.au/how-we-calculate-your-premium/
[83] Professional Standards are legal instruments that bind associations to monitor, enforce and improve the professional standards of their members, and protect consumers of professional services. See: Professional Standards Councils, ' Professional Standards Schemes' (Accessed December 2019), available online: https://www.psc.gov.au/professional-standards-schemes/what-are-schemes
[84] See: Law Council 2017 Consultation response, n6, [74].
[85] Dal Pont G Lawyers Professional Obligations 5th edition 2013, 617.

44. The *Legal Profession Uniform General Rules 2015* made under the Uniform Law, require a law practice to maintain a register of files opened. This must record the following:[86]

    a. the full name and address of the person;
    b. the date of receipt of the instructions;
    c. a short description of the services which the law practice has agreed to provide;
    d. an identifier.

45. Similar details are required in relation to safe custody documents; recording transactions in trust ledger accounts and a register of controlled money.[87] In addition, lawyers are prohibited from knowingly receiving, or recording receipt of, money in the law practice's trust records under a false name.[88] There is also a requirement to record all known names of the client in the practice's trust records.[89] In the Uniform Law, contraventions of the aforementioned requirements carry a civil penalty of 100 units and may result in sanction pursuant to disciplinary scheme in Chapter 5. [90]

46. As noted earlier in this submission, contraventions of professional conduct rules also trigger disciplinary proceedings.[91] Relevantly, Rule 8 of the ASCR provides: Professional Conduct Rules also require that a legal practitioner:

    a. must provide clear and timely advice to assist a client understand relevant legal issues and to make informed choices about action to be taken during the course of a matter[92];

    b. must follow a client's lawful, proper and competent instructions[93]; and

    c. avoid any compromise to their integrity and professional independence[94].

47. Implicit in the above (and other) professional duties is a requirement that a law practice adequately establishes a client's identity and purpose in giving instructions. As Dal Pont notes:[95]

    > *A Lawyer should take reasonable measures to ascertain a client's identity as soon as practicable before accepting instructions to act.*

48. Establishing a client's identity is also relevant to conflict checking, noting lawyers' duties of confidentiality and avoiding conflicts of interest between clients.[96]

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[86] Section 93 *Legal Profession Uniform General Rules* 2015.
[87] Section 147 *Legal Profession Uniform General Rules* 2015.
[88] For example, s147(3) Uniform Law.
[89] See section 147(4) Uniform Law.
[90] As mentioned earlier in this submission, Chapter 5 provides for the initiation and prosecution of proceedings by the designated local regulatory authority for either unsatisfactory professional conduct or professional misconduct. Also See *Cahill v Law Society of New South Wales* (1988) 13 NSWLR 1.
[91] For example, see Rule 2.3 ASCR.
[92] Rule 7.1 ASCR.
[93] Rule 8.1 ASCR.
[94] Rule 4.1.4 ASCR.
[95] G E Dal Pont, *Lawyers' Professional Responsibility*, 6th ed, 2017, [3.35].
[96] For example, see ASCR Rule 11 and *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2005] 1 WLR 567.

49. There are certain areas of law, of higher AML/CTF risk, that have more stringent identification and verification requirements for certain transfers and transactions**.** For example, the *Conveyancing Rules*[97] in NSW require under Rule 4.1.2:

> A Representative must take reasonable steps to verify the identity of:
>
> (a) Clients: each Client or each of their Client Agents; and
>
> (b) persons to whom certificates of title are provided:
>
> (i) any Client or Client Agent, prior to a Representative giving a certificate of title to that Client or Client Agent; and
>
> (ii) where a Representative acts for a mortgagee, any existing mortgagor, former mortgagor or their agent, prior to the Representative giving a certificate of title to that existing mortgagor, former mortgagor or their agent.

50. Rule 4.1.4 provides that legal practitioners and conveyancers can discharge this requirement by either taking reasonable steps to verify the identity of the person, or to apply the Verification of Identity Standard (**VIS**).

51. The VIS is outlined in Schedule 8 of the *NSW Participation Rules for Electronic Conveyancing* and imposes a range of stringent requirements including new and more effective verification of identity standard that replaces the traditional 100 point system of identification. The VIS requires a face to face interview[98] and the review of certain original documents verifying the identity of the person.[99] It also requires that certain searches be undertaken to verify the information and documentation provided by the client. Schedule 8 is an exhaustive document that is available here.

52. The Participation Rules have notably also been adopted in Victoria, Queensland, Western Australia and South Australia, which requires adherence to the VIS. It should be noted that these Rules permit "Identity Verifiers" to use Identity Agents to undertake these tasks.[100] There are also websites that offer verification of identity for this purpose. One such service is the Document Verification Service (**DVS**), managed by the Department of Home Affairs. The DVS is an online, electronic verification system that is real time and secure. Through the DVS, reporting entities can match some government-issued identification documents with those issued by government organisations, to check that the documentation is correct and current.

53. The VIS also forms part of the 'industry safeguards' incorporated into the Property Exchange Australia (**PEXA**) e-conveyancing network, regulated by the Australian Registrars' National Electronic Conveyancing Council. PEXA is presently utilised in Victoria, New South Wales, Queensland, South Australia and Western Australia and is mandatory in some states including New South Wales and Victoria.[101] The application of these requirements has already proved effective against attempted frauds.[102]

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[97] Section 12E of the *Real Property Act* 1900 (NSW).
[98] Rule 2, Schedule 8, *NSW Participation Rules for Electronic Conveyancing.*
[99] See Rule 3.4 of Schedule 8, *NSW Participation Rules for Electronic Conveyancing.*
[100] For example, Rule 4.2.1 of Schedule 8, *NSW Participation Rules for Electronic Conveyancing.*
[101] Law Institute Victoria, 'Electronic Conveyancing Resources & Advocacy', available online: https://www.liv.asn.au/Professional-Practice/Areas-of-Law/eConveyancing---100--Digital-Lodgement/Resources
[102] Law Council 2017 Consultation response, n6, 31.

54. It is further noted that, in the context of real estate, some Australian jurisdictions also require the involvement of a real estate agent in the formation of the purchase transaction.[103] Foreign purchasers of real estate in Australia also must obtain a prior approval of a proposed transaction from the Foreign Investment Review Board (**FIRB**). [104] The FIRB process establishes an initial *de facto* risk assessment of foreign real property transactions.[105] Accordingly, in Australia, foreign purchasers of real estate must pose a lower risk of AML/CTF than in other jurisdictions given such purchasers have already received Government approval for their transactions prior to settlement occurring.

55. There are resources available that encourage verification, such as the practice support resources provided by industry Professional Indemnity insurer Lawcover. Lawcover's *Risk Management Legal Practice Checks* contains templates for client identification checks, conflict of interest checks, and practice health checks, amongst others.[106] In this documentation Lawcover recommends that practitioners confirm the identity of all new clients, regardless of the type of matter.[107]

56. Similarly, the Queensland Law Society Ethics Centre *Guidance Statement No. 13 – Proceeds of crime compliance and Anti-money Laundering*[108] recommends that solicitors "always carry out due diligence by establishing and verifying client identity".[109]

57. The customer due diligence systems already in place within legal profession regulation are comprehensive and effective, and act in a way that is compatible with the role and other obligations of lawyers. Any extension of the AML regime to lawyers is unnecessary and would largely duplicate an existing regulatory burden.

Responding to risk through appropriate reporting obligations

58. It is necessary to briefly address the reporting obligations in the AML/CTF regime by way of comparison. Part 3 of the *Anti-Money Laundering and Counter-Terrorism Financing 2006* (Cth) (**AML/CTF Act**) addresses the specific reporting obligations of reporting entities. These obligations generally entail reporting:

    a. suspicious matters;

    b. threshold transactions; and

    c. international threshold transactions to AUSTRAC.[110]

[103] In Queensland, real estate agents form the contracts of sale between purchaser and seller and have a specific exclusion from legal professional regulation legislation to permit them to do so.
[104] FIRB, Residential real estate – overview [GN1], available online: https://firb.gov.au/resources/guidance/gn01/
[105]FIRB, Fact Sheet, available online: http://firb.gov.au/files/2015/09/FIRB_fact_sheet_residential.pdf
[106] Lawcover, 'Lawcover's Risk Management', available online: https://lawcover.com.au/wp-content/uploads/2018/11/Law-Practice-Checks-2018.pdf
[107] Ibid 4,10.
[108] Queensland Law Society Ethics Centre, 'Guidance Statement No. 13 – Proceeds of crime compliance and Anti-money Laundering' (Accessed June 2019), available online: https://www.qls.com.au/Knowledge_centre/Ethics/Guidance_Statements/Guidance_Statement_No_13_%E2%80%93_Proceeds_of_crime_compliance_and_Anti-Money_Laundering
[109] Ibid.
[110] Section 40 AML/CTF Act.

59. AUSTRAC also requires that reporting entities provide Compliance Reports (usually annually) for each reporting period detailing their compliance with their obligations under the AML/CTF Act, Regulations and Rules.[111]

60. Section 41 of the Act addresses *suspicious matter reporting*. This reporting is to take place the first time:

    a. The reporting entity provides, or has been requested to provide, the designated service; and
    b. The reporting entity suspects on reasonable grounds that the client or the agent of the client is not who he or she claims to be; or
    c. The reporting entity suspects on reasonable grounds that the information provided by the is relevant to:
        i. the evasion or attempted evasion of any Commonwealth, State or Territory taxation law; or
        ii. the investigation or prosecution of a person for an offence against a law of the Commonwealth, or of a State or Territory, including offences under the *Proceeds of Crime Act* 2002, and/or relating to terrorism financing or money laundering.

61. Section 41(2) provides that these suspicious matter reports need to be made within 3 business days, with the exception of suspicions involving terrorism funding which must be reported in 24 hours. The report must include a number of details, such as the known identifying details of the person and the circumstances giving rise to the suspicion, which are detailed in Chapter 18 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument (No.1) 2007* (Cth) (**AML/CTF Rules**).

62. *Threshold transaction reporting* obligations arise where monetary transfers of $10,000 or more[112] are made during the course of the reporting entity providing a designated service.[113] These reports must take place within 10 business days of the transaction taking place.[114] The report must include a number of details, which are detailed in Chapter 19 of the AML/CTF Rules.

63. *International funds transfer instructions reporting* relates to, unsurprisingly, transfers between an Australian and a foreign institution- covered in detail in section 46 of the AML/CTF Act. Unlike transaction reports, there is currently no monetary threshold for international transfers to trigger a reporting requirement. These reports must take place within 10 business days of the transaction taking place,[115] and must include a number of details, which are set out in Chapters 16 and 17 of the AML/CTF Rules.

Legal profession regulation

64. As a general rule legal practitioners and law practices are not required to disclose or report to legal profession regulators details of the matters they conduct pursuant to the client retainer, except in limited circumstances.

65. The triggering events are, for example, a cost assessment, the preliminary assessment or investigation of a complaint, or following the appointment of a trust account manager, a law practice manager or an external examination. The legal profession regulatory regime in Australia for trust money and trust accounts imposes

[111] Section 47 AML/CTF Act.
[112] Section 5 AML/CTF Act.
[113] Section 43(1) AML/CTF Act.
[114] Section 43(2) AML/CTF Act.
[115] Section 45 AML/CTF Act.

statutory duties on a range of persons and entities, including lawyers,[116] approved deposit-taking institutions, and trust account examiners (i.e. banks and independent auditors of law practices accounts) to give written notice to the regulatory authority as soon as they become aware that there may be an irregularity in any of a law practice's trust accounts or trust ledger accounts.[117]

66. Solicitors' trust accounts are subject to regular independent external examination and audit. As noted earlier in this submission, regulatory authorities with oversight of lawyers' trust accounts are empowered to conduct investigations of accounts at any time in relation to allegations or suspicions regarding trust money, trust property, trust accounts or any other aspect of the affairs of a law practice. In appropriate circumstances regulatory authorities can take over the management of the trust account or law practice including control of the funds.[118]

67. Legal practitioners also have existing obligations under the *Financial Transaction Reports Act 1988* (**FTR Act**) to report to AUSTRAC details of 'significant cash transactions'. A "significant cash transaction" is where the cash transaction involves the transfer of currency of AUD$10,000 or more (or foreign currency equivalent) in value.[119]

68. Section 15A of the FTR Act provides that when a transaction is entered into 'in the course of practising as a solicitor' and 'entered into by, or on behalf of, a solicitor' an obligation to report is triggered. The reportable details for a significant cash transaction are detailed in Schedule 3A of the FTR Act and includes information such as:

- the nature of the transaction;
- the details for the solicitor or law practice;
- details such as the name and address for any other party to the transaction; and
- the total amount of Australian and Foreign funds involved in the transaction.

69. The obligations under the FTR Act accordingly fall under an exception to a lawyers' duty of confidentiality (addressed in more detail later in this paper).[120] Failure to comply with the FTR Act can result in a fine of up to 10 penalty units for incomplete information, up to 2 years imprisonment for a failure to provide information, and up to 5 years imprisonment for false or misleading information. [121] Moreover, a failure to comply can result in finding of unsatisfactory professional conduct or professional misconduct.

70. An example of the existing regulations being effective in this area is in *Council of the Law Society of NSW v Galloway*,[122] where a solicitor was found guilty of professional misconduct, fined and had conditions attached to his practising certificate for a failure, among other things, to report a series of significant cash transactions to AUSTRAC pursuant to his obligations under the FTR Act. It is notable that his failures were found

[116] For example, see s154 of the Uniform Law.
[117] Law Council 2017 Consultation response, n6, 33.
[118] Ibid 28.
[119] Section 3 FTR Act.
[120] See Rule 9 ASCR.
[121] Part V, FTR Act
[122] *Council of the Law Society of NSW v Galloway* [2012] NSWADT.

not to be dishonest so much as negligent, for his failure to properly supervise the management of the firm's trust account.[123]

71. The Australian legal profession is accordingly already comprehensively regulated and manages the risks of AML/CTF in a manner that is appropriate for the role and obligations of lawyers. Extending the AML/CTF regime to the legal profession in this context would, however, undermine the role of lawyers, erode the fundamental professional obligations and ethics of the legal profession, and introduce a highly prescriptive regime that is incompatible with the aforementioned obligations.

Incompatibility of regulatory regimes

72. **This section addresses paragraph (h) of the Inquiry Terms of Reference, which queries:**

> **(h) the extent to which…**
>
> **ii. the existing professional obligations on DNFBPs are compatible with AML/CTF reporting obligations…**

Incompatible with the role of lawyers

73. Lawyers have a distinct role within democratic society that is intrinsically linked with the administration of justice and, by extension, the proper administration of the Rule of Law. [124] This unique and important role of lawyers is enshrined in the United Nations Basic Principles on the Role of Lawyers (**Basic Principles**).[125] While not a legally binding instrument, is a detailed exposition of the principles, rights and responsibilities of lawyers that are built upon human rights standards protected in other international instruments, such as the International Covenant on Civil and Political Rights (**ICCPR**).[126] As noted in the preamble: [127]

> The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice…

74. The Basic Principles provide, among other things, that:

a. Lawyers shall at all times maintain the honour and dignity of their profession "as essential agents of the administration of justice";[128]
b. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely

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[123] *Council of the Law Society of NSW v Galloway* [2012] NSWADT at [7].
[124] Also see: Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), 3 at paragraph 4(b), available online: <https://www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf>.
[125] Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990, available online: https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx (**Basic Principles**).
[126] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, available online: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx ;
Also see, for example: United Nations Human Rights Committee (Twenty-first session, 1984): "International Covenant on Civil and Political Rights General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)," April 13, 1984, para. 9.
[127] Basic Principles, Preamble.
[128] Basic Principles, Principle 12.

and diligently in accordance with the law and recognized standards and ethics of the legal profession;[129]

c. Lawyers shall always loyally respect the interests of their clients;[130]
d. Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled… requires that all persons have effective access to legal services provided by an independent legal profession;[131]
e. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential;[132] and
f. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.[133]

75. The unique relationship between a lawyer and their client accordingly must be recognised and accommodated in legislation- even legislation with otherwise laudable objectives. Australia's AML regime, and the 'Tranche two' models that have arisen over the years and in international contexts,[134] do not adequately account for this distinct role of lawyers and the duties inherent to that role. Moreover, key elements of the AML regime inherently undermine many of the Basic Principles excerpted above.

76. Central to this issue are the legal profession's obligations around confidentiality and privilege, and how those obligations are fundamental to role of lawyers and the administration of justice.

Incompatible with client legal privilege

77. Client legal privilege (also called "legal professional privilege" in its common law formulation) is a rule of substantive law, which can prevent the otherwise compulsory disclosure of the material to which it attaches, unless specifically abrogated by statute. It has been described as an 'an important common law right, or perhaps, more accurately, an important common law immunity'.[135]

78. Client legal privilege protects confidential communications between a lawyer and client made for the dominant purpose of the lawyer providing legal advice or professional legal services or for use in current or anticipated litigation. The privilege belongs to the client, not the lawyer.[136]

[129] Basic Principles, Principle 14.
[130] Basic Principles, Principle 15.
[131] Basic Principles, Preamble.
[132] Basic Principles, Principle 22.
[133] Basic Principles, Principles 16.
[134] For example, see the Law Council's responses to:
- Law Council of Australia, *Response to Senate*, n8.
- Law Council 2017 Consultation response, n6.

[135] *Daniels v ACCC;* [2002] HCA 49.
[136] *Baker v Campbell* (1983) 153 CLR 52.

79. Client legal privilege has been codified in sections 118[137] and 119[138] of the *Evidence Act 1995* (Cth)[139] which set out the privilege as it relates to advice and litigation.[140] The privilege does not extend to where advice is sought to further a fraud, crime of other unlawful purpose,[141] and there are also statutory exceptions.[142] In addition to the statutory and common law requirements of client legal privilege, the Barristers' Rules further provide that claims for privilege must be reasonably justified by the material then available to the barrister, be appropriate for the robust advancement of the client's case on its merits, and are not made principally in order to harass or embarrass a person. [143]

80. Client legal privilege is important because:

a. It exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers;[144] and

b. A person should be entitled to seek and obtain legal advice for the purposes of the conduct of actual or anticipated litigation, without the apprehension of being prejudiced by subsequent disclosure of the communication.[145]

81. To this end, in *Esso Australia Resources Limited v The Commissioner of Taxation* Justice Kirby described the fundamental purpose of privilege:[146]

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[137] **Section 118 Legal Advice**:

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication made between the client and a lawyer; or
(b) a confidential communication made between 2 or more lawyers acting for the client; or
(c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person;

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

[138] **Section 119 Litigation:**

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
(b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

[139] Equivalent Acts in State and Territory jurisdictions are, *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2011* (ACT) and *Evidence (National Uniform Legislation) Act 2011* (NT).

[140] Sections 118 and 119 are limited to the adducing of evidence and would not, for example, extend to ancillary procedures in litigation such as discovery. However, the legislative provisions did not supplant common law legal professional privilege which extends to such procedures (*Esso Australia Resources Limited v The Commissioner of Taxation [1999]* HCA 67 at [111]).

[141] See: *R v Cox & Railton* (1884) 14 QBD 153; *R v Bell* (1980) 146 CLR 141.

[142] See, for example: Evidence Act 1995 (NSW) sections 121-126.

[143] See Barristers' Rule 61:

61. A barrister must take care to ensure that decisions by the barrister to make allegations or suggestions under privilege against any person:
(a) are reasonably justified by the material then available to the barrister;
(b) are appropriate for the robust advancement of the client's case on its merits; and
(c) are not made principally in order to harass or embarrass a person.

[144] *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674.

[145] *Baker v Campbell* [1983] HCA 39; (1983) 153 CLR 52.

[146] *Esso Australia Resources Limited v The Commissioner of Taxation [1999]* HCA 67 at [111] per Kirby J, quoting *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490 per Deane J.

> It arises out of "a substantive general principle of the common law and not a mere rule of evidence". Its objective is "of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law". It defends the right to consult a lawyer and to have a completely candid exchange with him or her. It is in this sense alone that the facility is described as "a bulwark against tyranny and oppression" which is "not to be sacrificed even to promote the search for justice or truth in the individual case".

82. The proper functioning of our legal system is accordingly predicated on clients having confidence in the confidential nature of their relationship with their lawyer.[147] This facilitates a client's full and candid disclosures, which in turn allows that client to receive full, proper, and correct legal advice based on a complete knowledge of the facts and circumstances.[148] This has the effect of facilitating greater compliance with the law and more effective and efficient resolution of legal disputes. This confidence furthers access to justice through the provision of correct and appropriate advice, insomuch that it is based on full and correct information that the client felt safe to provide.[149]

83. However, the obligations of reporting entities under the AML/CTF Act are inherently in conflict with the client's right to client legal privilege, for the following reasons.

Privilege belongs to the client

84. Client legal privilege is a privilege that lies with the client. That is, a solicitor and barrister is required to observe client legal privilege: they do not have the right to waive it and they do not have a discretion to decide when such privilege will and will not apply. More fundamentally, client legal privilege attaches to communications so long as the client's intention in seeking the advice is to effect lawful outcomes.[150] Legal professional privilege is a privilege of the client, and the legal practitioner merely observes the privilege. Usually it is a court that will decide whether the privilege applies. The legal practitioner does not make determinations as to whether it applies but may cease to act in a matter if he or she believes their advice is to be used for an illegal or improper purpose.

85. A legal practitioner cannot reasonably be asked to make determinations as to whether client legal privilege will or will not apply to communications for the purposes of making a report. As further explained in the 'unreasonable burden' section below, to do so exposes that legal practitioner to disciplinary proceedings should they ultimately make the wrong judgment call.

86. The obligations of the AML/CTF Act would accordingly be in direct conflict with the professional obligations of legal practitioners.

The AML/CTF regime cannot adapt to the complexity of privilege in practice

87. Section 242 of the Act states that the law relating to legal professional privilege is not affected by the Act. However, this is not expressed in terms of being an exception from reporting obligations. Moreover, it is important that the protection is not limited

[147] As recognised in Basic Principle 22. Please also see: Also see: Law Council of Australia, *Policy Statement: Rule of Law Principles* n131, 3 at paragraph 4(b).
[148] *Esso Australia Resources Limited v The Commissioner of Taxation [1999]* HCA 67 at [111].
[149] It is noted that there are some exemptions allowing for lawyer' disclosure of confidential information, such as that addressed in ASCR 9, which are addressed later in this paper.
[150] *AG (NT) v Kearney* [1985] HCA 60; (1985) 158 CLR 500.

to information obtained in the course of litigation, leaving information gained by a legal practitioner in relation to non-litigation advice work unprotected. In practice maintaining such a distinction is problematic, for example, in the case of barristers often some initial advice on a matter will be a prelude to litigation.

88. However, even if section 242 was clearly expressed as an exception to reporting obligations, the operative sections of the AML/CTF Act which includes identification verification[151], ongoing customer due diligence[152] and reporting suspicious matters[153], act to diminish the unique relationship that exists between a lawyer and client.

89. For example, section 41 of the AML/CTF Act stipulates what a reporting entity has to do if it forms a reasonable suspicion that the circumstance presented by an individual falls into one or more of the wide circumstances outlined in sub-sections 41(1)(d) to (j) (summarised in pages 19 to 20 above). In the context of the legal profession, the scope of section 41 is wide, the standard of reasonable suspicion is too low, and it is invoked the moment a person inquires or requests a service from a reporting entity. This includes circumstances where a contract for service has not yet been entered into.

90. For example, it appears that leaving a message on a reporting entity's voicemail or sending an email to a reporting entity inquiring about fees for service would suffice in engaging section 41. To this end, client legal privilege can attach to communications made prior to the legal practitioner and client entering into a retainer, it extends to potential clients and to the extent a retainer is necessary, it is met where the client has a genuine belief that it is entitled to the legal advice.[154] However, it has been said that what passes between a client and lawyer must be for the purposes of retaining the legal practitioner.[155]

91. However, communications between a solicitor and a potential client which reveal the nature of the legal advice sought to be the subject of the retainer are also privileged.[156] As the voicemail example shows, there will be cases where either the existence of a retainer will be problematic or the communication may not necessarily reveal the nature of the legal advice sought but result in a communication that had the legal practitioner answered the phone and a conversation ensued, it would appear communications may be the subject of privilege. The conversation may give rise to the obligation to report under section 41 but the legal practitioner may not know, have met or never meet the potential client.

92. Moreover, there is a degree of fluidity to relationships in legal practice that do not exist within the financial sector which makes application of the AML/CTF Act difficult. If a client is not able to rely on the security of client legal privilege from the very outset of their relationship with their solicitor or barrister, it risks diminishing the effective and proper administration of justice resulting in significant flow on of costs to law enforcement, the legal system, government and the community.

93. It is also important to note that privilege can vary over time. For example, as Justice Young points out: '*if a company is the solicitor's client and that company becomes*

[151] Section 35 of the AML/CTF Act.
[152] Section 36 of the AML/CTF Act.
[153] Section 41 of the AML/CTF Act.
[154] *Grofam Pty Ltd v Australia and New Zealand Banking Group Ltd* (1993) 45 FCR 445 at 456.
[155] See *Minter v Priest* [1929] 1 KB 655 at 666 per Lord Hanworth MR (overruled on other grounds [1930] AC 558).
[156] *Kirby v Centro Properties Ltd (No 2)* (2012) 87 ACSR 229 at [18].

defunct, there is no basis for upholding a claim of privilege at the instance of the persons who were once interested in the company',[157] as it was the company who was the client. Accordingly- although such privilege can apply in some circumstances to third parties,[158] there will be instances where that will not be the case. The fact that privilege attached to a communication can vary with time places an intolerable burden on legal practitioners insofar as AML/CTF reporting obligations are concerned. In this example the solicitor to the company might need to keep a track of all his or her past corporate clients and if one goes defunct revisit the file and see if any communication could have been the subject of a report.[159]

AML/CTF reporting obligations and the identity of clients

94. There are also some circumstances where client legal privilege may attach to details of a client's identity.[160] As explained in *Commissioner of Taxation v Coombes* (**Coombes**):[161]

> Some of the cases support an exception to this general rule when so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication. This will be the case when the client's identity is so intertwined with the confidential communication that to disclose the identity would be to disclose the communication.

95. There are important public policy reasons for the maintenance of the *Coombes* common law protection, which has been endorsed in subsequent cases including *Z v New South Wales Crime Commission*[162] and the more recent decision of *John Bridgeman Limited v Dreamscape Networks FZ-LLC.*[163]

96. In the case of an AML/CTF regime extending to lawyers, much information can be gleaned from the fact of having consulted a lawyer of a particular known speciality. There is potential for adverse inferences being drawn about the legal practitioner's client for having sought legal advice from a practitioner with a particular speciality. One obvious example is the provision of tax advice- the thresholds in section 41 suspicious reporting would be triggered, for example, if a person sought the assistance of a lawyer for advice regarding remedying the late or incorrect filing of tax returns. In this instance, the lawyer will have an inherent conflict between reporting against the client, being prohibited from telling the client of the report (per the significant 'tipping off' offences under the AML/CTF regime)[164] and assisting the client to better comply with the law.

97. A foreseeable impact is that this will discourage clients from obtaining legal advice in complicated circumstances where citizens need and, per the Basic Principles, ought to have access to advice. As noted earlier in this paper, the availability of such advice also fulfils an important function in facilitating citizens' better compliance with the law.

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[157] *Global Funds Management (NSW) Ltd v Rooney* (1994) 36 NSWLR 122 at 130, (citing *Baker v Evans* (1987) 77 ALR 565 at 567).
[158] *Hicks v Trustees Executors & Agency Co Ltd* (1900) 25 VLR 668 at 671.
[159] Law Council 2017 Consultation response, n 6, 46.
[160] *Commissioner of Taxation v Coombes* [1999] FCA 842 [31].
[161] (1999) 92 FCR 240.
[162] *Z* v *New South Wales Crime Commission* [2007] HCA 7 [12].
[163] *John Bridgeman Limited v Dreamscape Networks FZ-LLC* (24 August 2018)[2018] FCA 1279 [31].
[164] For further information, see: AUSTRAC, 'Tipping off', available online: https://www.austrac.gov.au/business/how-comply-and-report-guidance-and-resources/reporting/suspicious-matter-reports-smrs/tipping .

Incompatible with the duty and purpose of confidentiality

98. The duty of confidentiality is a broader requirement imposed on legal practitioners compared to that of client legal privilege. A communication, including documents exchanged during the course of the barrister, solicitor and client relationship may be confidential but it may not necessarily fall within the confines of client legal privilege. The distinction is dependent on the purpose of the communication and whether it was for the dominant purpose of obtaining legal advice or advice in anticipation or in the course of litigation.[165]

99. The obligation to keep communications with a client confidential assists in the promotion of clients making full and frank disclosure to their solicitor or barrister. It is based on a secure knowledge that their legal representative will not disclose to a third party discussions or documents. It is similar to the fundamental characteristics of legal professional privilege with the distinct difference being that the duty of confidentiality applies to all communications regardless of whether it is for the purpose of legal advice or advice in anticipation or in the course of litigation.

100. There are, however, circumstances where solicitors and barristers may be allowed to disclose confidential material, which are outlined in ASCR 9[166] and Barristers' Rule 114.[167] Section 117 of the *Evidence Act 1995* (Cth) defines 'confidential communication' as communication made in such circumstances that, when it was made a person who made it or the person to whom it was made was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.[168]

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[165] *Esso Australia Resources v Commissioner of Taxation* [1999] HCA 67; 201 CLR 49.

[166] See ASCR 9:

> 9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:
>
> 9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice, or
>
> 9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,
>
> EXCEPT as permitted in Rule 9.2.
>
> 9.2 A solicitor may disclose information which is confidential to a client if:
>
> 9.2.1 the client expressly or impliedly authorises disclosure,
>
> 9.2.2 the solicitor is permitted or is compelled by law to disclose,
>
> 9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations,
>
> 9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence,
>
> 9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person, or
>
> 9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity.

[167] See Barristers' Rule 114:

> 114. A barrister must not disclose (except as compelled by law) or use in any way confidential information obtained by the barrister in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep the information confidential unless or until:
>
> (a) the information is later obtained by the barrister from another person who is not bound by the confidentiality owed by the barrister; or
>
> (b) the person has consented to the barrister disclosing or using the information generally or on specific terms.

[168] This is similarly defined in equivalent State and Territory legislation and are contained in, section 117 of the *Evidence Act* (NSW); section 117 of the *Evidence Act 2008* (Vic); section 117 of the *Evidence Act 2001* (Tas); section 117 of the *Evidence Act 2011* (ACT) and section 117 of the *Evidence (National Uniform Legislation) Act 2011* (NT).

101. The obligations of reporting entities under the AML/CTF Act are inherently incompatible with a lawyers' obligations around confidentiality, for the reasons outlined as follows.

The AML/CTF regime does not contemplate obligations around confidentiality

102. As noted above, AML/CTF Act section 242 provides that it does not affect legal professional privilege. This implies that while it will not affect legal professional privilege, there may be circumstances where obligations under the AML/CTF Act may infringe upon the duty of confidentiality so that reporting under the Act will form an exception based on legal compulsion. Moreover, any protection given to the legal practitioner under the Act for disclosing confidential communications to the relevant authority may result in the legal practitioner being liable to third parties unless specific protection is provided for under the Act. For example assume A and B as joint venturers approach C for legal advice. During the course of their conversation C obtains confidential information that results in C reporting B. That information may also be confidential in C's relationship with A and the disclosure a breach of C's duty to A.[169]

103. It is important to note that the duties of a barrister or solicitor cannot be ranked in order of importance but rather as duties that exist as pillars that complete the foundations on which the relationship a legal practitioner has with their clients, other legal practitioners, with the courts (as officers of the court) and to the greater community. Duties such as client legal privilege, confidentiality, to the client and court should be considered equally and each are significant cornerstones in the advancement of the administration of justice for the public interest.

104. Should the AML/CTF regime ever require legal practitioners to report suspicious matters that may fall outside client legal privilege but within the realms of confidentiality, this would disturb the relationship of trust, integrity and honesty that underpins that relationship. This in turn risks encroaching on the public interest and the manner in which justice is administered more broadly.

The AML/CTF regime cannot adapt to the complexity of confidentiality

105. Additionally, at times, it is unclear what communications fall within client legal privilege and/or confidentiality. Such distinctions have been the subject of litigation over the years. The lack of clarity around the scope of client legal privilege and/or confidentiality, coupled with the subjective test contained in section 41 of the AML/CTF Act under which designated services providers are required to report suspicious matters, risks leaving legal practitioners vulnerable. If a legal practitioner fails to report, there may be penalties under the Act but, if they report under section 41 but the communication was subject to client legal privilege, then they may be exposed to disciplinary processes through their respective professional associations.[170]

106. Client legal privilege cannot be used to cloak illegality and impropriety and does not apply when advice is sought to further or facilitate fraud, a crime or unlawful purpose. The policy for a carve out in relation to litigation is therefore just as applicable to all communications subject to client legal privilege. In addition, if confidential communications that are not the subject of client legal privilege are reportable, it needs to be recognised that it can be difficult in practice to draw a line between that which is confidential and that which is privileged. Further- in practice the separation

[169] Law Council 217 Consultation response, n6, 47.
[170] Law Council 2017 Consultation response, n6, 25.

between AML/CTF regulated services and unregulated work that has arisen in the UK, would if it were to occur in Australia, lead to two classes of clients - those whose confidential information is accessible to regulatory intrusion because their lawyers provide AML/CTF regulated services, and non- AML/CTF regulated services.

107. In addition, key elements of the AML/CTF regime, such as suspicious matter reporting, addressed above, undermines the necessary confidential relationship between lawyers and their clients, thereby undermining the role of lawyers in the administration of justice. Such obligations also, pertinently, offend the Basic Principles excerpted above. It is notable, then, that AML/CTF regulation of legal practitioners has not met with unanimous support in FATF member countries including the United States and Canada.

108. In Canada the threat to client legal privilege, the damage that would result to the lawyer client relationship and the inconsistency with ethical obligations were considered matters of fundamental justice sufficient to warrant the exemption of the legal profession from AML/CTF regulation.[171] In that case, the Canadian Supreme Court held there were more proportionate and less drastic measures available to pursue the legitimate objective of preventing money laundering and terrorist financing. The Supreme Court concluded the provisions in issue failed the proportionality test and could not be demonstrably justified in a free and democratic society.[172]

109. The Court further noted clients and the broader public must be confident that lawyers are committed to furthering their clients' legitimate interests and are free from competing obligations that may interfere with this duty. The duty was described as critical to both the representation of individual clients and public confidence in the administration of justice: [173]

> …as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients…

An unreasonable burden

110. **This section addresses paragraph (g) of the Inquiry Terms of Reference, which queries:**

> **(g) the regulatory impact… of extending AML/CTF reporting obligations to designated non-financial businesses and professions (DNFBPs or 'gatekeeper professions'), often referred to as 'Tranche two' legislation;**

111. Extending the AML/CTF regime to the legal profession would introduce a highly prescriptive regime that is incompatible with the obligations of the legal profession and, accordingly, is in practice unreasonably burdensome for the profession to comply with in practice.

112. The legal profession's regulatory and disciplinary scheme addressed above has been developed over time and though legal precedent to strike an appropriate balance of obligations. Key principles include, as noted above, the duty of confidentiality and legal professional privilege. As noted above, there are circumstances where lawyers can disclose confidential or privileged information. However, if lawyers disclose this

[171] *Canada (Attorney-General) v Federation of Law Societies of Canada* 2015SCC 7.
[172] *Canada (Attorney-General) v Federation of Law Societies of Canada* 2015 SCC 7 [24].
[173] *Canada (Attorney-General) v Federation of Law Societies of Canada* 2015SCC 7 [84] per Cromwell J.

information without a proper basis, they will be exposed to disciplinary proceedings- due to the fundamental importance of confidentiality and legal professional privilege within the broader functioning of the legal system. In the present disciplinary system, regulators have discretion to render sanctions that reflect the severity and circumstances of the breach.

113. In the context of the AML/CTF regime, lawyers would risk significant civil penalties if they fail to make reports under the scheme,[174] but also significant professional discipline if they make the wrong decision. [175] This involves careful consideration of all the applicable thresholds in the AML/CTF regime in order to make a report, as compared the thresholds in legal professional legislation and rules around confidentiality. Adding to this pressure is the requirement for reports to be made within 3 business days.[176] Busy professionals, subject to a myriad of Court and other inflexible deadlines, would be required to make high-stakes decisions within extremely tight timeframes. This is particularly difficult when noting that matters of confidentiality and privilege can involve complex questions of law, and the timeframes involve allow little time for analysis or advice when necessary, for example from an expert Barrister.

114. During consultations in the preparation of this submission, the Law Council also consulted with experts from jurisdictions where Tranche two had been implemented. The Law Council was advised in its consultations that such tensions had seen a reduction in lawyers willing to provide those services captured by the AML/CTF regime. This, the Law Council was advised, not only limits access to justice but potentially shifts the provision of some services to the unregulated sector.[177] In his study of the UK regime Scott Rothstein noted a comparable impact for banks (and in particular smaller banks): [178]

> These regulations have also driven many banks to have to consolidate and drop certain customers, reducing access to the financial system in the United States.
>
> To reduce costs, banks will drop customers they determine to be riskier, a process known as "de-risking."

115. At the other extreme, in some jurisdictions these tensions have also seen reliance on defensive and/or over-reporting, to guard against sanctions for non-compliance. This has been particularly noted in the UK context, as noted by Dr Kebbel: [179]

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[174] Section 42 AML Act. Also see: AUSTRAC, Consequences of not complying, (accessed 23 August 2021), available online: https://www.austrac.gov.au/business/how-comply-and-report-guidance-and-resources/consequences-not-complying

[175] See G Dal Pont, 'To keep a confidence', Law Society of Western Australia *Brief* (May 2014),8, available online: https://www.lawsocietywa.asn.au/wp-content/uploads/1970/01/brief-may-2014-keep-confidence-lawyer-client.pdf

[176] Section 41(2) AML Act. It is noted that is the financing of terrorism is suspected, this timeframe is shorted to 24 hours.

[177] To this end, the Law Council also notes that this view is supported in the submission of Chartered Accountants Australia, 2:

> *Small practices who may involuntarily cease to offer designated services due to excessive compliance obligations, which in turn may inadvertently displace the risk of ML/TF to service providers that are not members of a professional body or outside the regime.*

[178]S Rothstein, 'They're watching You: An examination on whether the United States Should Impose Anti-Money Laundering Regulations onto us lawyers', Fordham International Law Journal (Vol. 43:5, 2020), 1398, 1402, available online: (https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2797&context=ilj

[179] Kebbell, S. (2018) The Law Commission : anti-money laundering and counter-terrorism financing - reform of the suspicious activity reporting regimes. Criminal Law Review, 2018 (11),882, 889, ISSN 0011-135X.

> Practical issues include the high volume of SARs, some of which are submitted defensively to avoid criminal liability, and many of which are of little intelligence value and/or are of poor quality…
>
> Defensive reporting has also become an intrinsic feature of the regime, understandably so, with a few hours spent submitting a SAR being infinitely preferable to the prospect of more than a few years' incarceration for a substantive laundering or failure to disclose offence. The failure to disclose offences under ss.330/331 are also broad in scope, perpetuating defensive reporting as a consequence.

116. This has been exacerbated by broadly defined thresholds, that expanded the ambit of reportable matters to include very minor (and irrelevant) offences. For example, in the UK, the adoption of 'all crimes' approach, criminalises dealings with the broadly-defined 'criminal property' that in practice obliges lawyers to report many minor offences and regulatory breaches in compliance with the regime. [180] As noted by Dr Sarah Kebell: [181]

> Minor offences and regulatory breaches carrying criminal sanctions (which may be conceived of as "technical" breaches) may come to light in the course of a retainer. Such technical breaches, examples of which are the breach of a tree preservation order or failure to obtain an asbestos survey, will trigger reporting requirements, a process made more challenging by the requirement to identify any notional saving or benefit from the breach under the Act. It is these "technical" reporting requirements, offering little by way of valuable intelligence, which may have a corrosive effect on confidence in and compliance with the regime for the legal sector. Reporters in the banking sector, in contrast, would rarely, if ever, encounter such minor offences or regulatory breaches on the basis that their customer interaction is primarily focussed on the movement of funds.

117. In recommending that the US avoid a Tranche two extension of the AML/CTF regime to lawyers, Scott Rothstein similarly noted: [182]

> Imposing these requirements would not address any of the significant problems with the current US AML regulatory scheme and would instead burden small law firms in the United States that would be unable to cope with the significant costs of such a regulatory expansion. Further, the fundamental changes to the attorney-client relationship would injure the nature of the relationship with little benefit.

118. Considerations of extending the AML/CTF regime to lawyers must accordingly also be measured against the costs.

Impact and costs of extending AML/CTF the regime to the legal profession

119. **This section addresses paragraph (g) of the Inquiry Terms of Reference, which queries:**

> **(g) the regulatory impact, costs and benefits of extending AML/CTF reporting obligations to designated non-financial businesses and professions (DNFBPs or 'gatekeeper professions'), often referred to as 'Tranche two' legislation…**

[180] Ibid 886.
[181] Ibid 887
[182] S Rothstein, 'They're watching You: An examination on whether the United States Should Impose Anti-Money Laundering Regulations onto us lawyers', Fordham International Law Journal (Vol. 43:5, 2020), 1435, available online: (https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2797&context=ilj

120. The extension of the AML/CTF regime to the legal profession would require legal practices to implement, maintain and report against the highly prescriptive AML/CTF regime, including new due diligence, training, and compliance programs.[183] The additional administrative structure required to comply with these measures is detailed at **Appendix B** to this submission.

121. For this Inquiry, the Law Council consulted with jurisdictions where 'Tranche two' has been implemented. During these consultations, the Law Council was advised that additional implementation costs largely arose from:

    a. Augmenting (sometimes bespoke) IT and onboarding systems to comply with the new regime, including ongoing monitoring, maintenance and updating to ensure that it remained compliant;
    b. Training or recruiting suitable AML compliance officers and managers, and maintaining said training;[184]
    c. The training (and maintenance of training) of all other relevant staff; and
    d. The development and maintenance of compliance programs, including risk assessment, due diligence and reporting requirements.

122. In the years since the UK legal profession become subject to AML/CTF regulation in 2001, the Law Society of England and Wales has advised in separate consultations that:

> …Commercial providers are very costly. Small firms can be spending a few hundred pounds a year simply to prove that they do not have a secret PEP in their client base. Larger firms can find themselves spending hundreds of thousands of pounds in licence fees and thousands of pounds in search fees each year…[185]
>
> … the opening of a new international corporate client matter can cost in the region of £5,000 due to the chargeable time lost by fee earners and compliance staff in chasing documents and undertaking research, even in circumstances that generally would not be considered to give rise to a risk of money laundering. Even for smaller law firms, the opportunity cost of time spent on conducting due diligence checks on any client who is other than the absolute standard, is more than the fees they are able to charge for the work being undertaken. This either results in them taking on the client at a loss in the hope of future work or in simply turning away possible legitimate business….'[186]
>
> The cost in private sector and National Crime Agency (NCA) resources used in making, analysing and storing these reports far outweigh the theoretical benefits.[187]

123. In 2016 the Ministry of Justice in New Zealand commissioned Deloitte to undertake a costs analysis to estimate the establishment costs across the circa 7,600 DNFBPs,

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[183] For more information, see: Law Council 2017 Consultation response, n6, 52 – 56.
[184] Also noted by Rothstein: "*These costs of finding and hiring more staff and paying consultants to address BSA/AML compliance have led to earnings losses and foregone dividends…*", see: S Rothstein, n 196, 1403 .
[185] The Law Society of England Wales, *Financial Action Task Force Consultation Response*, January 2011, 14: available online: http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_taskforce_lawsocietyresponsetofatfconsultation.authcheckdam.pdf
[186] The Law Society England and Wales, *Development of a 4th Money Laundering Directive: Response to the European Commissions review of third money laundering directive,* June 2012 at pages 10-11 available online: http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/documents/EU-consultation-response-2012/
[187] Law Society response to the Law Commission consultation on the UK Suspicious Activity Reporting (SARs) regime , 5 October 2018, 2.

including for lawyers.[188] This costs analysis noted that the New Zealand legal profession comprised (at the time) of approximately 7,115 lawyers in firms and 992 sole practitioners, totalling 1,919 businesses. Of the 1,919 businesses, Deloitte estimated that approximately 1,570 would be reporting entities.[189]

124. In Australian dollars, the lower end estimate for Legal Practitioners and Conveyancing was $15.29 million in total ($9,725 per regulated entity/reporting entities) while the higher end estimates was $76.85 million ($48,800 per regulated entity/reporting entities).[190] Of significance, however, is that the size distribution of businesses was said to be approximately: 'Small': 981 (51%); 'Medium': 904 (47%); 'Large': 34 (2%).[191] These terms ('small', 'medium' etc) are not precisely defined in the report.

125. However, it is significant that the New Zealand legal profession only appears to consist of 51% of small businesses. In comparison, the Australian legal profession is overwhelmingly comprised of small and micro businesses. The 2020 National Profile of Solicitors found that 82% of private law practices were sole practitioners or law practices with one principal, followed by a further 10% that were law practices with two to four principals.[192] Furthermore, all practising barristers are sole practitioner/principal businesses. [193]

126. One can accordingly assume that the costs to the Australian legal profession will be higher in proportion. In our consultations for this Inquiry, one contributor noted:

> … a rough multiplier of the NZ numbers for compliance eight-fold to gross up for Australia probably gives a pretty good stab at the costs we are looking at. On the Deloitte's figures (taking an average) I make it about $388M for the legal sector to set up and ongoing yearly compliance costs of around $296M. Over five years that is $1.57Bn additional cost to the consumers of legal services. That is more than the commonwealth spending on access to justice under the NLAP.

127. Of further concern is the proportional impact of the AML/CTF regime on smaller firms. As noted by Deloitte in its report:[194]

> The relative impact on each entity segment also varies as a function of entity size. Our modelling has shown that relative to the 'Large' entities the cost burden for 'Medium' and 'Small' entities can increase by a factor of approximately 50% (i.e. 1.5 times 'Larger Firm') and 70% respectively (i.e. 1.7 times 'Larger Firm'). This applies to each of the sectors below where the size distribution is shown.

128. To this end, in December 2016 and January 2017 Queensland Law Society (**QLS**) conducted a survey to assess of likely implementation costs for law firms, should the

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[188] Deloitte, Ministry of Justice: Phase II Anti-money laundering reforms Business Compliance Impacts (September 2016), available online: https://www.justice.govt.nz/assets/Documents/Publications/aml-phase-2-business-compliance-impacts.pdf

[189] Noting that the figures do not include overseas based NZ lawyers, 'in-house' lawyers or barristers. See: Deloitte, Ibid 15.

[190] Ibid.

[191] Ibid.

[192] URBIS for the Law Society of New South Wales, *2020 National Profile of Solicitors* , 2021, 30, available online: https://www.lawsociety.com.au/sites/default/files/2021-07/2020%20National%20Profile%20of%20Solicitors%20-%20Final%20-%201%20July%202021.pdf

[193] It is noted that barristers, because they obtain instructions from solicitors, do not handle trust accounts or keep files are an even lower risk of AML/CTF, however the manner in which they practice also makes them more susceptible to the costs and burdens of AML regulation: See Law Council 2-17 Consultation response, n6, 47; Also see Australian Bar Association, *Membership Statistics,* January 2021*,* available online: https://austbar.asn.au/for-members/member-information (6300 practising barristers).

[194] Deloitte, n 202,15.

existing regime be extended to legal practitioners.[195] A detailed breakdown of the QLS survey results is at **Appendix A** to this submission, however the results indicate that set up and annual compliance costs for the AML/CTF regime for legal practices would be: [196]

a. for larger firms (19 or more solicitors) around $748,000 per year;
b. for medium sized firms (6 to 19 solicitors) around $523,000 per year; and
c. for smaller firms (sole practitioners and up to 5 solicitors) around $119,000 per year.

129. Relevant to these figures is that the gross revenue of small firms is in many cases between $300,000 and $600,000 a year and an additional compliance burden of around $120,000 is not sustainable for communities which cannot support significant and sustained rises in legal fees.[197]

130. The most recent National Profile of Solicitors revealed that there were 16,393 private law practices across Australia in 2020, [198] and found that approximately 82% are sole practitioners, another 10% have 2 - 4 principals, 1% have 5-10 principals and another 1% with 11 or more principals. [199] While the National Profile categories do not exactly align with the QLS categories, using this data one can approximate the cost for smaller Australian firms to be a total of $1.8 billion per annum.[200]

131. The above data demonstrates that the annual cost of AML/CTF compliance for the legal profession will prove to be a significant burden on the Australian economy and of such a scale that it is unlikely that these costs can be absorbed by the legal profession.[201] This will necessarily see legal costs rise and/or law practices that become unprofitable because of AML/CTF regulatory compliance will close. It could be anticipated that regional/rural businesses in Australia, especially smaller organisations, will be affected more than others and many will close.

132. To this end, the Law Council also notes the submission of the Hon. Bruce Billson to this Inquiry:[202]

> Any overregulation of DNFBPs will dampen competition as small businesses pass on the associated costs, which their larger competitors are more able to absorb. Overregulation may also see small business DNFBPs unable to secure financial services.

133. As is the experience in the United Kingdom, the closure of smaller and regional firms will not only have a deleterious effect on access to justice but will also remove from smaller communities an integral and important pillar in local community infrastructure. This reasoning has similarly been observed in respect of the United States, who have declined to extend their AML Regime to lawyers: [203]

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[195] Queensland Law Society, *Anti-Money Laundering: Where are we? And what next?* (10 June 2019), available online: <https://www.qls.com.au/About_QLS/News_media/News/Anti-Money_Laundering_Where_are_we_And_what_next>.
[196] Ibid.
[197] Law Council 2017 Consultation response, n6, [158].
[198] URBIS , n 206, 28.
[199] Also noting that the National Profile does not account for 6% of legal practices, whose sizes were listed as 'unknown': URBIS , Ibid.
[200] Being 92% of 16,393 private practices, at an annual cost of $119,000.
[201] Law Council 2017 Consultation response, n6, [158].
[202] Submission of the Hon. Bruce Billson.
[203] S Rothstein, n 196, 1423, 1435.

> The ABA [American Bar Association] argues that imposing such AML/CFT requirements on American lawyers would injure the confidential lawyer-client relationship and that it would "impose burdensome, costly, and unworkable beneficial ownership reporting requirements on small businesses, their lawyers, and states".
>
> …The amount of money laundered globally and in the United States annually has not been reduced by efforts to regulate financial institutions, insurance companies, casinos, and other industries and the FATF's evidence that lawyers contribute significantly to global money laundering is inadequate to justify imposing costs of billions of dollars on US law firms.
>
> …Imposing these requirements would not address any of the significant problems with the current US AML regulatory scheme and would instead burden small law firms in the United States that would be unable to cope with the significant costs of such a regulatory expansion.

134. The estimated magnitude of the compliance costs can be expected to significantly impact on the affordability of legal services and the viability of law practices to be able to provide such services. Moreover, such an impact can be anticipated to impede access most for the legal assistance sector, pro bono legal service providers, regional and rural Australians as well as ordinary members of the community.

135. It is noted that the Federal Government commissioned a cost/benefit analysis report in June 2017 from KMPG and that this report remains unpublished. The Law Council queries whether that the findings of the report reflected the concerns expressed above.

PART TWO: Financial Services

Introduction

136. Unnecessary complexity, and ineffective or arbitrary enforcement undermine the effectiveness and increase the regulatory burden associated with the regime. The Law Council considers it important that the AML/CTF regime, as it currently applies to financial services, is designed and implemented so as to remain consistent with the rule of law and to direct the resources of Australian financial services and other businesses as efficiently as possible.

Consultation comments

137. Paragraph (e)(ii) of the Committee's Terms of Reference relates, among other things, to Australia's compliance with the Financial Action Task Force Recommendations and the Commonwealth Government's response to the April 2016 Report on the Statutory Review of the AML/CTF Act and Associated Rules and Regulations (the **Report**). The Statutory Review recommended simplification of the AML/CTF Act and the simplification and rationalisation of the AML/CTF Rules. The Government accepted those recommendations in its response to the Report.

138. The Law Council submits that the Committee, in considering the adequacy and efficacy of the Australian AML/CTF regime, should have regard to the drafting of the AML/CTF Act and the AML/CTF Rules to ensure that action is taken to correct the unintended consequences of the AML/CTF regime which have previously been identified and acknowledged.

139. The Law Council's Business Law Section Financial Services Committee (**FSC**) made submissions to the Attorney-General's Department in relation to the Statutory Review of the AML/CTF Act. In a submission dated 30 April 2014 (**2014 Submission**)[204], the FSC submitted that:

    a. the AML/CTF Act and the AML/CTF Rules as then in force contained an unacceptably high level of areas of great uncertainty for business, primarily caused by imprecision in definition of key concepts and overreach through the use of unduly broad definitions; and

    b. compliance costs and uncertainty as to the appropriate measures needed to comply with the AML/CTF Act and AML/CTF Rules could be reduced.

140. The Law Council considers that several issues raised in that submission remain unresolved and wishes to bring the following aspects of this submission to the Committee's attention.

The risk based approach and better regulation

141. At paragraphs [16] – [21] and [25] of the 2014 Submission, the FSC discussed its view that the AML/CTF regime is inappropriately weighted towards minimum prescriptive requirements and is insufficiently risk-based. Service providers that are very low risk or only tangentially providers of designated services should have greater latitude to take a 'scalable' approach. The FSC wishes in particular to emphasise its concerns defects in the adequacy of expression in a number of key definitions in the AML/CTF Act.

142. Overly broad definitions are ultimately harmful when they extend to activity not in the contemplation of the legislature at the time the provision was enacted or indeed of the regulator. Industry is unable to respond effectively or efficiently when obligations as enacted do not reflect the stated intention of the legislature and are not supported by the practice of the regulator.

"In the course of carrying on a business"

143. This phrase was enacted to limit the scope of many designated services but has since been applied as if it has the opposite effect. This concern is discussed in the 2014 Submission at paragraphs [63] – [67].

144. In September 2017 the Committee invited submissions regarding the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017* (Cth) (**the Bill**). The following extract of paragraphs [4] to [6] of the Law Council submission again addressed this issue and remains as pertinent now as when it was made:[205]

    4. The Explanatory Memorandum (**EM**) for the Bill states that regulatory relief will be given by qualifying the term 'in the course of carrying on a business', pointing to widespread industry concern that the phrase 'in the course of carrying on a business' is excessively broad. [206] The Bill contains no change which addresses this concern. The same language is added to some places where it had not previously been included. The EM refers to the Replacement Explanatory Memorandum (**REM**) for the Anti-Money

[204] Law Council of Australia Business Law Section, n4.
[205] Law Council 2017 Consultation response, n6, [4] to [6].
[206] Explanatory Memorandum, Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017, paragraph 30.

Laundering and Counter-Terrorism Financing Act 2006 (Cth) (**AML/CTF Act**) as demonstrating that the term 'in the course of carrying on a business' should not be construed in a manner that is excessively broad.

5. However, the plain words of the legislation are inconsistent with the REM. AUSTRAC's Public Legal Interpretation No. 4 (**Public Interpretation**) states that 'business' is very broadly defined. However, in reliance on the Acts Interpretation Act 1901 (Cth), the Public Interpretation also notes that the broad definition of 'business' in the AML/CTF Act contradicts clear statements in the REM that the defined business types are intended to confine reporting entity status to businesses with a 'core' function involving the designated service.[207] This inconsistency means (in AUSTRAC's view) that the statements in the REM are unable to be used in construing the effect of the contradictory provisions of the legislation.[208] The legal result will therefore, on a traditional analysis, be opposed to the effect that was intended by the legislature.[209] The same analysis would apply in the context of the current Bill.

6. The FSC has previously submitted that the AML/CTF Act itself should be amended to specifically reflect the original intention that a reference in section 6 to a particular kind of business is intended to limit the broad scope of the defined term 'business' so that it only applies when the specified business is a core function or a substantive part of the operations of the relevant entity.[210] Instead, the decision seems to have been made to repeat exactly the initial error in this Bill.

The wholesale application of certain concepts from the Corporations Act to the AML/CTF Act.

145. Key examples discussed at paragraphs [26] – [33] of the 2014 Submission are the definitions of 'managed investment scheme', and 'derivative'.

146. The FSC made a submission on 1 May 2015 in response to the 'live issues for the banking/finance sector' document issued by the Attorney General's Department in connection with the Statutory Review (the **2015 Submission**).[211] The Law Council reiterates paragraphs [70] and [71] of the 2015 Submission relating to the AML/CTF Act definitions of 'managed investment scheme', the effect of which is that the AML/CTF definition should only extend to managed investment schemes which are regulated as financial products (and not those that are not).

Treatment of true economic units as 'related' regardless of whether they meet the definition of a related body corporate under the Corporations Act.

147. Paragraphs [50]-[51] of 2014 Submission raise the possibility of broadening the concept of related bodies corporate for the purposes of the AML/CTF Act to recognise the effect of intervening trust and management arrangements as per the approach taken in a number of relief instruments issued by AUSTRAC. General application of a broader definition will affect both customers and designated business groups.

'Remittance' services are defined far too broadly

148. The Law Council would like to call the Committee's attention to paragraphs [68] – [71] of the 2014 Submission in particular, in which the FSC submits that the drafting of a

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[207] AUSTRAC, *Public Legal Interpretation No. 4 of 2008* (July 2008) <http://www.austrac.gov.au/sites/default/files/pli04-reporting-entity-July-2008.pdf> 5-6.
[208] Ibid 6.
[209] Law Council of Australia, n4, 10.
[210] Ibid.
[211] Law Council of Australia Business Law Section, n5.

'remittance' service under the AML/CTF Act is unintentionally and exceptionally broad.

149. That is, the AML/CTF Act regulates any person who provides a remittance service as defined therein. Any person (whether or not in the course of any business) that accepts an instruction or gives value in connection with 'an arrangement' (defined extremely broadly) that is 'for' the 'transfer' (which has an extended meaning) of money or property (that is, a remittance service), commits a serious criminal offence if they are not registered with AUSTRAC as a remittance service.

150. Such a broad definition captures many ordinary business activities that wouldn't otherwise ordinarily be considered to be a remittance service and accordingly raises significant uncertainty for these businesses. It is only by the grace and favour of the AUSTRAC CEO of the day that they are not subject to criminal prosecution as unregistered remittance businesses. For this reason, the Law Council wishes to reiterate the submissions and recommendation it made on this topic to the Attorney-General's department, as set out in the 2014 Submission.

ASIC and ATO Collection of beneficial owner information

151. The Law Council wishes to draw Committee's attention to paragraphs [17] – [20] of the 2015 Submission.

152. It would reduce the regulatory burden imposed on reporting entities required to collect and verify identification information about the beneficial ownership and control of a customer, for ASIC to be required to collect this information in the annual statement for Australian companies, and to make this information available to reporting entities. The Australian Taxation Office could perform a similar function for trusts with an ABN, as part of the annual reporting obligation of the trusts.

153. Centralised collection in this way, while not a complete solution, would be more efficient than the current duplication of the same often time-consuming and difficult enquiries by multiple reporting entities dealing with the particular customer may need to make to ascertain that customer's beneficial ownership and control.

Appendix A

Results from QLS study[212]

Overview

In December 2016 and January 2017 Queensland Law Society conducted a survey of law firms to assess likely implementation costs of an AML/CTF regime akin to the existing Australian scheme being extended to legal practitioners. The survey approached the imposition of a scheme by considering the impact of each of its component parts on a law firm, with special consideration of different sizes and locations. Firms reported whether they undertook transactions of the following kind and the approximate number undertaken in any year:

a. Transfer of real estate (including conveyancing, administration of estates, family law matters);
b. Management of client money, securities or other assets;
c. Management of bank, savings, or securities accounts (including interest-bearing trust accounts, money held under direction);
d. Organisation of contributions for the creation, operation or management of companies, trusts and other structures; and
e. Creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

Larger firms

154. Large firms were described as being solely metropolitan and comprised of 19 or more solicitors. In summary, they reported:

Measure to the extent prescribed under AML/CTF regime	Survey average cost	Total
Implement client due diligence for every client of the firm, on-going client re-identification and verification using reliable, independent source documents, data or information	$80,000 annually	$80,000
Identify the beneficial owner in a transaction or in the case of legal person arrangements take reasonable measures to understand the ownership and control structure	$50.00 per transaction or up to $275,000.00 annually	$ 355,000
Obtain information on the purpose and intended nature of each client matter	$50.00 per transaction or up to $275,000.00 annually	$630,000
Implement a risk management system to determine whether a client is a politically exposed person, obtaining senior management approval for establishing a business relationship with such a client, take reasonable steps to establish source of wealth of the person and source of funds. Conducting enhanced ongoing monitoring of the business relationship.	$17,100 annually	$647,100

[212] This was sourced from: Law Council 2017 Consultation response, n6, 50-52.

Conduct risk ratings of clients to determine whether a client is a higher risk of being involved in money laundering	$21,250.00 annually	$668,350
Implement ongoing AML/CTF financing programmes including: Risk-rating clients Development of internal policies, procedures and controls including compliance management arrangements, employee screening and on-going training, audit function and testing of the programmes.	$80,000 annually	$748,350

Medium sized firms

155. Medium sized firms were described as being predominantly based in regional cities or in metropolitan areas and comprised of between 5 and 19 solicitors. In summary, they reported:

Measure	Survey average cost	Total
Implement client due diligence for every client of the firm, on-going client re-identification and verification using reliable, independent source documents, data or information	$100,000 annually	$100,000
Identify the beneficial owner in a transaction or in the case of legal person arrangements take reasonable measures to understand the ownership and control structure	$122.33 per transaction or up to $148,875.60 annually	$248,875.60
Obtain information on the purpose and intended nature of each client matter	$123.66 per transaction or up to $150,494.22 annually	$399,369.82
Implement a risk management system to determine whether a client is a politically exposed person, obtaining senior management approval for establishing a business relationship with such a client, take reasonable steps to establish source of wealth of the person and source of funds. Conducting enhanced ongoing monitoring of the business relationship.	$35,000 annually	$434,369.82
Conduct risk ratings of clients to determine whether a client is a higher risk of being involved in money laundering	$18928.65 annually	$453,298.47
Implement ongoing AML/CTF financing programmes including: Risk-rating clients Development of internal policies, procedures and controls including compliance management arrangements, employee screening and on-going training, audit function and testing of the programmes.	$70,000 annually	$523,298.47

Smaller firms

156. Smaller firms were described as being across the categories of metropolitan, suburban, regional city and rural/remote. This classification includes both sole practitioner firms and micro firms of between 2 and 5 solicitors. In summary, they reported:

Measure	Survey average cost	Total
Implement client due diligence for every client of the firm, on-going client re-identification and verification using reliable, independent source documents, data or information	$30,000 annually	$30,000
Identify the beneficial owner in a transaction or in the case of legal person arrangements take reasonable measures to understand the ownership and control structure	$65.53 per transaction or up to $14,803.00 annually	$44,803.00
Obtain information on the purpose and intended nature of each client matter	$76.80 per transaction or up to $16,588.80 annually	$61,391.8
Implement a risk management system to determine whether a client is a politically exposed person, obtaining senior management approval for establishing a business relationship with such a client, take reasonable steps to establish source of wealth of the person and source of funds. Conducting enhanced ongoing monitoring of the business relationship.	$7,687.59 annually	$69,079.39
Conduct risk ratings of clients to determine whether a client is a higher risk of being involved in money laundering	$9,218.78 annually	$78,298.17
Implement ongoing AML/CTF financing programmes including: Risk-rating clients Development of internal policies, procedures and controls including compliance management arrangements, employee screening and on-going training, audit function and testing of the programmes.	$41,000 annually	$119,298.17

Appendix B

Administrative structures for the AML/CTF Regime[213]

157. The AML/CTF Act imposes onerous obligations on *reporting entities* when they provide a *designated service*, which legal practitioners would in addition to their existing regulatory obligations have to put in place. Additional administrative structures would include:

- enrolling and/or registering with AUSTRAC;
- customer identification and verification of identity;
- record keeping;
- establishing and maintaining an AML/CTF program; and
- ongoing customer due diligence and where necessary reporting (suspicious matters, threshold transactions and international funds transfer instructions).

Enrolment

158. *Reporting entities* must enrol with AUSTRAC (which entails filling out forms that require extensive details about business structure, number of employees, annual earnings and the designated services they provide) and be entered on the Reporting Entities Roll and if appropriate must also apply for registration on the Remittance Sector Register before they commence providing remittance services to their customers.

159. An agent on behalf of a principal can complete the enrolment process, provided a *current* written agreement or written authority authorises the agent to enrol on the entity's behalf. The *reporting entity* is required to keep an original/certified copy of the agency agreement for the duration of the term of agreement or authority and be able to produce it upon request.

160. AUSTRAC uses enrolment information to assess the liability of *reporting entities* to pay the AUSTRAC Industry Contribution annually and to determine the amount each *billable entity* will be required to pay. Accordingly a *reporting entity* is required to keep financial statements for the most recent financial year and information about its business structure at hand and be able to produce these upon request.

161. A reporting entity:
- must update enrolment details within 14 days of any change of details (including updated annual earnings); and
- may authorise an agent to notify AUSTRAC of changes provided there is a written agreement that authorises the agent to change the reporting entity's enrolment details.

162. An agent acting for a deceased estate or for a person who does not have capacity, must provide AUSTRAC with evidence of the agent's authority to act in this capacity.

163. A *reporting entity* that ceases providing *designated services* must request, using the relevant form to be removed from the Reporting Entities Roll. However when deciding whether to remove a *reporting entity* from the Reporting Entities Roll, AUSTRAC will consider the following factors:

[213] This was sourced from: Law Council 2017 Consultation response, n6, 52-56.

- whether the reporting entity ceased to provide designated services
- the likelihood of the reporting entity providing designated services in the future
- any outstanding reporting obligations.

Registration

164. To provide remittance services businesses must also apply to be registered with AUSTRAC in one or more of the three capacities AUSTRAC recognises.

165. Businesses providing remittance services (under items 31, 32 or 32A, table 1, section 6 of the AML/CTF Act) must apply for registration by providing the AUSTRAC CEO with information about their suitability for registration. A registration applicant must obtain and retain original or certified copies of national police certificates (or foreign equivalent) for their personnel. Certificates (or foreign equivalent) must have been issued within six months prior to the application for registration (or 12 months for affiliates of remittance network providers). Remitters must also keep information about their remittance business and business structure (that is, the management structure and information on related entities).

Identification

166. To ensure a *reporting entity* knows its customers and understands their customers' financial activities, the *reporting entity* must undertake and retain customer due diligence (CDD) documentary procedures in detail. All AML/CTF programs (standard, joint and special) must include Part B.

167. A *reporting entity* must be reasonably satisfied:
    - an individual customer is who he/she claims to be;
    - a non-individual customer exists and their beneficial ownership details are known.

168. The CDD requirements include:
    - collecting and verifying customer identification information (eg, documents, data or other information obtained from a reliable and independent source);
    - identifying and verifying the beneficial owner(s) of a customer;
    - identifying whether a customer is a politically exposed person (**PEP**) (or an associate of a PEP) and
    - taking steps to establish the source of funds used during the business relationship or transaction;
    - obtaining information on the purpose and intended nature of the business relationship.

Record keeping

169. *Reporting entities* must retain records they must create or obtain to comply with the AML/CTF Act as this information is used by AUSTRAC and its partner agencies to create audit trails.

170. The types of records that must be retained (amongst others) include transaction records; electronic funds transfers (international funds transfer that involves two or more institutions); customer identification procedures; AML/CTF programs and due diligence assessments of correspondent banking relationships.

171. Transaction records relate to the provision of a *designated service* or prospective provision of a *designated service* to a customer which must be retained in a retrievable and auditable manner for seven years after the record is created. Records of customer identification procedures must be kept for the life of the relationship and a further seven years after the *reporting entity* ceases to provide the *designated services* to the customer.

172. If a *reporting entity* collects new customer information, for example as part of its enhanced customer due diligence procedures, the obligation to retain the records of the original customer identification procedure is unaffected and must be retained for an additional seven years after the reporting entity ceases to provide the designated service.

173. A reporting entity must retain for seven years after the day AML/CTF program ceases to be in force:

- a record, or a copy of a record, specifying the date the reporting entity adopted its AML/CTF program (eg Minutes of the Board of Directors approving the adoption of the AML/CTF program),
- the program, or a copy of the program, which has been adopted by the reporting entity; and
- the variation, or a copy of the variation of an AML/CTF program.

AML/CTF programs

174. AML/CTF programs are said to be risk based and relate to the size and nature of each business, the designated services offered and its ML/TF risk profile. However, in practice the requirements of the AML/CTF are highly prescriptive and detailed with little scope for a true 'risk-based' approach. Each *reporting entity* is expected to develop and document an AML/CTF program tailored to its business needs and proportionate to the level of ML/TF risk it faces. All AML/CTF programs (standard, joint and special) must include Part B.

175. Part A of an AML/CTF program is aimed at identifying, managing and reducing ML and TF risk faced by a *reporting entity* including:
- a reporting entity's ML/TF risk assessment of the business which must be reviewed and updated periodically;
- boards (where appropriate) and senior management approval and ongoing oversight;
- appointment of an AML/CTF compliance officer;
- regular independent review of Part A;
- an employee due diligence program;
- an AML/CTF risk awareness training program for employees;
- policies and procedures for the reporting entity to respond to and apply AUSTRAC feedback;
- systems and controls that ensure compliance with AML/CTF reporting obligations; and
- ongoing customer due diligence (OCDD) procedures for the ongoing monitoring of existing customers to identify, mitigate and manage ML/TF risks, including transaction monitoring program and an enhanced customer due diligence (ECDD) program.

176. Part B covers a reporting entity's customer due diligence procedures including

- establishing a framework for identifying customers and beneficial owners of customers so the reporting entity can be reasonably satisfied a customer is who they claim to be; and
- collecting and verifying customer and beneficial owner information.

177. Most CDD obligations must be completed before the provision of a designated service, regardless of whether it involves a one-off transaction or an ongoing business relationship (such as an account or a loan). However the obligation to identify the beneficial owner of a customer and determine whether the customer or a beneficial owner is a PEP may also be performed soon as practicable after the service has been provided.

178. A reporting entity must develop risk-based CDD procedures that are based on the risk posed by reference to factors:

- customer types, including beneficial owners of customers and PEPs;
- customers' sources of funds and wealth (eg by enquiring into the expected source and origin of the funds to be used in the provision of the designated service);
- nature and purpose of the business relationship (eg the customer's business or employment);
- control structure of non-individual customers (eg corporate structures and beneficial ownership);
- types of designated services the reporting entity provides;
- how the reporting entity provides its designated services (eg, over-the-counter or online); and
- foreign jurisdictions in which the reporting entity deals (eg customers that live or are incorporated in a foreign country).

179. An AML/CTF program must:
- provide for the collection of certain minimum Know Your Client information;
- provide for the collection of certain minimum information about beneficial owners of customers;
- include certain requirements in relation to customers who are PEPs, or who have beneficial owners that are PEPs;
- include appropriate risk-based systems and controls to determine whether further customer information should be collected;
- provide for the verification of customer information;
- include appropriate risk-based systems and controls to determine whether further customer information collected from the customer should be verified; and
- provide for the collection of information about the agent of a customer and include appropriate risk-based systems and controls to determine whether to verify information about the agent.