Law Council
OF AUSTRALIA

Modernising Australia's anti-money laundering and counter terrorism financing regime

Response to the 'Consultation paper on reforms to simplify and modernise the regime and address risks in certain professions' (April 2023) Phase 1 consultation

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27 June 2023

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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 its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra. The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council acknowledges the work of the Financial Services Committee of the Business Law Section for preparing part 1 of this submission, in response to part 1 of the consultation paper, *Modernising Australia's anti-money laundering and counter-terrorism financing regime.*

Part 2 of the submission responds to part 2 of the consultation paper. The Law Council acknowledges the work of the members of the Anti-Money Laundering and Counter-Terrorism Financing Working Group in the preparation of this response. The members of the Working Group are:

- Mr Luke Murphy (Chair)
- Mr Shannon Adams
- Mr Adam Awty
- Ms Pip Bell
- Dr Mark Brabazon SC
- Ms Simone Carton
- Mr Des Crowe
- Mr Ross Drinnan
- Mr Matt Dunn
- Ms Shannon Finch
- Mr Simon Gates
- Ms Clarissa Huegill
- Mr Jeremy Moller
- Ms Lana Nadj
- Ms Elizabeth Ong
- Mr Craig Slater
- Mr Steven Stevens
- Ms Bobbie Wan
- Mr Marco Zanon.

Overview

1. The Law Council supports the elimination of money laundering and terrorism financing, and is committed to engaging with the Australian Government to implement a cost-effective, risk-based and proportionate response by the profession to the task.

2. The Law Council has commissioned an independent vulnerabilities analysis of the national legal profession. This is expected to identify any areas of significant residual risk. The findings are expected to inform the second phase of the consultation and the nature of any additional obligations that may be found to be required. The Law Council is now working to raise awareness of risk, and will publish nationally consistent guidance for the profession in the second half of 2023.

3. A key concern of the Law Council is that sole practitioners and small practices, particularly those in regional and remote areas, are not burdened with excessive obligations and are properly supported to effect any necessary augmentation of their existing risk management practices.

4. The Law Council considers proportionality, effectiveness and a risk-based foundation for policy to be critical principles to guide reform.

5. The Law Council is unable to comment definitively at this stage on the regulatory model proposed by the Government that sees AUSTRAC as the sole AML/CTF regulator. When the designated services are more clearly defined, and the scope and character of the intended tranche 2 regime clarified, these views will be provided in light of the numerous regulatory models in place in other jurisdictions internationally. Nevertheless, the Law Council has supplied detailed feedback in response to the proposed designated services and looks forward to examples and information being provided by the Department in the consultation paper for phase 2 of these consultations.

6. The Law Council proposes that 'pathways' workshops be held with participation of the legal profession, the accounting profession and the Government to map how service delivery works in practice. This pathways project would identify risk points as well as redundant administrative burden. Such a project would greatly assist policy development by:

   (a) providing a thorough understanding of daily legal practice;

   (b) providing a forensic basis for identifying gaps;

   (c) facilitating discussion about how those gaps may be filled; and

   (d) ensuring that existing obligations are recognised as far as possible.

7. The Law Council asks that the legislation clearly exclude from tranche 2 regulation those legal practitioners who are employees of government entities or of non-legal businesses. The Law Council asks that the legislation provide certainty that legal practitioners practising solely as, or in the manner of, a barrister will not be reporting entities—this could be done by explicit exemption, or by clear legislative recognition that the litigation services and legal advisory services that barristers provide (in contradistinction to transactional services) are outside the scope of designated services. The use of exemptions and deemed compliance as mechanisms to recognise existing risk mitigation practices are also proposed, should the present framework be retained.

8. The Law Council has provided detailed analysis of protections afforded to legal professional privilege in New Zealand and the United Kingdom. In order to give substance to the protection of legal professional privilege, the protection of confidentiality is also required across a range of settings. New Zealand and the United Kingdom furnish examples that go some way to showing how legal professional privilege and confidentiality

may be protected. Yet risks will remain, including, in particular, to the legal practitioner–client relationship itself. An analysis of these protections highlights the limited extent to which information is likely to be made available to the financial intelligence unit if protections are to be robust. In circumstances where other jurisdictions around the world operate under a range of different models, the analysis raises the question as to whether more effective protection for legal professional privilege and confidentiality might not be more simply achieved by the augmentation of existing obligations, affording a strong and tailored response to money laundering and terrorism financing risk.

Part 1 Response

Executive Summary

In principle, the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) generally supports the policy intention of reducing complexity, removing ambiguity, and increasing flexibility within the current regime with a view to making the compliance burden associated with some of the problematic aspects of the regime more manageable for reporting entities.

The Committee broadly agrees with the proposals set out in Part 1 of the consultation paper to:

- include express obligations that focus on the critical nature of the risk assessment;
- broaden the scope of circumstances in which a number of different reporting entities may form a designated business group;
- align customer due diligence obligations with the associated level of money laundering or terrorism financing risk;
- introduce an exemption for assisting in the investigation of a serious offence; and
- modernise the “tipping off” offence.

In its submission, the Committee has sought to:

- highlight some of the practical difficulties associated with the current regime, as well as some of the reform proposals (most notably, the proposed changes to the “travel rule”); and
- make suggestions as to how some of the proposals might be enhanced to deliver more fair, efficient and effective regulatory outcomes.

The Committee also notes that the effectiveness of the implementation of the proposals will depend upon the drafting of the relevant amending legislation, and looks forward to commenting on the associated exposure draft legislation at the appropriate time.

Submission to Part 1

General comments on Part 1

1. The Committee firstly wishes to share the following general observations.

2. It has proved to be a challenge for the Committee to make detailed comments on the legal aspects of the various proposals, because they are conceptual in nature. Where the Committee gives its support, this is in respect of the high-level proposal, and the Committee reserves the right to further comment on the draft legislation.

3. The Committee broadly supports the intended outcome of Part 1. The Committee considers that the current AML/CTF Act and the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (Cth) (the **AML/CTF Rules**) are in some respects complex and difficult for reporting entities to implement and operationalise in the current business and technological environment.

4. The Committee supports the intent to streamline Part A and Part B of the AML-CTF program. However, the Committee cautions against the proposed requirement for Part B Applicable Customer Identification Procedures (**ACIP**) to be approved by the reporting entity's governing body. The Committee notes that formal approval for Part B is not currently required in rule 8.4.1 of the AML/CTF Act. Rather, Part B, like Part A, is required to be adopted under the AML/CTF Act (see subsection 81(1)).

5. The Committee further notes that, as identified in the consultation paper, 'obligations [are] dispersed throughout the Act and the Rules'. If the AML/CTF program is to be streamlined to reduce complexity and enhance understanding, the Committee recommends that the higher-level obligations be captured within the AML/CTF Act, with the AML/CTF Rules providing more detail and guidance in support of the primary obligations. Likewise, where obligations in the AML/CTF Act reference exemptions within, or compliance with, the AML/CTF Rules, some cross-referencing to relevant Chapters would assist in reducing the complexity and improving the navigability of the legislation.

6. The Committee supports the proposed express requirement for a reporting entity to identify, assess and understand the money laundering and terrorism financing risks it faces, prior to the implementation of its AML/CTF program with rules and guidance to support how that occurs. The Committee notes that sufficient flexibility will need to be built into such rules to allow for the different size, complexity and nature of reporting entities, and to allow for adaptation in the face of emerging risks.

7. To reflect modern business operations, both local and global, the Committee supports the broadening in scope of which entities are able to "opt-in" to designated business groups (**DBGs**). In particular, extending the circumstances under which members of the same corporate group etc. can place 'reliance' on one another for AML/CTF compliance related activities is likely to be of great assistance to reporting entities which sit within

   such structures. The Committee believes that this should provide more opportunity for reporting entities to create centralised AML/CTF compliance functions within a broader corporate group.

8. However, the Committee cautions against the proposed requirement for non-reporting entities to submit to compliance with AML/CTF legal obligations (via their membership of the DBG), which would otherwise not apply to such entities. If the Government is of the view that certain key AML/CTF obligations must be applied to such entities, the Committee recommends that this be provided for explicitly within a dedicated Part/Chapter in the AML/CTF Act and the AML/CTF Rules.

9. The Committee supports:

   (a) the proposal to align customer due diligence procedures with customer risk, thereby allowing reporting entities more flexibility to meet the overarching obligation to "know the customer" as defined. The methods of verification, particularly around simplified due diligence, could be detailed in guidance instead of the AML/CTF Rules; and

(b) the proposed model with respect to exemptions for assisting an investigation of a serious offence; and

(c) the proposed model to modernise the "tipping-off" offence.

10. The Committee has used the same headings as the consultation paper to comment on specific aspects below.

AML/CTF programs

11. The proposed model covers:

(a) streamlining Parts A and B into a single program;

(b) stating that money laundering and terrorism financing risks must be assessed;

(c) requiring processes, systems, procedures, and controls to be designed and implemented to identify, assess, understand, manage and mitigate risk;

(d) a requirement to identify, mitigate and manage proliferation financing risk; and

(e) simplification and consolidation of obligations for foreign branches and subsidiaries.

12. The Committee broadly supports the policy aims, subject to the following comments.

Streamlining Parts A & B into a single program

13. The Committee considers that the current system is generally well understood by reporting entities, notwithstanding the inconsistencies between elements of Part A and Part B, and the complexity of Part B. However the new cohort of reporting entities (covered in Part 2 of the consultation paper) may struggle.

14. In principle, the Committee supports the objective of making an AML-CTF program less complex.

15. The Committee has the following suggestions:

(a) use a definition of "AML-CTF program" which includes both the written program document and the operational processes, systems, and controls which are reflected in the written document;

(b) introduce flexibility to allow an AML-CTF program to be captured within one document or a series of related Policies, Controls, Procedures (PCPs);

(c) allow current AML-CTF programs which consist of Parts A and B to continue to be used by existing reporting entities (to mitigate compliance costs and minimise operational systems changes which would be associated with combining Parts A and B); and

(d) allow ACIPs to be changed without the need for formal approval at the board or senior management level.

16. The Committee notes that some reporting entities are familiar and relatively comfortable with the existing AML/CTF compliance program, and cautions against forcing existing reporting entities to make changes which are likely to involve significant compliance costs and operational change without any clear, demonstrable regulatory benefit.

17. Further, the linkages between having and complying with an AML/CTF program and the civil penalties which may arise from non-compliance would need to be outlined before the Committee could make further comment on this proposal.

Assessing risk

18. The Committee agrees that the current obligations are unclear as to:

(a) when it is necessary for a reporting entity to undertake a formal ML/TF risk assessment;

(b) the extent to which an AML-CTF program must be based upon the ML/TF risk assessment; and

(c) the content of the ML/TF risk assessment.

19. Subject to comments made below, the Committee agrees with the proposed model with respect to the ML/TF risk assessment. It is akin to the New Zealand model which has proven to work well, as there is clear link between the ML/TF risk assessment and the AML/CTF program (including processes and controls), and an explicit obligation to review a ML/TF risk assessment.

20. However, the Committee cautions against creating inflexibility in the risk assessment and resulting internal controls by mandating elements of the risk assessment in the AML/CTF Rules which must be followed irrespective of the nature, size, and complexity of the reporting entity. The Committee suggests that detailed guidance would be the more appropriate place for the methodology of the ML/TF risk assessment and resulting controls. The Committee believes that the current risk-based system should be preserved.

Group wide risk management for designated business groups

21. The Committee agrees that the current definition of DBGs does not meet modern business legal and operational structures. Currently, there are many perfectly legitimate business structures that technically fall outside of the current definitions to allow for the formation, or joining, of a DBG. The Committee supports a broader definition of DBG including widening which entities, reporting entities, or entities related to reporting entities, are allowed to elect to join a DBG.

22. The Committee also suggests that the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) implement a fast-track process for approving the establishment of potential DBGs which fall outside the updated definition. This will mitigate against the legal expenses, and regulatory risks, that any updated definition may present.

Proliferation financing risk

23. According to the consultation paper:

> 'Proliferation financing risks refer to the potential breach, non-implementation or evasion of targeted financial sanctions obligations related to the prevention, suppression and disruption of proliferation of weapons of mass destruction and its financing. Australia does not currently explicitly require regulated entities to consider and mitigate these risks, although such risks are indirectly included in certain requirements in the regime.
>
> The Department is considering potential reforms to clarify the requirement for regulated entities to manage their proliferation financing risks as part of their AML/CTF programs…'

24. While Australia may not currently require reporting entities to consider and mitigate these risks as part of their AML/CTF obligations, the Committee notes that there is an entire body of separate legislation applicable to relevant persons and entities, which requires compliance with such sanctions and imposes penalties for breaches or evasion of such requirements.

25. Rather than creating a further 'risk assessment' obligation in relation to this risk, which may be the subject of prosecutions and penalties in addition to the consequences of breaches which may arise under the Australian sanctions legislation, the Committee recommends that this category of risk be identified as one to be taken into account by reporting entities as part of their broader ML/TF risk assessment process. If this approach is taken, then those reporting entities which face this risk can naturally include it as one of many factors they consider as part of the broader risk assessment exercise, while those reporting entities to which it is irrelevant will not be subjected to an additional obligation which is of little or no relevance to their operations.

26. The Committee notes that the overwhelming majority of current, and future, reporting entities are unlikely to face proliferation risk. The Committee therefore submits that any extension of the obligation to identify, mitigate, and manage proliferation risk must be

targeted at reporting entities, or sectors, which have more than an insignificant proliferation risk, based on an up-to-date national proliferation risk assessment.

27. The Committee considers that adopting the model suggested above would accommodate such differences.

Foreign branches and subsidiaries

28. At present, each of the following must enrol with AUSTRAC:

    (a) an Australian resident with a foreign branch; and

    (b) a foreign subsidiary of an Australian resident.

29. Each reporting entity must have a Part A Program but, if the law of the foreign place is comparable, the reporting entity need only consider minimal additional systems and controls: see rules 8.8.3 and 9.8.3 of the AML/CTF Rules. The requirements for an ACIP do not apply (subsection 39(5) of the AML/CTF Act).

30. In practice this often means that the reporting entity need not do more than provide for governance or oversight in the AML/CTF program it creates for Australia, with the emphasis being on ensuring compliance with local laws in the other jurisdiction. In the view of the Committee, this strikes an appropriate balance.

31. The Committee does not object to measures to simplify and consolidate obligations, but is uncertain as to whether the proposal would involve imposing a greater degree of regulation.

32. In the consultation paper, under the stated purpose of simplifying obligations, it is proposed that Australian businesses operating overseas should apply measures consistent with their AML/CTF programs in their overseas operations, to the extent permitted by local law (in those overseas places). Members of the Committee have expressed concerns that:

    (a) the extent to which this is meant to represent a departure from the approach under the current law is unclear; and

    (b) to the extent that a different approach is being proposed, the perceived policy benefits this approach would achieve, for operations that are regulated according to local laws in another jurisdiction which is compliant with the standards of the Financial Action Task Force, have not been sufficiently articulated.

33. The Committee considers that, if it is the intention that processes from two jurisdictions would become mandatory in the overseas jurisdiction then, rather than simplifying obligations, the proposal may complicate compliance for some Australian businesses and would therefore appear to have an unwarranted anti-competitive effect by potentially making the Australian business more complex for customers to deal with, as well as adding a cost burden through regulatory duplication.

Customer due diligence

Understanding customer risk

34. The Committee supports the overarching obligation to assess and understand the risk for each new and ongoing business relationship with a customer based on the stated risk factors. However, the Committee is concerned that the obligation to undertake a discrete and individual ML/TF risk assessment would be a significant compliance burden and regulatory risk for the vast majority of current and future reporting entities which generally do not have many higher risk customers.

35. The Committee suggests that a reporting entity should be required to risk assess its customer base and then only apply a discrete individual customer risk rating to those customers who are in the higher risk rating cohort. If a customer who is not initially in that cohort but is later re-rated as higher risk, then the obligation to conduct enhanced customer due diligence would apply. The Committee notes that AUSTRAC will not be able

to provide appropriate guidance on each and every potential customer for each reporting entity.

Know your customer

36. The Committee agrees that:

    (a) the AML/CTF Act should set high-level obligations with the effect that a reporting entity must be reasonably satisfied of certain characteristics about a customer; and

    (b) the AML/CTF Rules should set high-level standards for how those obligations should be met.

37. The Committee submits that guidance, rather than the AML/CTF Rules, should be used to outline the various methods for identification and verification to meet the overarching obligations, which might be reflected in the form of policies, procedures, systems and controls of the reporting entity.

38. It is important to recognise that guidance does not have the force of law and it is not an exhaustive statement on the ways in which a reporting entity may comply with the law. Therefore non-adherence to published guidance, as opposed to contraventions of the AML/CTF Act and the AML/CTF Rules, should not in and of itself expose a reporting entity to potential civil and criminal liabilities.

Ongoing customer due diligence

39. The Committee agrees in principle with the proposal for ongoing customer due diligence. The Committee notes that the drafting of the current AML/CTF Rules 15.2 and 15.3 - additional KYC in-formation and refreshing customer KYC information - is complex and open to misunderstanding. Therefore, a simplification of these obligations is welcomed.

Enhanced customer due diligence

40. The Committee agrees in principle with the proposal for enhanced customer due diligence (**ECDD**).

41. The Committee notes the proposed extension of the mandatory application of ECDD to circumstances where there is a suspicion of "identity fraud and the reporting entity proposes to continue the business relationship". The wording of the new rule must be precise with respect to that subsentence.

42. The consultation paper states that the rules could set out specific circumstances that should trigger "extended customer due diligence". The Committee does not recommend that another enhanced due diligence concept be introduced over and above ECDD.

43. With regard to the actual ECDD measures, it is the view of the Committee that the current, flexible, approach under rule 15.10 of the AML/CTF Rules should be maintained.

Simplified customer due diligence

44. The Committee agrees that the current customer due diligence provisions are complex. Any flexibility in the current rule 4 of the AML/CTF Rules, particularly around verification, is difficult for reporting entities to both understand and implement.

45. For example, rule 4 has the concepts of "full name" and "name" with respect to an individual. The Committee sees no valid reason why safe harbour individual verification allows for verification of a "name", whereas non-safe harbour mandates verification of a "full name". The Committee also notes that the safe harbour verification requirements for customers who are individuals are different than the corresponding verification requirements for beneficial owners who are individuals.

46. The Committee agrees that the concept of Simplified customer due diligence (**CDD**) should be extended to include what is currently referred to as the "safe harbour" for

individuals, but notes that the concept of "safe harbour" is now ingrained. An alternative would be to follow the New Zealand CDD framework of:

(a) Simplified - similar to current rule 4, simplified and extended to include other lower risk non-individual entities, and formally stating the classes of those entities (including holders of Australian financial services or credit licences):

(b) Standard - to include current low/medium risk individuals, non-individual entities, beneficial owners and politically exposed persons (**PEPs**); and

(c) Enhanced - to include high-risk individuals, non-individual entities, beneficial owners and PEPs (including foreign PEPs).

47. The Committee considers that:

(a) guidance, rather than rules, around how each level of CDD is reached would be required;

(b) verification methods should be technology neutral, and should recognise current available technology and the Document Verification Service; and

(c) identification and verification requirements should also take into account recent changes in technology and requirements under COVID-19 specific relaxations which have meant that identification information is often no longer obtained from the customer via a face-to-face method - a development which appears to have made identity fraud easier to perpetrate and more prolific.

Lowering the reporting threshold for the gambling sector

48. The Committee agrees that there are significant risks in the casino sector. However, the Committee has concerns about the operational implications of reducing the CDD limit in isolation from wider sector reforms.

Amending the tipping-off offence

49. At present, section 123 of the AML/CTF Act prohibits disclosure of the lodgement of a suspicious matter report (**SMR**) or disclosure of information from which it could reasonably be inferred that an SMR has been given, or is required to given, by the reporting entity to AUSTRAC. There is a complicated set of exceptions within section 123 and the consultation paper correctly notes that the current prohibition under section 123 gives rise to significant challenges and risks of non-compliance for reporting entities wishing to centralise certain compliance functions, use related bodies corporate to assist with compliance, and/or outsource certain of these activities.

50. The Committee also notes that the tipping off offence appears to create uncertainty, and have unforeseen consequences, in the context of the relationship between reporting entities, for example where banking services are provided to payment service providers, remitters or centralised digital currency exchanges. One way to address this could be to create a carefully circumscribed exception to the tipping off offence. This would permit the reciprocal sharing of information between a bank and its customer (itself a reporting entity) about SMRs in relation to customers of the bank's customer, in narrowly defined circumstances.

51. The consultation paper suggests a revised prohibition which focuses on conduct or an intention to compromise a law enforcement investigation. This is consistent with the approach in the United Kingdom and Canada and, in the Committee's view, for behaviour that is such a serious criminal offence, it appears to be more appropriate and would alleviate some of the challenges identified above.

Regulation of digital currency exchanges

52. The Committee agrees with, and supports, the regulation of services concerning digital assets.

53. If digital currency is property (as has been held in some other jurisdictions including New Zealand), then, arguably, the activities which the consultation paper singles out for regulation are already captured by items 31, 32, 46 and potentially 33 and 35 of Table 1 in section 6(2) of the AML/CTF Act. It makes sense to clarify the position.

54. The Committee submits that, ideally:

    (a) any improved definitions should align, to the extent possible, with similar definitions in other potentially applicable legislation (e.g., the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth), and other financial services legislation); and

    (b) the types of activities covered by any new or updated obligations will be informed by the current understanding of how digital currencies are used, or likely to be used, as part of criminal activities (with a particular focus on money laundering and terrorism financing).

Modernising the travel rule obligations

55. The Committee welcomes the proposal to review the travel rule, but does not support the model which is proposed in the consultation paper.

56. The Committee is of the view that it is neither practical nor desirable to impose new obligations that are tied to the current definitions associated with "designated remittance arrangements".

57. In terms of desirability, the Committee has previously observed that the key definition of an "arrangement" <*exceptionally broadly defined*> that is for the transfer <*which 'has an extended meaning'*> of money or property", applying the literal meaning, encompasses most commercial transactions of any kind, including for example:

    (a) a postal service;

    (b) a stock exchange;

    (c) a retail shop; and

    (d) cargo ships.

    The Committee also considers that, arguably, many non-commercial arrangements are also caught within the definition, and that there are very few arrangements that can be conclusively confirmed **not** be remittance arrangements.

58. The current definitions operate effectively only because of selective non-enforcement, and the Committee submits that, under those arrangements, there is no sound principle which distinguishes what kinds of arrangements should be treated as regulated remittance arrangements and what kinds should not. The Committee has observed that this can cause grave concern and a significant amount of, arguably, wasted resources for organisations which suspect they may be affected by the regime. The Committee has previously submitted that the definitions should be entirely redrafted, with a view to describing with specificity money services businesses of the kind mentioned in the relevant Recommendations of the Financial Action Task Force.

59. The Committee notes that AUSTRAC has provided industry guidance for remittance service providers on its website, which states that AUSTRAC will not treat many reporting entities as providers of designated remittance arrangements if they also provide other designated services. However, this guidance does not assist the significant number of potentially regulated entities which are otherwise not reporting entities at all (including postal services, retail shops and cargo ships).

60. In terms of practicability, the Committee observes that the current travel rule, as legislated, appears to be based on how SWIFT messaging operated around 2005, but without a full appreciation of all its technical nuances. (The Committee notes that card payments continue to be exempt from travel rule requirements because no SWIFT-like data chain exists for them.) The Committee notes that the key operative definitions concerning

remittance arrangement participants are not consistent with arrangements relating to SWIFT participants, at the present times or circa-2005.

61. A particular concern of the Committee is that the definitions frequently deem a reporting entity's "customer" for the Item 32 "making arrangements" designated service to be people that are not actually customers of that reporting entity (i.e., the reporting entity is in fact acting for the sender, not the recipient, but introduces the payment into the banking system for delivery to the recipient, and can thus be seen as "making arrangements" for the final payment, while knowing only the end account number) and with whom the reporting entity has no relationship.

62. Further, unlike SWIFT, there is frequently no information pathway through which the information might be provided.

63. The Committee has strong concerns that in many scenarios this rule cannot be implemented, noting that:

    (a) just because an entity "receives an instruction" does not mean that there is necessarily any end-to-end communication pathway; and

    (b) for the "making arrangements" pathway, the reporting entity often has no knowledge of at least one of the sender or the recipient.

64. The Committee therefore submits that the end points need far better definition, by way of amendments to the basic definition of remittance services and the parties involved, and if there is in truth no joined up "chain", then the obligations should not arise.

65. At a minimum, the Committee submits that a reporting entity should not be required to include information that it does not have, or to go beyond some limited level of endeavour to find out. The Committee notes that, if reporting entity R receives a batched payment from payment services provider P in the European Union:

    (a) reporting entity R will not know who P's several customers are;

    (b) foreign sender P may be prevented by law from giving reporting entity R detailed information or might simply decline to provide such information to reporting entity R; and

    (c) failure to capture information that is not known will not be a flaw in the system, as it is open for AUSTRAC to ask its international peers to compel that information if it is really needed.

Exemption for assisting an investigation of a serious offence

66. The Committee agrees that it makes sense to allow eligible agencies to issue "keep open" notices to a reporting entity (copying AUSTRAC). It would be important that the effect of relying on such a notice is relief from any liability under the AML/CTF Act and also any other relevant legislation including, for example, the *Proceeds of Crime Act 2002* (Cth), the *Privacy Act 1988* (Cth), and any applicable sanctions legislation.

67. From an AML/CTF perspective, the Committee notes that this removes the difficulties that can arise where a reporting entity might ordinarily want to terminate the provision of designated services consistently with the processes contemplated by Chapter 15 of the AML/CTF Rules when applying ECDD, but where terminating may alert the customer to the fact that their activities were under scrutiny.

68. The use of such notices could also be considered specifically in relation to the efforts of the Australian Taxation Office to be informed by Australia's banking sector about potential fraud.

Revised obligations during COVID-19 pandemic

69. The Committee acknowledges that the changes to Part 4.15 of the AML/CTF Rules which were introduced during the COVID-19 pandemic did provide relief, and sees no reason why they should not either be extended or rolled into the broader CDD obligations. The

Committee also notes that the intention was for the alternative procedures to only be adopted in 'exceptional' circumstances.

70. The Committee acknowledges that the scenarios outlined under Part 4.15 of the AML/CTF Rules include circumstances in which a person/customer may be unable to provide the type of identification and/or verification information typically required to comply with the ACIP obligations. However, the Committee also notes the increased risks currently faced by individuals across Australia of identity theft as a consequence of cyber-attacks and other criminal activity.

71. In the absence of some form of facial recognition, combined with the increasingly digital and 'online' nature of Australia's financial system, it appears that the opportunity for identity theft and fraud has only increased.

72. Accordingly, while noting the benefits of remote access and alternative forms of identification, the Committee encourages the Attorney-General's Department to consider how the AML/CTF Rules could be amended to continue to require some form of face-to-face interaction between the providers of designated services and their customers, particularly at the stage of the process when reporting entities are first obtaining identification information from customers.

73. The Committee submits that various 'collection' methods could be included within the AML/CTF Rules to allow reporting entities the flexibility to adopt practices which are best suited to the nature, size and complexity of their business, and the particular circumstances of their customers.

74. For instance, collection methods involving some form of facial recognition could take the form of:

    (a) face-to-face meetings via an online mechanism during which the individual shows a relevant form of photographic identification (a copy of which can be submitted after the interaction);

    (b) photos sent to the reporting entity which include the face of the individual with a copy of a relevant form of photographic identification;

    (c) for elderly customers or those without access to the technology required to achieve the above outcomes, an alternative form of collection process could be offered, e.g. attendance at a branch of a bank or a post office; and

    (d) for reporting entities who have the technology available to them, facial recognition software could also be employed and acknowledged as a suitable mechanism to satisfy this element of the collection process.

Repeal of the *Financial Transaction Reports Act 1988 (Cth)* (FTRA)

75. For those reporting entities which are 'cash dealers' as defined for FTRA purposes (this applies, for example, to many AFSL holders), the circumstances in which a suspect transaction report (**STR**) must be lodged under the FTRA are different to those which trigger a SMR under the AML/CTF Act. A STR must be lodged for a transaction to which the cash dealer is a party. For a reporting entity there needs to be a connection to the provision or proposed provision of a designated service. For both a STR and a SMR the lodging party has immunity from suit. If the FTRA is to be repealed, the Committee submits that it will be important for policy makers to ensure that it will not mean that certain types of report which AUSTRAC currently receives will cease to be required.

76. The Committee is of the view that it would be beneficial to include any remaining relevant obligations under the FTRA within the AML/CTF legislation, so that certain organisations will no longer need to comply with different obligations under different legislation and there is a 'single source' for AML/CTF obligations in Australia.

77. To further discuss any matters raised in this submission, please contact Pip Bell, Chair of the Financial Services Committee (pbell@pmclegal-australia.com).

Part 2 Response

Executive Summary

The Law Council of Australia recognises the importance of:

- effectively combating money laundering and terrorism financing;
- ensuring that mitigation measures are proportionate to risk;
- ensuring that mitigation measures are sympathetic to the current regulatory and organisational settings of the profession; and
- ensuring that regulation does not impose unreasonable, additional cost burdens on legal practices, particularly small and medium-sized practices.

The Law Council welcomes further engagement with the Government and, in particular, seeks that:

- the proposed designated services be limited in number and scope;
- the implementation timeline for the proposed introduction of any tranche 2 regulation ensure that legal practices are afforded adequate time to prepare to comply with any new obligations, especially small and medium-sized practices;
- any anti-money laundering and counter-terrorism financing regulation model under consideration be designed to be fully compatible with and not hinder the duty of confidence owed by a legal practitioner to a client, nor a client's legal privilege (legal professional privilege); and
- regulatory design be undertaken from the premise of recognising existing risk mitigation practices.

Submission to Part 2

General comments on Part 2

1. The Law Council's response to part 2 of the consultation paper[1] (**consultation paper**) reflects the work of our Anti-Money Laundering and Counter-Terrorism Financing Working Group and extensive consultation with the constituent bodies of the Law Council. The expertise and experience of various policy committees of Australia's law societies and bar associations, legal regulator departmental heads, lead trust account investigators, professional ethics committees, subject-matter experts and representatives of the Australian Bar Association, including the considered views of senior counsel, have informed this response. We appreciate the magnitude of the challenge ahead for Government and the profession but we are encouraged by the eagerness and willingness of our members across all jurisdictions, in general practice and specialised fields alike, to inform themselves and engage forthrightly and with open minds with this issue. We are grateful for the commitment made by the Attorney-General and the Department to continue to seek this engagement. We are also optimistic about achieving clear and effective outcomes and are committed to continuing to work together to that end.

2. It will not pass unnoticed that, for many years, the Law Council has expressed its members' concerns in the form of opposition to tranche 2. 'Tranche 2' means many things. That includes of course, the proposed new relationship with a Commonwealth regulator AUSTRAC, to be established upon what is at present state and territory-based regulatory terrain. One aspect of that potential relationship would be an obligation to make suspicious matter reports to AUSTRAC.

3. The Law Council's opposition to 'tranche 2' has never and does not entail opposition to anti-money laundering and counter terrorism financing measures as such. Money laundering is a scourge. No solicitor or barrister in Australia wants to be caught up in it, with the exception of criminals who have brought shame on their communities and the profession. These are eventually caught by the long arm of the law; they are expelled from the profession and no excuse may, could or should be made for them. This reform is not about criminals, but about the prospect of unwitting participation in someone else's crime. Money laundering creates devastating consequences for individuals and communities. These include enslavement, impoverishment and corrosion of the entire social fabric. Further criminal behaviour, including the activities of organised crime, can be enabled by money laundering. Financing terrorism is, like money laundering, a serious criminal offence, and participating unwittingly in it is also a risk with unspeakably high stakes, the costs counted in human lives. The profession takes these risks and these crimes seriously. For us, the question is not whether to mitigate the risks of money laundering and terrorism financing, but how.

4. In 2021, the Senate Legal and Constitutional Affairs References Committee (**Senate Committee**) inquired into the adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime (the **Senate Inquiry**). The bipartisan Senate Committee published its report in March 2022, issuing just four recommendations.[2] Relevantly, these were to expedite the introduction of tranche 2, and in so doing to give specific consideration to:

   - the impact of regulatory burden on small business;
   - the existing regulatory and professional obligations already applicable to tranche 2 entities, including their effectiveness for AML/CTF purposes; and

[1] Australian Government Attorney-General's Department, *Consultation Paper: Modernising Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime* (April 2023).
[2] Senate Legal and Constitutional Affairs References Committee, *Report: Inquiry into the Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime* (March 2022) p ix.

- protecting legal professional privilege.

5. These three points are in fact the three top priorities for the profession and we are pleased to have reached a position of full accord as to their importance. It is true that in accepting the recommendations of the Senate Committee, the Government has stated its overarching objectives clearly. Tranche 2, we understand, will be legislated. However, in considering the scope of the AML/CTF regime to be applied to the legal profession, the regime should be designed with the particular characteristics of the legal profession in mind and with a focus on the risks specific to the profession, rather than applying the existing framework in its entirety. The consultation paper posits a form that the Department proposes the regime might take, and invites dialogue, yet the various alternative regulatory models cannot really be appreciated until the scope of the legislation is made clear.

6. An assessment of the optimal model requires consideration to be given, among other factors, to the merits and viability of alternative regulatory models, including that in place in the United Kingdom where self-regulatory bodies act as sector-specific supervisors for AML/CTF purposes. The profession's consideration of this question depends on the breadth and scope of the legislation itself as determined in part, under the current proposal, by threshold categories known as designated services. These as yet are not clear. Until the gateway into compliance obligations is well-defined, the breadth of the responsibilities known, and the designated services accompanied by examples and scenarios that may be readily understood, the various alternative regulatory models and the scope of the responsibilities of potential regulators cannot really be appreciated. There is an opportunity, we believe, for the Department to provide this clarity in the second consultation paper, due to be released in September 2023.

7. Effectiveness, proportionality to risk, and clarity in the final outcome are objectives that are common to us all. The Department has already delivered outcomes in the consultation process that we believe may soon provide clear definition, based on the development of preliminary views as to the unlikelihood that designated services will capture barristers' work. The Law Council proposes that the areas of ambiguity or unfamiliarity be the subject of joint workshops in the coming months with subject-matter experts from the practising arm of the profession and jointly with the accounting profession. We thank Daniel Mossop, Evan Gallagher, Alex Engel and Matilda Jureidini in particular for their patient working through of the issues to date. We trust that this submission will further shape our future discussions.

The Consultation Questions

8. This submission takes the following approach to the relevant questions in Part 2 of the consultation paper.

9. In relation to Question 23[3]—This question is addressed in the reverse mode, that is, by way of a response to the proposed designated services which are set out in the consultation paper as background to the question. This response may be found in paragraphs 44 to 64. In order to answer the question directly as it has been formulated, one needs to possess a detailed knowledge of the actual money laundering and terrorism financing risks in the sector. Despite the sector's own knowledge of its practices, money laundering and terrorism financing risk will shortly be the subject of a vulnerabilities analysis. This will be undertaken by a leading independent AML/CTF expert from New Zealand, Neil Russ of Russ + Associates.

[3] 'What services by lawyers, accountants, conveyancers and trust and company service providers should be regulated under the Act so that they can manage their AML/CTF risks? Are these international examples that have worked well for these sectors?': AGD, *Consultation Paper* (April 2023) p 23.

10. In relation to Question 24[4]—This question identifies a key priority for the Law Council's constituent bodies and their members: guidance. It is addressed in paragraphs 24 and 25. Relevant to this issue is also the need for clear definitions, a topic addressed in paragraphs 44 and 45.

11. In relation to Question 25[5]—We focus on trust accounting controls, electronic conveyancing rules and practices, and a range of regulatory practices analogous to employee screening and rescreening. These three risk mitigation practices[6] could be leveraged with appropriate augmentation to satisfy anti-money laundering and counter-terrorism financing objectives. Within the framework of the current proposal, we propose mechanisms for leveraging existing controls in paragraphs 26.3 to 26.5. 'Pathways' workshops are proposed to form part of the consultation process in phase 2, and these are explained in paragraphs 27 to 30.

12. Questions 26 to 28, which cover legal professional privilege and seek feedback in relation to the 'six key AML/CTF obligations' and the lawyer-client relationship, are addressed in paragraphs [95] to [173]. As communicated during the phase one consultation period, the Law Council has been carefully analysing and comparing the experience of other jurisdictions where legal profession regulatory framework now includes regulation for money laundering and terrorism financing risk. We have paid particular attention to the issues of client confidentiality and legal professional privilege in this context. Comparative analysis has included many lengthy discussions as well as the review of different legislative provisions in place in other jurisdictions. While the United Kingdom and New Zealand are certainly of interest, our attention has not been limited to these jurisdictions. In the past six months the President of the Law Council, who is also Chair of the LCA Working Group, has engaged in discussions with the Law Society of Singapore, the Malaysian Bar, the New Zealand Law Society, the American Bar Association, the Solicitors Regulation Authority (UK), the Law Society of England and Wales, the Bar Council of England and Wales and the Federation of Law Societies of Canada. The results of these discussions will inform our ongoing contribution to the consultation process.

13. As Financial Action Task Force (**FATF**) Recommendation 1 makes plain, at the heart of the FATF's regulatory philosophy is a **risk-based approach** to regulation. The Interpretative Notes to Recommendation 1 go so far as to say that in applying the risk-based approach:

> Countries may also, in strictly limited circumstances and where there is a proven low risk of money laundering and terrorism financing, decide not to apply certain Recommendations to a particular type of financial institution or activity, or DNFBP (see below). Equally, if countries determine through their risk assessments that there are types of institutions, activities, businesses or professions that are at risk of abuse from money laundering and terrorist financing, which do not fall under the definition of financial institution or DNFBP, they should consider applying AML/CTF requirements to such sectors.[7]

14. An aspect of the risk-based approach is that limited resources should be deployed to mitigate risk in higher risk areas. At the level of compliance obligations, this is meant to be achieved through more stringent ('enhanced') Know Your Client and associated obligations and conversely, simplified measures or exemptions where the risk is low.

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[4] 'What guidance could be provided to assist those providing proposed legal, accounting, conveyancing and trust/company services in managing these AML/CTF obligations?': AGD, *Consultation Paper* (April 2023) p 23.
[5] 'Are there any existing practices within the accounting, legal, conveyancing and trust/company services sectors that would duplicate the six key AML/CTF obligations? If so, do you have suggestions on how these practices could be leveraged for the purpose of AML/CTF compliance?': AGD, *Consultation Paper* (April 2023) p 23.
[6] Practices in greater number than discussed in this submission could be selected for these purposes. At the stage of scheduling workshops and expert-led discussions, should the Department agree, we will identify further examples for joint examination.
[7] Financial Action Task Force, *The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (updated June 2021), Recommendation 1 and Interpretative Note to Recommendation 1, p 10 and p 31.

15. For a regulatory strategy to be effective, the Law Council appreciates that it is not enough to simply identify and assess the actual risk. Nor is it sufficient to have on-paper policies in place. The Law Council considers that the critical questions are: are we all sufficiently aware of our risk of participating in money laundering or terrorism financing? Do legal practitioners know what the red flags specific to these crimes are and how to spot them, and can we confidently activate appropriate responses?

16. The Law Council agrees with the risk-based philosophy and the critical importance of education, training and guidance. We consider that, to some degree, steps have already been taken by law societies to this end. However, on 17 February 2023 at its inaugural meeting the reconstituted Anti-Money Laundering and Counter Terrorism Financing Working Group of the Law Council of Australia (the **LCA Working Group**) identified the absence of a base-line analysis of the money-laundering and terrorism financing risk of the profession to be a key stumbling block to the application of the risk-based approach. By virtue of the multi-sectoral nature of the current national threat and risk assessments[8] they understandably do not focus in sufficient detail on the legal profession and the underlying research is now outdated.[9]

17. The LCA Working Group recommended to the Law Council that an independent, peer-reviewed vulnerabilities analysis of the profession be commissioned to remove this obstacle and supply the evidentiary basis for a risk-based approach. The full Council of the Law Council of Australia and the energetic, preliminary work of a subgroup of the LCA Working Group means that the leading expert appointed by the Law Council has now been fully instructed and will be in a position to present the results of the vulnerabilities analysis in time to inform, we hope, legislative design and certainly the next phase of the present consultation. This is not a small undertaking, and considerable energy, time and cost have been devoted to the planning phase by the expert to ensure a process that has integrity and comprehensive reach.

18. The second and equally important limb of the strategy to combat money laundering and terrorism financing identified by the LCA Working Group is the development and implementation of an effective, multidimensional education strategy for the profession. This work began in February and the Law Council expects to launch a campaign with the support of constituent bodies in the second half of the year. Again, the work is the product of a dedicated subgroup of the LCA Working Group. That group includes members of large and small practices across several jurisdictions. The aim will be to create nationally consistent tools to be delivered to practitioners through their professional associations with a focus on maximising practical support for micro- and small practices to ensure that risk mitigation is as cost-effective, and as effective in meeting its aims, as possible.

How the Profession is Structured and its Concerns

19. The focus on supporting smaller practices is based on the reality of how law is practised in the eight jurisdictions of Australia. As we have communicated to the Department and AUSTRAC, of the approximately 90,000 practising solicitors in Australia, **93%** of private solicitors' law firms have 4 or fewer partners. **84% are sole practices** or law practices

[8] AUSTRAC, *Money Laundering in Australia*, 'National Threat Assessment' (2011) and AUSTRAC, *Terrorism Financing in Australia*, 'National Risk Assessment' (2014) available respectively at https://www.austrac.gov.au/business/how-comply-guidance-and-resources/guidance-resources/money-laundering-australia-2011 and https://www.austrac.gov.au/sites/default/files/2019-07/terrorism-financing-in-australia-2014.pdf (each accessed 4 June 2023). This submission does not address proliferation financing but the Law Council expects to have the opportunity to discuss this issue in the second round of consultation.

[9] As noted, (in relation to the national threat assessment) by the APG and the FATF in FATF and Asia-Pacific Group, *Anti-Money Laundering and Counter-Terrorist Financing Measures – Australia: Mutual Evaluation Report* (FATF: 2015) p 124.

with one principal, employing perhaps one or more employees.[10] The dominant form within the profession is the micro-practice.

20. A major concern expressed by the Senate Inquiry and repeatedly by members of the profession through our constituent bodies is the need to design compliance obligations to align with and not duplicate existing mitigation practices. In so doing, it is hoped we will avoid a reform that will impose a cost burden on practices which some will be ill-equipped to absorb. As presently proposed, however, the Law Council is concerned that the compliance regime would essentially extend obligations designed for banks and casinos to micro-practices.

21. Of course, the cost of compliance will depend on the design of the statutory regime.[11] In past years, the Law Council has looked to New Zealand to understand the costs of compliance under a model that also can be described in broad terms as extending tranche 1 obligations to services supplied by tranche 2 entities. The results of those investigations were supplied to the Senate Committee in answers to questions taken on notice.[12] The Law Council has more recently been advised that a 4-partner firm in regional New Zealand with approximately 14 employed solicitors dealing with typical conveyancing, trusts, estate and business/commercial matters, would employ a dedicated compliance officer and related staff of an additional full-time equivalent person to meet the firm's compliance, record-keeping and reporting obligations (this is not unusual) with an estimated cost of at least NZD $100,000 per annum. The costs of any external providers (for example for electronic identity verification) and the additional costs of enhanced due diligence for complex clients are additional to this figure.[13]

22. In north-west Tasmania, there is one legal practitioner for every 2,000 people. With very few exceptions, these men and women are sole practitioners or practice in very small firms. The research shows that Australia-wide, sole practitioners and solicitors working in a law practice with just one principal tend to have been practising law for longer. Analysing the consultation proposal and its potential costs against the characteristics of north-western Tasmania, the LCA Working Group has found that at least one of four consequences is likely to result if significant design modifications are not made to the designated services and consequential obligations. The likely results for north-west Tasmania are:

    - It will push solicitors at a later stage of their career into retirement.

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[10] First in 2011, and biennially since 2014, the Law Society of New South Wales has commissioned the consulting firm Urbis to produce a demographic picture of the solicitor branch of the legal profession nationally, on behalf of the Conference of Law Societies. See Urbis, *National Profile 2022* (2023) p 29 (p 33 for employee-to-principal ratios) available at https://www.lawsociety.com.au/state-nsw-legal-profession (accessed 1 June 2023).

[11] Costings undertaken for the Australian Government in June 2017 by KPMG have not been published.

[12] Law Council of Australia, Answers to Questions on Notice, Senate Legal and Constitutional Affairs References Committee *Inquiry into the Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime* Document No 21 (3 December 2021) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AUSTRAC/Additional_Documents (accessed 7 June 2023). The Law Council's written submission to the Senate Inquiry also analysed the Deloitte report of 2016 commissioned by the Ministry of Justice, New Zealand, which forecast establishment costs for legal practitioners and conveyancers of $15.29 million in total ($9,725 per regulated entity) with the estimate at the higher end of the range projected to be $76.85 million ($48,800 per regulated entity). This was in a context of a profession with significantly fewer of its members practising in micro- and small practices relative to Australia's profession profile (see paragraph 19 of this submission): Deloitte, 'Report–Ministry of Justice: Phase II Anti-money laundering reforms; Business Compliance Impacts' (September 2018) p 15 available at https://www.justice.govt.nz/assets/aml-phase-2-business-compliance-impacts.pdf (accessed 15 June 2023).

[13] In addition to the annual costs mentioned, a New Zealand law firm of that size would have to meet the costs of an independent audit by a suitably qualified person every 3 years. The Law Council is advised that the audit fee for a firm of the size in this example (assuming a limited assurance audit standard and a review of 15–20 files) would be NZD $15,000 plus GST and possibly more. The cost of additional advice to meet special situations (political exposed persons enquiries, determination of privilege issues and suspicious activity reporting) can also be substantial and is usually not recoverable from the client. It should be noted that these figures are consistent with the Deloitte report (see n 12).

- If not approaching retirement, sole practitioners will be displaced into employment in order to share compliance costs (that is, potentially displaced altogether from their locality, as well as from their practices).
- It could push up the prices of legal representation, with obvious consequences for access to justice in the region.
- There is a criminal law and litigation lawyers' skills shortage in this region at the moment. This existing shortage will worsen if the associated compliance costs are in the order of the corresponding costs in New Zealand.

23. Members of the Law Society of South Australia have also informed the Society that costs of this order would potentially lead to smaller practices becoming unviable in that State. Yet this problem is entirely avoidable. The special question of how best to regulate small business to insure against these outcomes has been the focus of authoritative research including by the Productivity Commission.[14] Such an approach requires sensitivity to the economics of the sector to be present at the design stage, even when regulation is motivated by considerations of law enforcement or national security. The Law Council is concerned that to neglect to take into account the specific circumstances of sole practitioners and smaller law firms is to invite market disruption, encouraging a shift away from small businesses. The Law Council is urged by its members to seek that the Government be cognisant of the financial implications for the profession of this reform agenda, and to seek proportionality at all times, particularly due to the practical implications for access to justice.

Guidance

24. The consultation paper invites comment on what guidance could be provided to assist those providing, relevantly, proposed legal, conveyancing and trust/company services in managing new AML/CTF obligations. In our consultations, the constituent bodies of the Law Council have persuasively emphasised the need for any reform to be accompanied by high quality guidance provided in a timely fashion. Constituent bodies interact directly with the profession and are on the front line for enquiries, support and the provision of training. Members of law societies have advised their representative bodies that they would benefit from specific guidance and education around:

    (a) minimum documents required for verification of identity of all types of entities;

    (b) developing a secure repository for verification of identity documents with access to security settings;

    (c) accessing beneficial ownership registers and conduct foreign registry searches; and

    (d) training materials that include case studies and examples of red flags.

25. For the benefit of their members, constituent bodies of the Law Council as a matter of course administer effective hotlines, provide professional development throughout the year, and maintain multiple communications channels in urban centres and regional areas. They are ready to supplement these delivery channels with content to support anti-money laundering and counter terrorism financing initiatives.

Design Strategies

26. The design strategies that we ask/urge the Department to consider, with further detail supplied below, include:

[14] Australian Government Productivity Commission, 'Regulator Engagement with Small Business,' *Research Report* (September 2013) especially chapter 3 ('Is a different approach needed for regulating small business?' available at https://www.pc.gov.au/inquiries/completed/small-business/report/small-business.pdf (accessed 15 June 2023).

Amending Definitions in the AML/CTF Act

26.1. **Defining providers to clearly exclude entire categories of practitioners**, such as inhouse lawyers, government lawyers and barristers. The Financial Action Task Force itself excludes inhouse and government lawyers from the definition of Designated Non-Financial Businesses and Professions (**DNFBP**s). Lawyers who practise solely as or in the manner of barristers should be excluded by definition because their work is exclusively litigious and/or advisory, and not transactional: they do not provide services that give rise to appreciable tranche 2 risks which are intended to be caught as designated services. These categorical exclusions could be achieved by amending s 5 ('Definitions') of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**). In addition or alternatively, the exclusion of barristers could be confirmed by appropriate provision in s 6 ('Designated services').

Tightening Designated Services

26.2. **Ensuring that each of the designated services is defined to be clear, and limited according to risk**. The manner in which each service is defined should not result in the entire suite of compliance obligations applying to a low-risk firm. For example, we consider that a definition that captures using a trust account for personal injuries litigation where managing the account is the sole designated service relevant to that firm would produce an inefficient and unfair outcome, and should be avoided. Likewise, it should be made clear that a firm that drafts wills, administers testamentary trusts, and holds a trust account to receive payment of legal fees, but does not create, operate or manage commercial trusts or otherwise manage client money, will not fall within the regime. It is considered that these results can be achieved with tight drafting of the description of the designated services. Further examples where this mechanism might be used are given below.

Issuing Exemptions

26.3. **Issuing clear, legally binding exemptions.** This should be considered where it is not possible to carve out an activity, or not practicable to recognise a legally binding, existing mitigating practice within the definition of a designated service itself. This could include, for example, exempting from the designated service currently described as 'buying and selling real estate', transactions where the incoming proprietor:

(a) is the Commonwealth, state or local government, or a statutory authority;

(b) is a member of an entity already regulated under the AML/CTF Act (for example, a mortgagee financial institution taking possession of a property);

(c) possesses Foreign Investment Review Board approval for the acquisition; or

(d) is a listed domestic company.

Deeming Compliance

26.4. Utilising a **deemed compliance mechanism** either within the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No 1) (Cth) (**AML/CTF Rules**), or within official or officially endorsed Guidance, as the case may be, to recognise practices that achieve the same outcomes as other obligations under the regime. This could include, for example, deemed compliance for sole practitioners and smaller practices with the obligation to formulate and document a practice-wide anti-money laundering and counter terrorism financing risk assessment. Such practitioners could be required to review the sector-wide vulnerabilities analysis, actively apply its findings to the individual circumstances of their own practice, determine their practice's risk appetite and settle upon mitigation measures consistent with those settings. These practitioners could declare that they have undertaken these steps as a condition of the renewal of their practising

certificate,[15] with training provided by the relevant law society and insurer. The Law Council emphasises that this would need to be an active process. Support and guidance materials would need to emphasise that boilerplate approaches are not permissible and that application to the particular circumstances of the practice is required. Other examples might include a recognition of the Know Your Client obligations under the Australian Registrars' National Conveyancing Council (**ARNECC**) Participation Rules,[16] and recognising admission requirements under the Legal Profession Uniform Law (**Uniform Law**) and practising certificate renewals processes for the purposes of deemed compliance with the obligations to undertake employee screening and rescreening.[17]

Augmentation by the profession

26.5. Associated with the above, the Law Council believes that it would be significantly beneficial for consideration to be given by the profession to appropriate **augmentation** of its own suite of existing obligations to address money laundering and terrorism financing. The profession has already made significant headway to achieve this and has commissioned an independent vulnerabilities analysis of the profession. Our continuing dialogue with the Department will also inform this work.[18]

Why We Need Examples of Legal Services: 'Pathways'

27. Any serious consideration of tranche 2 must be thoroughly informed by the practical experience of legal practice to ensure any potential regime is effective and workable. The Law Council's constituent bodies have sought reassurance from the Law Council that the Department understands the realities of daily legal practice. The Executive Secretary of the Asia/Pacific Group on Money Laundering (APG),[19] Dr Gordon Hook, has made the deceptively simple observation that '[i]t is important to understand … the services [accountants and lawyers] offer.'[20] While Dr Hook made this observation in the context of

[15] Nova Scotia Barristers' Society Annual Firm Report, December 31, 2022 is attached as **Annexure 1**. Question 8 deals with lawyers' obligations relating to compliance with client identification rules that have been put in place nationally with the adoption by each province and territory of the Canadian Federation of Law Societies' AML Model Rules.

[16] See paragraphs 88 to 94 of this submission.

[17] See paragraphs 68 to 79 of this submission.

[18] It should be noted that no consultation as to the augmentation of any existing obligations under the Legal Profession Uniform Law and subordinate legislation (or under the equivalent law in the states and territories which are not part of the Uniform Law) has been undertaken. In particular contexts, such as electronic conveyancing, augmentation requires the initiative and participation of other parties. No assumptions are implied in this regard where mention is made in this submission of augmentation. With respect to the Uniform Law, augmentation would be accomplished by Legal Profession Uniform rules, developed and made under Part 9.2 of the Uniform Law. Responsibility for developing (relevantly) Uniform Legal Practice Rules sits with the Law Council so far as they relate to solicitors, and those rules may provide for any aspect of legal practice by legal practitioners, Australian-registered foreign lawyers and law practices. In developing (for example) proposed Legal Practice Rules, the Law Council as a matter of practice consults with its constituent bodies and other stakeholders in developing the proposed rules. The Uniform Law then requires the Law Council to consult with the Legal Services Council and its advisory committees, the Commissioner for Uniform Legal Services Regulation, and the local Uniform Law regulatory authorities. The Law Council must also, with the approval of the Legal Services Council, engage in public consultations on the draft Rules. In practice, the Law Council also consults directly with significant stakeholders including federal, state and territory courts, the Commonwealth and state and territory Attorneys General and relevant government agencies. Following public and direct consultations, the Legal Services Council may, if it approves final draft Rules proposed by the Law Council, submit them to the Standing Committee of Attorneys-General of the Uniform Law jurisdictions, which may either approve the draft Rules or veto them, for particular specified reasons. Legal Practice Rules, together with Admission, Legal Profession Conduct, Continuing Professional Development and general Uniform Rules are statutory instruments which come into effect after publication on the NSW legislation website. These Rules are therefore legally binding and may provide for civil penalties for contraventions (in addition to a contravention of a Rule being capable of constituting unsatisfactory professional conduct or professional misconduct).

[19] The APG is a key member of the international network called 'FATF-styled Regional Bodies' or FSRBs: see 'About Us' at apgml.org.

[20] Dr Gordon Hook, 'Assessing the Risks of Money Laundering and Terrorist Financing through Companies and Trusts', chapter 7 in Chaikin and Hook (eds), *Corporate and Trust Structures: Legal and Illegal Dimensions* (Australian Scholarly Publishing: 2018) p 82.

DNFBP risk assessments, it holds true just as well, we believe, for the process of laying the foundations for significant legislative reform.

28. One way of ensuring that this knowledge is captured and communicated effectively would be to map out each of the steps that is taken by a given party to the relationship to progress the service through its numerous stages to completion. This process would allow the ready identification of duplication, and of risk points. Such an approach would also illustrate how seemingly abstract obligations translate into practice. For example, ethical obligations are expressed at a high level, yet in practice, mandate Know Your Client steps at certain stages of representation. This mapping process would also allow for more concrete consideration of trust accounting controls (including how they could potentially be augmented), by allowing mitigation practices to be observed in the context of inflows into and outflows from a trust account for key transactions.

29. This step-by-step, descriptive approach, has been called a 'pathway' in analogous contexts (such as in tax reform).

30. Developing pathways is reasonably complex and requires the involvement of subject-matter experts (experienced practitioners). Based on consultation roundtables to date and input from constituent bodies, the Law Council has identified four transactions or services that we believe could usefully form the basis for a series of pathways workshops with Government. We consider that these could be conducted jointly with the accounting profession. The Law Council has begun work to map such pathways as set out in **Annexure 2** (included for illustrative purposes). While the list of pathways should be expanded, we have identified the following potential services and transactions:

- plaintiff personal injuries litigation
- a 'cottage conveyance'
- drafting a will in which a testamentary trust is created,[21] and the administration of the estate
- cross-border dealings.

Implementation

31. Before turning to specific questions associated with designated services as raised by the consultation paper, it is important to convey the keen interest of the Law Council, its constituent bodies, and practitioners across the country in knowing when obligations are likely to come into force. The value of a consultation period that allows for a considered exchange to inform design and support services cannot be overstated and is greatly appreciated. There is anxiety within the profession, however, about the prospect of obligations to which considerable penalties for breach attach coming into effect without adequate time to prepare or put in place an effective compliance framework. On behalf of their members, constituent bodies have asked the Law Council to seek assurances of an implementation grace period once the second tranche of the regime were to come into force. This would allow time for legal practitioners to familiarise themselves with the detail of the new requirements and update their compliance processes. The constituent bodies of the Law Council have themselves committed to providing assistance to the profession in complying with any new regime, including raising awareness of the attendant obligations. All newly regulated entities will need guidance as to the interpretation of requirements and the nature and scope of their risk management regimes. The expertise required to meet these needs requires development, which in turn, requires sufficient time.

32. A particular challenge for the legal profession will be the large number of entities that will need both to enhance their processes and to comply under any proposed regulatory regime. This will require a mixture of external resource (new employees or technology)

[21] A testamentary trust is created by a will and comes into effect upon the death of the testator.

that will be in short supply or internal resources that require a significant uplift through training and education. Consequently, to balance the burden on external and internal resources, we suggest that, should the legal profession be required to enrol with AUSTRAC, that this take place in cohorts broken down by size. This could be based on the annual revenue of the law practice (such as $10+ million, $1–$10 million, under $1 million) or the number of partners (50+ partners, 5–49 partners, 4 partners or less). Such an approach has particular benefits:

- Those law firms with the most existing experience and resource could be the first to implement an AML/CTF program, therefore addressing any sector-wide issues identified.
- AUSTRAC could better manage the enrolment of new reporting entities through this staged process.
- External resources could be balanced to best leverage available personnel and technology.
- Training and education could occur for existing partners and employees to best aid compliance.

33. We understand that the regulatory approach foreseen by AUSTRAC does not envisage enforcing breaches until a reasonable time has been given for newly regulated entities for newly regulated entities to achieve compliance. This is particularly important for a profession dominated by small practices. A timeline that includes an extended implementation date, an outlined of phased implementation and commitment to compliance strategies that privilege education and guidance in the first instance, over the early imposition of penalties, would provide reassurance. The Law Council considers that the terms of phased or staged implementation and could be the subject of further discussion, but a commitment to it and overarching principles should be resolved and published in the second consultation paper.

Excluded categories

Inhouse and Government Lawyers

34. The consultation paper makes it clear that the Government intends to comply with the Recommendations issued by the FATF using a risk-based approach, such that over-compliance is not an objective. FATF makes clear that the reference to lawyers and legal professionals in the concept of DNFBPs 'is not meant to refer to "internal" professionals that are employees of other types of businesses, nor to professionals working for government agencies, who may already be subject to AML/CFT measures.'[22] The Law Council anticipates that the second consultation paper will carry a commitment to the same effect. The Law Council considers that the mechanism that the FATF has utilised, namely an exclusion from the definition of the provider of the services sought to be regulated, is appropriate. The appropriate definitional mechanism will become clearer when details of the proposed statutory design and terminology emerge in relation to tranche 2 entities.

Barristers

35. The independent bar in each Australian jurisdiction is made up of legal practitioners who practise solely as or in the manner of barristers and whose practising certificates are specific to that manner and form of practice. They provide advocacy and related services in the conduct of litigation and alternative dispute resolution; some also provide legal advice; but significantly, they do not represent their clients other than in litigation or alternative dispute resolution, they do not carry out transactions for their clients, they do

[22] FATF, *FATF Recommendations* (June 2021) Glossary, definition of 'Designated Non-Financial Businesses and Professions,' p 120.

not set up legal entities or provide company or trust services, and they do not administer or manage their clients' entities, money or investments.[23]

36. The services that have been identified as involving sufficient risk to warrant classification as designated services under tranche 2 all involve transactional work.[24] A legal practitioner who practises solely as or in the manner of a barrister provides litigious and advisory services, but does not provide transactional services. This remains a fundamental distinction between lawyers practising solely as or in the manner of barristers and other legal practitioners.

37. Ordinarily, barristers' fees are paid only after performing the work for which they have been retained, often out of funds in the instructing solicitor's trust account. In some but not all jurisdictions, it is possible for a barrister to receive funds for payment of his or her fees in

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[23] These positive and negative elements of legal practice are exemplified by rules 11 and 13 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*, applicable to the holder of a barrister's practising certificate under the *Legal Profession Uniform Law* (NSW, Vic, WA):

'11 Work of a barrister

Barristers' work consists of:

(a) appearing as an advocate,

(b) preparing to appear as an advocate,

(c) negotiating for a client with an opponent to compromise a case,

(d) representing a client in or conducting a mediation or arbitration or other method of alternative dispute resolution,

(e) giving legal advice,

(f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs,

(g) carrying out work properly incidental to the kinds of work referred to in (a)–(f), and

(h) such other work as is from time to time commonly carried out by barristers.

…

13 A barrister must not, subject to rules 14 and 15:

(a) act as a person's general agent or attorney in that person's business or dealings with others,

(b) conduct correspondence in the barrister's name on behalf of any person otherwise than with the opponent,

(c) place herself or himself at risk of becoming a witness, by investigating facts for the purposes of appearing as an advocate or giving legal advice, otherwise than by:

(i) conferring with the client, the instructing solicitor, prospective witnesses or experts,

(ii) examining documents provided by the instructing solicitor or the client, as the case may be, or produced to the court,

(iii) viewing a place or things by arrangement with the instructing solicitor or the client, or

(iv) library research,

(d) act as a person's only representative in dealings with any court, otherwise than when actually appearing as an advocate,

(e) be the address for service of any document or accept service of any document,

(f) commence proceedings or file (other than file in court) or serve any process of any court,

(g) conduct the conveyance of any property for any other person,

(h) administer any trust estate or fund for any other person,

(i) obtain probate or letters of administration for any other person,

(j) incorporate companies or provide shelf companies for any other person,

(k) prepare or lodge returns for any other person, unless the barrister is registered or accredited to do so under the applicable taxation legislation, or

(l) hold, invest or disburse any funds for any other person.'

Rule 14 excludes things done 'without fee and as a private person not as a barrister or legal practitioner'. Rule 15 exempts conduct 'as a private person and not as a barrister or legal practitioner' that would otherwise offend rule 13(a), (h) or (l).

[24] AGD, *Consultation Paper* (April 2023) p 22.

advance of performing that work.[25] If the fees turn out to be less than the amount received, the excess will be repayable. This is the only context in which a barrister may end up paying money back to a client.

38. The particular characteristics of barristers' practice and the ethos and regulation of the bar are discussed in greater detail *inter alia* in the submission of the NSW Bar Association of 8 June 2023. In summary, the money laundering and terrorism financing risks associated with the independent bar are extremely low.

39. The best and clearest way to deal with the position of barristers in the tranche 2 legislation would be to provide expressly that a legal practitioner practising solely as or in the manner of a barrister is not thereby a reporting entity or, if the design preference is to focus on designated services, to make clear that a practitioner practising solely as or in the manner of a barrister does not thereby provide designated services.

40. If lawyers practising solely as or in the manner of barristers were treated as reporting entities, the administrative burden would be disproportionately onerous, the public's access to justice would be consequently impaired, and any resulting public benefit would be disproportionately low. Barristers as such are sole practitioners and sole traders, and cannot engage in any trade or profession that is inconsistent with their role as barristers. These points are made clear *inter alia* in the submission of the NSW Bar Association of 8 June 2023.

41. It is also to be expected that the communication of information to or by a barrister in connection with litigation or the provision of legal advice will always or nearly always be covered by legal professional privilege. The Government and the FATF correctly recognise that legal professional privilege must be maintained, and that the confidentiality of privileged communications cannot be compromised by an obligation to report. This underscores the absence of utility in treating barristers as reporting entities.

Services provided for non-commercial purposes

42. The Law Council considers the exclusions noted on page 22 of the consultation paper (services provided for non-commercial purposes and as noted, litigation) are reasonable and appropriate in the circumstances. We suggest that an additional exclusion be considered (which is proposed to apply to dealers in precious metals), namely that the AML/CTF regime will not apply to legal practitioners dealing in cash transactions less than AUD$10,000 and any transactions involving payments made by electronic funds transfer, or through an electronic lodgement network operator by cheque.[26]

Litigation

43. The Law Council welcomes as necessary and appropriate the exclusion of litigation from the scope of the proposed regime. Specific clarification is sought that civil litigation, family law litigation, occupational discipline litigation, administrative appeals, criminal litigation and other quasi-judicial litigious processes such as patent and trade mark appeals, and tribunal proceedings, would be exempt from the regime.

[25] See, for example, the *Legal Profession Uniform Law Application Regulation 2015* (NSW) cl 15. This allows direct access clients to provide and barristers to receive funds into a dedicated and independently examined 'trust money account', thereby providing effective security for the payment of the barrister's fees. The NSW Bar Association reports that only 1.5% of barristers make use of the facility. It does not involve the management of clients' money in a conventional sense. It also seems fairly clear that such arrangements do not present a realistic risk of money laundering or terrorism financing.

[26] This exclusion is noted in relation to dealers in precious metals and stones: AGD, *Consultation Paper* (April 2023) p 24.

Designated Services

44. Extending the scope of the current AML/CTF regime to include the legal profession will have a significant impact on the sector. Aside from the definitions in s 5 of the AML/CTF Act, the designated services listed in s 6 are the gateways to the compliance regime. Every legal practitioner apart from those excluded will need to review and interpret each individual designated service and come to an appreciation of whether they or not they are required to develop part A[27] and part B[28] programs under the Act and Rules. The designated services thus bear the potential of bringing in to the regime a very significant proportion of the profession, or alternatively, a more targeted sector, depending on how the designated services are framed. Whether or not bright lines are drawn will determine the amount of time spent by practitioners in working to understand whether their practice comes within the regime, the extent of the risk they take in acting upon their interpretation (and the anxiety some will experience), as well as the cost some will feel they need to expend to obtain advice as to the scope of the provisions. Over-compliance is costly and runs directly counter to a risk-based approach and where there has been confusion about scope, as there has been in some jurisdictions, over-compliance has been one result.

45. We accordingly urge the Department to provide a refined list of designated services to inform the next phase of consultation. For the benefit of concerned practitioners, examples of legal services drawn from daily life that illustrate what does and does not fall within the scope of a defined service should be included. As discussed in the roundtable meetings, the marginal cases are often the very cases that create anxiety and unnecessary costs. As such, we ask that the examples deal with the margins, as well as illustrating the central points within the scope of the services proposed.

46. The 'gatekeeping' role played by legal professionals (as gatekeepers to the legitimate financial system) was the original rationale and remains the reason for bringing them with other DNFBPs into the scope of the FATF's Recommendations. That is, the focus on this group is due to their participation in transactions. For this reason (as well as in consideration of the special role of legal practitioners in the administration of justice), litigation has always been exempted. Family lawyers, personal injuries lawyers and criminal defence lawyers are often organised in firms where their sole focus and service offering is in their chosen area of law. They are engaged in representing clients with respect to litigious matters and do not undertake transactional work. However, the list provided on p 22 may be interpreted as capturing these, and others, whose practices are similarly circumscribed. We do not consider that this is the intention of the Department, and it is contrary to the experience of other jurisdictions where DNFBPs are regulated for money laundering and terrorism financing risk according to a risk-based approach. We ask that special attention be given to including examples in the next consultation paper which establish that these and other practitioners [29] are not captured simply because they maintain a trust account for receipt and disbursement of settlement monies or court-ordered payments, and legal fees.

47. The prefatory phrase on p 22 of the consultation paper, 'lawyers when they prepare or carry out transactions for clients….' implies the need for an underlying transaction separate from a trust account inflow and payment. If this understanding is correct, the mere fact of maintaining a trust account would not bring a law practice into scope if it does not otherwise provide any designated service. However, if this implication is not accepted as correct, a large proportion of Australia's 90,329 solicitors will otherwise be brought within scope merely by virtue of having a trust account.

48. A list of questions and concerns is provided below to inform the process of refining the definitions.

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[27] AML/CTF Act, s 83 and s 84(2) and Ch 8 of the AML/CTF Rules.
[28] AML/CTF Act, s 83 and s 84(3).
[29] Other examples include boutique planning and environment advisory and litigation practices, health law practices, migration law firms, employment and industrial law firms, animal law firms and sports law practices.

The Proposed Designated Services:

Lawyers when they prepare or carry out transactions for clients, relating to buying and selling of real estate

49. Since the FATF Recommendations were drafted to include DNFBPs in 2003, electronic conveyancing in Australia has fundamentally changed the risk profile of this activity insofar as legal practitioners are participants. While there are differences between the rules and the AML/CTF regime objectives, the ARNECC regulatory framework, described on pages 40 to 42, establishes rigorous, legally binding obligations upon participants to verify the identity of their client. The Law Council considers that it would place a heavy and unnecessary regulatory burden upon legal practitioners (particularly property lawyers) to require them to comply with both the ARNECC framework and the AML/CTF regime. We seek that further consideration be given to this important area of legal practice, jointly with Government, potentially through the pathways mechanism already proposed.

50. If this item is included as a designated service it would be desirable to define 'real estate'. It would be appropriate to align the definition with that of 'real property' in s 195.1 of *A New Tax System (Goods and Services Tax) Act 1999* (Cth):

> "***real property***" includes:
> (a) any interest in or right over land; or
> (b) a personal right to call for or be granted any interest in or right over land; or
> (c) a licence to occupy land or any other contractual right exercisable over or in relation to land.

51. Alternatively, consideration could be given to the definition of 'interest in Australian land' in s 12 of the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

Lawyers when they prepare or carry out transactions for clients, relating to managing of client money, securities or other assets

52. The Law Council seeks clarification in relation to the following questions.

52.1. How is 'managing' defined?

52.2. How are 'other assets' to be defined?

52.3. Is the intention to include maintaining a trust account for the payment of legal fees? The Law Council seeks assurance that funds held in a solicitor's trust account on account of fair and reasonable legal fees, disbursements and counsel's fees are to be excluded from consideration of whether a designated service is being provided.

52.4. Is the intention to include the receipt and disbursement of settlement money following the resolution of a dispute? The Law Council seeks assurance that funds held in a solicitor's trust account on account of receipt of settlement monies from licensed insurers and other credit licensed entities[30] and for disbursement of counsel's fees, are excluded from consideration of whether a designated service is being provided. **Annexure 2** gives plaintiff personal injuries litigation as an example.

52.5. In addition to the above, the receipt, holding and disbursement of trust money to, in and from a trust account maintained by a legal practitioner where the relevant inflows of funds

[30] including holders of an Australian Financial Services Licence. In these circumstances, inflows into a trust account, it is submitted, pose no or negligible risk of money laundering or terrorism financing.

into the account originate only with the following categories of payers should be excluded from the definition of designated services:

(a) Commonwealth, state or local government or a statutory authority

(b) a domestic listed company

(c) the holder of an Australia Financial Services Licence

(d) credit licensed entities (such as litigation lenders, banks and insurers).

In the alternative, exemptions should be made to prevent triggering onerous compliance obligations with respect to transactions involving only these parties.

52.6. Is the intention to include:

(a) funds under a National Disability Insurance Scheme plan or at the direction of the National Disability Insurance Agency?

(b) a capital raising by a domestic listed company or managed investment scheme?

(c) a court-supervised scheme of arrangement under the *Corporations Act 2001* (Cth) (the **Corporations Act**)?

(d) funds held and disbursed pursuant to a grant of probate or letters of administration?

(e) funds under the direction of the office of a public trustee or a guardianship of administration order?

(f) funds received according to a court order, for example, a compensation order for a minor or a disabled person?

Lawyers when they prepare or carry out transactions for clients, relating to [the] management of bank, savings or securities accounts

53. Clarity should be provided as to the meaning and object of this proposed set of services, including the definition of 'management'.

Lawyers when they prepare or carry out transactions for clients, relating to [the] organisation of contributions for the creation, operation or management of companies

54. The Law Council seeks clarity as to what in practical terms, is intended to be subject to further regulation within this category.

55. In the absence of significant clarification and risk-based justification, the Law Council submits that this should not be included as a designated service.

56. There is a risk of inadvertently capturing the following activities, which is considered inappropriate and likely to be highly disproportionate to risk:

(a) court-supervised schemes of arrangement under the Corporations Act;

(b) capital raising, merger or acquisition by a domestic listed corporation;

(c) advising directors on their legal obligations and duties;

(d) holding company meetings;

(e) auditing accounts and financial reporting;

(f) taxation advice;

(g) reporting and compliance obligations; and

(h) acting in relation to workplace health and safety and workers' compensation obligations.

Lawyers when they prepare or carry out transactions for clients, relating to [the] creation, operation or management of legal persons or legal arrangements (e.g. trusts)

57. Trusts serve many legitimate and important functions in Australian life. A severely brain-injured child might benefit from an income trust established by their parents to manage capital and supply a regular source of funds for personal support and maintenance. There are legitimate commercial purposes for trusts, including tax and estate planning and wealth management utilised widely across Australian society. The Law Council submits that the object of this designated service should not be to capture dealing with trusts for non-commercial purposes at all,[31] but nor is it self-evident that money laundering and terrorism financing risk is associated with the establishment of trusts for commercial purposes. The Law Council notes that the Panama Papers and other 'leaked' caches of similar document have not shown Australian legal practitioners to have been acting improperly. Certainly, statutory investment vehicles such as managed funds, listed investment trusts and superannuation funds should be excluded from the proposed scope and at a minimum, 'operation or management' must be clearly defined and examples should be given. The potential to capture the following activities is considered inappropriate and disproportionate to risk and the Law Council asks that further consideration be given to whether the intention is to capture:

    (a) advising trustees on their legal obligations and duties;

    (b) holding meetings of members;

    (c) auditing accounts and financial reporting;

    (d) providing taxation advice;

    (e) reporting and compliance obligations; and

    (f) changing trustees.

58. As previously noted, current drafting appears to capture the drafting of almost any will, which usually involves the creation of a testamentary trust that takes effect upon the death of the testator. If this interpretation is correct, this form of words would result in a significant additional number of legal practitioners falling within the scope of the regime and increasing costs significantly.

59. In the absence of significant clarification and risk-based justification, the Law Council seeks that this proposed designated service be excluded.

Lawyers when they prepare or carry out transactions for clients, relating to buying and selling business entities

60. As with real estate transactions, the practice of buying and selling a business as a matter of course requires the practitioner to undertake conflicts checks, client identification and verification and associated due diligence measures, including enquiries to confirm that the client's goals and instructions are lawful. These obligations have their sources in ethical rules (particularly Rule 8 of the Australian Solicitors' Conduct Rules), the common law, statute and subordinate legislation and do not depend on the value of the transaction.[32] The transactions will also already involve banks regulated for money laundering and terrorism financing risk.

[31] We note the intention expressed in the consultation paper not to include activities where they serve purposes that are not commercial: AGD, *Consultation Paper* (April 2023) p 22.

[32] A practitioner is also exposed to the risk of civil liability if their negligent or other wrongful conduct should cause loss.

61. Given the prospect that this proposed designated service as currently worded may capture the small end of the market with deleterious and disproportionate consequences due to the compliance costs, the Law Council proposes the definition be modified by a threshold, such that the sale of an individual business for consideration less than $20,000 does not amount to a designated service.

Proposed Designated Services with respect to Trust and Company Service Providers

62. The Law Council notes that relevance of the list of designated services related to trust and company service providers (**TCSP**s) to legal practitioners. This list of designated services, which has its origins in Recommendation 22 paragraph (e) of the 40 + 9 FATF Recommendations, is designed to encourage the regulation for money laundering and terrorism financing risk of anyone, including a legal practitioner, who carries on a business of providing the listed services rather than as a one-off service. While this includes a legal practitioner or an accountant, as Dr Hook has noted, '[m]ore often than not, TCSPs are incorporated entities offering a wide range of financial services in addition to the services listed by the FATF.'[33] The Law Council notes that in the United Kingdom, to provide any of the relevant services except on an occasional basis requires registration as a TCSP with HM Revenue and Customs. The sector supervisor for the legal profession in England and Wales, the Solicitors Regulation Authority, manages this process for solicitors and makes a recommendation to HM Revenue and Customs, with whom it liaises directly until an approval to act and inclusion on the register is granted. However, TCSPs are not supervised by the Solicitors Regulation Authority and overlaps in jurisdiction between AML/CTF supervisors are managed by the relevant supervisors by consent.

63. As with the proposed list of designated services drawn from FATF Recommendation 22 paragraph (d), the Law Council seeks greater clarity as to the precise definitions proposed with respect to those activities, and in particular, whether activities that do not include undertaking a financial transaction for a client in this context would nevertheless fall within scope. As such, it would also be helpful to clarify that the provision of advisory services (legal advice) is not included merely because it relates to the subject matter of the various activities listed.

64. Reducing and refining the designated services provides the first opportunity for the Government to apply the risk-based approach by ensuring that activities which present a low risk of money laundering and terrorism financing are not included. Subject to the clarifications sought above, the Law Council submits that if designated services are to be legislated for legal practitioners, they be limited to those discussed in paragraphs 49 to 53 above, and the designated service that would capture buying and selling businesses exclude transactions where the consideration is less than $20,000, as set out above. In the absence of significant clarification, and justification of money laundering and terrorism financing risks, the Law Council submits that the following should be excluded from being designated services:

    (a) organisation of contributions for the creation, operation or management of companies; and

    (b) creation, operation or management of legal persons or legal arrangements (e.g., trusts).

Existing practices

65. As noted in the consultation paper, Australia will undergo its next FATF Mutual Evaluation between 2025 and 2027. Alongside technical compliance with its Recommendations, the FATF's keen interest is to measure how effectively a country applies its anti-money laundering and counter terrorism financing measures. The observations that follow, which

[33] Hook, 'Assessing the Risks', p 83.

deal with existing practices, are motivated by a desire to ensure that effective outcomes are achieved.

66. The legal profession in Australia operates under a comprehensive, stringent regulatory framework. Lawyers are bound by strict ethical and professional standards, subject to rigorous licensing and oversight, and owe fundamental common law and statutory duties to their clients, including that of client confidentiality and legal professional privilege. The Law Council submits that any extension of the AML/CTF regime to the legal profession must take this robust pre-existing framework into account, ensuring that existing obligations are not needlessly duplicated and that any additional obligations do not undermine the unique constellation of duties and responsibilities to which legal practitioners are subject.

67. The consultation paper asks: Are there any existing practices within the accounting, legal, conveyancing and trust/company services sectors that would duplicate the six key AML/CTF obligations?[34] We welcome the invitation and respond below. Yet we are conscious that describing practices one by one and even undertaking a gap analysis between AML/CTF rules and 'existing practice' leaves out a key ingredient. It is far from a pointless process—it will elicit, we hope, useful information. But a defining characteristic of legal practice, which is difficult to convey, is the way in which actual daily legal practice is informed by and steeped in ethics and professional responsibility. Ethics education begins with tertiary legal studies and ends on retirement. It is reinforced and applied through repetition, mentoring, professional collegiality, and decision-making frameworks that with repeated application become integrated into the fabric of who one is, as a lawyer. As the Hon Justice Martin of the Supreme Court of Western Australia told law students, ethical problems that arise in daily practice are nuanced. Legal ethics are 'indispensable to navigating the daily challenges of legal practice' and 'any attempt at a comprehensive written codification is likely to fail. Real ethical problems are invariably subtle.'[35] In practice, these subtleties are experienced regularly. Problems on a file, or with a client, are talked out with a senior colleague or with an equal, sometimes with the assistance of the law society or bar association but typically that is reserved for thornier issues. None of the existing practices described below can be properly understood without an appreciation of the fundamental ethical responsibilities that the practitioner owes to the court, the client and the community as a whole, and an appreciation of the fact that these are not abstract considerations but are embedded in ordinary, daily legal practice.

Employee screening and re-screening

68. One element of an AML/CTF framework is for a business or practice to that ensure employees and independent contractors do not pose a money laundering or terrorism financing risk to the business. This risk is mitigated within the AML/CTF regime by undertaking employee due diligence. Law firms, too, have systems in place, partly based on profession-wide systems within each jurisdiction, but checked and implemented at a practice level, to help ensure that employees and independent contractors who are engaged by a law firm are persons of integrity.

69. For the legal profession, the screening and rescreening of practitioners is achieved in the first instance through admissions standards. A practitioner's fitness to practice is then verified through the process of granting a practising certificate and, subsequently (usually annually), when the solicitor applies for the practising certificate to be renewed. Within the practice itself, the supervisory responsibility of the principal over employed solicitors and non-professional staff is fundamental to legal practice.

[34] Question 25, AGD, *Consultation Paper* (April 2023) p 23.
[35] The Hon Justice Kenneth Martin, 'Legal Ethics: Navigating the Daily Minefields', Address, Legal Theory and Ethics course, University of Western Australia, 17 August 2015, available at supremecourt.wa.gov.au, 'Speeches', (accessed 10 June 2023).

70. Part 8.3 of the AML/CTF Rules set out the elements of the AML/CTF requirements in Australia. A relevant entity must have:

(a) a documented program for screening and re-screening employees and independent contractors; and

(b) a documented plan of the consequences an employee/ contractor will face where there is a failure to comply with the AML/CTF program without reasonable excuse.

71. The Law Council has considered AUSTRAC's Guidance[36] and notes that among other steps, AUSTRAC suggests that as one of a number of methods contributing to the vetting process, enquiries be undertaken to ascertain whether a prospective or existing employee possesses a state or territory gaming regulator-issued licence to perform their functions. AUSTRAC notes in this context the potential significance of whether a 'fit and proper person' test must be met before such a licence is granted. This contributes to the strength of the vetting process.[37]

72. Taken together, the four analogous mitigation practices in place within law firms are:

(a) admissions standards;

(b) the granting of practising certificates and their renewal;

(c) supervision of employees; and

(d) trust money controls.

73. In order to be admitted to legal practice, candidates must pass the **fit and proper person** test and be of good fame and character. Section 17(c) of the Uniform Law sets out the fit and proper person test requirement. Section 17(2)(b) stipulates that the matters set out in the Admission Rules (for example, the Legal Profession Uniform Admission Rules 2015) must be taken into account. This includes student conduct reports (including with respect to practical legal training undertaken),[38] additional independent evidence of character[39] and a police report.[40] Case law elaborates on the meaning of 'good fame and character', which includes the enduring moral qualities of the individual, and reputational considerations with respect to the individual (which has important consequences, of course, for the profession).[41] The admissions standards provide that a practitioner will be disqualified if they are no longer a fit and proper person, thus ensuring the continuing nature of the obligation.

74. For the Uniform Law jurisdictions, the provisions that govern the issue of practising certificates, including their renewal, are found in Pt 3.3 Divs 2 and 3 of the Uniform Law. Section 45(2) of the Uniform Law prohibits granting or renewing a practising certificate if a regulatory authority considers that the applicant is not a fit and proper person. Rule 13 of the Legal Profession Uniform General Rules 2015 sets out the criteria that may be considered for the purposes of section 45. This extensive set of grounds accords wide discretion to the regulatory authority, including to consider whether 'the applicant is currently unable to carry out satisfactorily the inherent requirements of practice as an

[36] AUSTRAC, 'Employee due diligence' including 'How to screen and rescreen employees' (last updated 24 March 2023) https://www.austrac.gov.au/business/how-comply-guidance-and-resources/amlctf-programs/employee-due-diligence (accessed 5 June 2023).
[37] AUSTRAC also notes that its guidance on this topic is general (that is, not specific to any particular industry sector) and 'relates to situations which pose the highest ML/TF risk and may exceed the minimum requirements' as set out in the AML/CTF Act and AML/CTF Rules: AUSTRAC, 'Employee due diligence', online.
[38] Legal Profession Uniform Admission Rules 2015 (NSW), r 19.
[39] Legal Profession Uniform Admission Rules 2015 (NSW), r 16.
[40] Legal Profession Uniform Admission Rules 2015 (NSW), r 18.
[41] High Court authority for this test is found in *Re Davis* (1947) 75 CLR 409 at 420 per Dixon J and *Council of The Law Society of New South Wales v Hislop* [2019] NSWCA 302 at [43].

Australian legal practitioner'. The criteria are set out for illustrative purposes in **Annexure 3**.

75. As part of the renewal process, applicants must disclose any matters which may affect their suitability to continue to hold a practising certificate. Such matters are listed in legislation[42] and their contents and the significance of disclosure to the legal regulator are the subject of professional ethics training prior to admission. Within this same renewal process, the practitioner applicant must disclose whether any show cause event which might affect their fitness to hold a practising certificate has taken place[43] and whether there has been any disqualification from managing a corporation under any law in Australia. While AML training is not mandatory, continuing education in ethics and professional responsibility and practice management are, and the renewal process requires the applicant to certify that they have met the minimum mandatory requirements. Risk management training is a precondition to granting a principal's practising certificate. At present this typically includes training for cyber risk and fraud, but the risk management framework is, of course, designed to establish an awareness and practices to identify and appropriately mitigate all foreseeable risks to a practice.

76. It is a cardinal rule within law firms that principals must supervise professional and non-professional staff. Rule 37 of the Australian Solicitors Conduct Rules unambiguously provides 'A solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter.' The primacy of the role of the supervising principal underpins every facet of practice. The client retainer is a contract between the principal of the firm and not the employee who may have day-to-day carriage of the file. The principal's failure to supervise may result in

    (a) a finding of unsatisfactory professional conduct

    (b) a finding of professional misconduct

    (c) a personal costs order against the principal.

77. These sanctions act as strong disincentives to fail to properly supervise, and insurers train principal solicitors extensively on this point. Firms that maintain trust accounts also have extensive trust money and account controls that place limits on who can deal with the account.[44] The Law Council understands that some firms undertake criminal records checks of staff who are not qualified legal practitioners, on a risk-sensitive basis.

78. We note that the FATF recognises that the level of assessment (vetting of staff and principals) should be proportionate to the risk the practice faces and the role of the employee. In its risk-based Guidance, the FATF notes that the assessment may include:

    (a) criminal records checking; and

    (b) other pre-employment screening, for example, background verification and credit reference checks.[45]

79. While the effectiveness measures outlined above would need to be interpreted in the context of a practice's own assessment of its risks, based on the AML/CTF framework for

[42] To take Queensland as an example, 'suitability matters' are listed in the *Legal Profession Act 2007* (Qld) s 9. They include being an insolvent under administration, being convicted of an offence, having contravened a law about trust money or trust accounts, and being 'unable to carry out the inherent requirements of practice as an Australian legal practitioner': https://www.legislation.qld.gov.au/view/html/inforce/current/act-2007-024#sec.9

[43] To continue with Queensland, 'show cause' events are set out in Sch 2 to the *Legal Profession Act*. By way of example, these include becoming bankrupt or having been served with a creditors' petition, being a director of a company that is being wound up or having been convicted for a serious offence or any tax offence in any jurisdiction: https://www.legislation.qld.gov.au/view/html/inforce/current/act-2007-024#sch.2.

[44] Trust accounts are discussed in their own right in paragraphs 80 to 85 below.

[45] FATF, *Guidance for a Risk-Based Approach: Legal Professionals* (June 2019) at [143].

currently regulated entities it would appear that the measures described may well be sufficiently robust to meet the demands of a high-risk environment.

Trust accounting

80. It must be made clear at the outset that the Law Council does not regard the practices outlined below as substitutes for AML/CTF measures. It does not. Trust accounts have arisen over time as a result of a legal practitioner's fiduciary relationship with their client (as beneficiary). In a fiduciary relationship, the fiduciary (the legal practitioner) has a duty to account to the beneficiary. Trust money controls accordingly have developed to ensure the separation of funds held for the client from those utilised as operating accounts, and a series of other supporting regulatory controls. Rigorous trust account investigations programs in every jurisdiction track practitioner observation of customer due diligence, reporting and record-keeping within the trust account framework, and require practitioners to address any weaknesses in those areas in order to minimise risk to them and to their clients. Nevertheless, as the original foundation was the expression of the fiduciary relationship, the controls in place are fitted to that context. Despite this, they may prove to be a tool that could help guard against the criminal client, too—that is, where there is a real risk of misuse for money laundering or terrorism financing. This prospect would need to be explored in greater detail with the participation of the Government, trust accounting regulators and other relevant experts but some suggestions are offered below. In this regard, it should be noted that further increasing regulation that is not sympathetic to existing processes in this area raises the real risk that legal practitioners become increasingly unwilling to hold and operate trust accounts. This could have a number of impacts, including for barristers who rely on solicitors to hold their fees in trust, and for clients where firms potentially offer fewer services that require deposits to be held, such as conveyancing.

81. Trust account operating manuals are detailed and voluminous and the description supplied in this submission does not purport to be comprehensive.[46] Happily, statutory rules for legal practitioners' duties to account for trust money exhibit 'significant uniformity across Australia.'[47] A trust account is a special bank account that can only be opened with a specific financial institution (vetted and placed on a select list of nominated banks by the legal regulator), that a legal practitioner (or law firm) must maintain when she or he receives and holds money on behalf of clients or third parties. Trust money[48] includes money received in advance for legal costs, 'controlled money'[49] and money that is subject to the law practice's authority to handle on behalf of others. This latter power can only be exercised on written instructions. To handle trust money, individuals working in a law practice must complete a prescribed trust account course, pass an assessment, and be deemed suitable by the relevant legal regulator.[50]

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[46] Professor Dal Pont directs readers of his own leading textbook to Mortenson's *Client Money: Trust Account Management for Australian Lawyers* (LexisNexis Butterworths, 2017) for a more detailed treatment of the subject: GE Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co: 2021, 7th ed) at [9.05] n 1.

[47] Dal Pont, *Lawyers' Professional Responsibility* at [9.05].

[48] *Legal Profession Act 2006* (ACT), Dictionary; *Legal Profession Act Uniform Law* (NSW), s 129(1); *Legal Profession Act 2006* (NT), s 235(1); *Legal Profession Act 2007* (Qld), s 237(1); *Legal Practitioners Act 2007* (SA), Sch 2 cll 11, 12; *Legal Profession Act 2007* (Tas), ss 231(1); *Legal Profession Uniform Law* (Vic) s 129(1) and *Legal Profession Uniform Law* (WA), s 129(1).

[49] 'Controlled money' is trust money (money entrusted in the course of or in connection to the provision of legal services) that is subject to a written direction to deposit money to an account of an authorised deposit-taking institution, other than a general trust account, over which the law practice has or will have exclusive control. Controlled money can only be deposited in the account specified in the written direction which must be effected as soon as practicable (that is, without delay). Each jurisdiction sets out specific record-keeping obligations for controlled money, see Dal Pont, *Lawyers' Professional Responsibility* [9.10] n 8.

[50] In Victoria the legal regulator for trust money and accounts is the Victorian Legal Services Board. In Western Australia the legal regulator for these purposes is the Legal Practice Board of Western Australia. In all other jurisdictions it is the law society for that jurisdiction that regulates trust money and accounting. Note that funds received for the purposes of electronic conveyancing (discussed on pp 40-42 of this submission) are trust money. In order to undertake electronic conveyancing, under Australian law a law practices must have at least one principal holding a practising certificate with trust account authorisation, and access to a solicitor's general trust account.

82. Under the Uniform Law, legal practitioners, law practice associates, the approved banks, external examiners, and any other designated entities are required to promptly report any irregularities or suspected irregularities involving trust accounts to the regulatory authority.[51] Failure to comply with this reporting requirement can result in penalties and be deemed unsatisfactory professional conduct or professional misconduct. Neither a law practice's lien over documents, nor the practitioner's duty of confidence (nor, it follows, legal professional privilege) may be relied upon within the coregulatory framework of the Uniform Law to excuse a failure to report a suspected or actual irregularity. It may be that existing trust accounting regulations for Australian legal practitioners could be augmented to incorporate threshold reporting obligations for cash and structuring to the trust account regulator.

83. The Uniform Law imposes certain requirements for the examination of a law practice's trust records. A law practice must have its trust records externally examined by a suitably qualified person appointed as an 'external examiner' at least once in each financial year, in accordance with Uniform Rules made under the Uniform Law. The external examiner is authorised to examine the affairs of the law practice in connection with the examination of the trust records—a power that affords a broad scope for thorough review and assessment. Likewise, the relevant legal regulatory authority has the power to conduct external investigations or authorise an external investigator in relation to specific allegations or suspicions regarding trust money, trust property, trust accounts, or any other aspect of the law practice's affairs. The term 'affairs of the law practice' is defined in the legislation and encompasses various elements, including required accounts and records, other records, and transactions involving the law practice or its associates. These powers recognise the importance of examining and investigating the overall operations and activities of a law practice beyond just the trust records.

84. Within a firm, it is the principals (or sole practitioner) who possess the authority to act on the trust account, and strict rules limit the delegation of that power in the principals' absence. On an annual basis, as a prerequisite to the renewal of their practising certificate, solicitors are required to make a declaration as to whether they have handled trust money.

85. As mentioned, the profession's stringent regulation of trust accounts may afford an analogy with the transaction monitoring program under Pt 15.4 to 15.7 of the AML/CTF Rules. The regulation of trust accounts by the various legal regulators demonstrates a risk-based approach, and the Uniform Law imposes an obligation to refer matters to the police or a relevant prosecuting authority if the legal regulator has reasonable grounds for believing another person has committed a serious offence. In the case of the Law Society of New South Wales, for example, while the Council of the Law Society of New South Wales is prevented from discussing specific cases by the confidentiality provisions of the legislation, it confirms that matters are regularly referred to the NSW Police and/or the Australian Federal Police. This has included instances where suspicious activity potentially associated with money laundering has been identified. The Law Council is advised that discussions are currently underway between that Law Society's Trust Account Department, and various police agencies and regulators with an interest in money laundering, to identify opportunities to improve cooperation.

Conveyancing

86. As previously mentioned, every legal process undertaken by a legal practitioner within a law firm is undertaken within the bounds (and with the assistance) of a set of intersecting ethical obligations. The starting point for understanding conveyancing as conducted by a legal practitioner is the duty under Rule 8 of the Australian Solicitors' Conduct Rules namely that '[a] solicitor must follow a client's lawful, proper and competent instructions.'

[51] For example, in New South Wales, the practice is that notification is made to the Law Society Trust Accounts Department; in Victoria it is to the Victorian Legal Services Board: see n 50 above.

This rule imports a duty to identify the client, understand the purpose of the client's instructions and not to act if those instructions are for an improper or unlawful purpose.

87. Of course, the differences between the formality of the AML/CTF regime and this guiding principle are acknowledged, and it is acknowledged that the information generated by the solicitor in making these enquiries is and remains confidential, unless they reveal a fraudulent intention on the part of the client. Yet there is a significant correlation between the enquiries taken by practitioners in practice and the risk-based measures prescribed by the AML/CTF Act and Rules. Bearing in mind the regulatory oversight of a solicitor's trust account, the practitioner's duty to the court and duty under Rule 8 of the Australian Solicitors' Conduct Rules, the Law Council considers that it would be a high and unnecessary burden for property lawyers to have to comply with both the electronic conveyancing rules, discussed below, and the AML/CTF framework, unless they were in perfect alignment.

88. In all participating jurisdictions, the framework developed by the ARNECC governs electronic conveyancing. Save for an extremely small fraction of transactions,[52] all settlements must be completed by an Electronic Lodgment Network (**ELN**). ELNs require funds to be provided from a registered financial institution (that is, a regulated entity) or funds transferred directly into a legal practitioner's trust account. Practitioners consider the use of cash for such deposits to be highly unusual and the Law Council is advised that in practice, the proposed use of cash would cause the solicitor to make further enquiries. There is a convention not to accept cash. Where exceptions occur, if the amount equal or exceed $10,000, the practitioner is required to notify AUSTRAC under s 15A of the *Financial Transaction Reports Act 1988* (Cth).[53]

89. It is a matter of grave concern that recent figures show real estate to constitute 57% of assets confiscated as proceeds of crime in Australia[54] and it would be of enormous assistance to the profession to know which of these transactions, if any, involved legal practitioners and under what circumstances. While the Law Council does not purport to have any forensic skill in this context, the possibility is suggested that there may be a time lag, insofar as the illicit acquisitions of the properties may pre-date the recent introduction of mandatory electronic settlements in the major jurisdictions. Of course, this may not be correct. The Law Council would like to understand which, if any, professional entities were involved in a representative capacity in the transactions.

90. Under the ARNECC framework, Model Participation Rules have been made and adopted by participating jurisdictions under the Electronic Conveyancing National Law. The Model Participation Rules establish the obligation of a 'Subscriber', in this case, the legal practitioner, to verify the identity of their client. Under rule 6.5.2, this obligation can be discharged by taking reasonable steps to identify the person or applying the 'Verification of Identity Standard', as set out in Schedule 8 of the Participation Rules. If a practitioner uses the 'Verification of Identity Standard', they are deemed to have taken reasonable

[52] These include water rights where banks take or discharge a mortgage over the water right. Further information could be sought as to any other residual paper transactions, but experts advise the Law Council that such transactions are vanishingly small in number and appear to be of low or nil risk for money laundering or terrorism financing. Further, in New South Wales the ARNECC framework for verification of identity, right to deal and retention of evidence has been imported into the paper environment pursuant to rule 4.1, rule 4.3 and rule 5 of the NSW Conveyancing Rules made under s 12E of the *Real Property Act 1900* (NSW).

[53] Since 2004, Model AML Rules developed by the Canadian Federation of Law Societies have included a Cash Transactions Rule prohibiting a legal practitioner from receiving or accepting cash in an aggregate amount of over CAN$7,500 in respect of any one client matter. The Model Cash Transaction Rule has been adopted by the legal regulator (law society, *barreau* or barristers' society as the case may be) in every Canadian province and territory as a by-law or legally binding rule made under the enabling statute for the regulatory body. The text of the Cash Transactions Model Rule (October 2018) is available here: flsc.cau/what-we-do/fighting-money-laundering-and-terrorist-financing/ (accessed 2 June 2023).

[54] Alex Engel, Assistant Secretary, Keynote address to the ACAMS Australasia Conference, Sydney, 19 June 2023 and see AGD, *Consultation Paper* (April 2023) p 18.

steps under rule 6.5.6. Guidance regarding the obligation to verify identity has been issued by ARNECC.[55]

91. Rule 6.4 of the NSW Participation Rules establishes a practitioner's obligation to verify their client's right to deal, being their client's entitlement to be a party to the transaction. For example, for a vendor client, the practitioner must establish that the client is the registered proprietor of the subject land being sold. Guidance regarding the obligation to verify the right to deal has been issued by ARNECC.[56] Practitioners are required to retain all supporting evidence in completing a client's verification of identity for no less than seven years from the date of lodgment of the final binding instrument in a transaction.[57] Guidance has been issued by ARNECC as to practitioners' obligations to retain evidence when transacting for a client.

92. In addition to the safeguards set out above, the Australia Taxation Office has a mandatory requirement that a Foreign Resident Capital Gains Withholding Certificate be obtained for any transaction to the value of $750,000 or above. This application usually includes the provision of a Tax File Number and also forces those individuals seeking to legitimise any ill-gotten gains to reveal sensitive and detailed information about themselves. Further, the Foreign Investment Review Board provides an important regulatory and compliance monitoring system for any foreign person planning to invest in or purchase Australian residential, agricultural or commercial land. Practitioners seeking approval are required to complete a complex application often with significant sensitive and detailed information for anyone seeking to invest or purchase, creating an additional barrier (and detailed profile) for anti-money laundering and counter terrorism financing purposes.

93. As is the case with a number of other transactions and legal services (that we hope may be the focus of workshops with the Department in the near future) we note that conveyancing involves legal practitioners following other actors who already regulated for anti-money laundering and counter terrorism financing purposes (and some who may be regulated under tranche 2). The Law Council considers that measures should be undertaken to facilitate reliance on other regulated entities such that the second regulated entity is released from the responsibility of duplicating the client due diligence that will already have been undertaken by another regulated entity.

94. For sole practitioners and practitioners in small and medium-sized firms who undertake conveyancing, we urge that there be alignment between standard or simplified AML/CTF customer due diligence obligations and the verification of identity standards applicable in electronic conveyancing, to include both a 'reasonable steps' measure as set out in the ARNECC Model Participation Rules and, critically, a safe harbour construction. The safe harbour is a very important element for smaller and less well-resourced practices to achieve compliance and remain able to provide services in the communities in which they practise.

Legal professional privilege, confidentiality and the lawyer-client relationship

95. The following questions have been posed in the consultation paper (Questions 26 to 28):

How can the Government ensure legal professional privilege is maintained while also ensuring the known money laundering and terrorism financing risks are appropriately addressed?

[55] Model Participation Rules Guidance Note 2, Verification of Identity https://www.arnecc.gov.au/wp-content/uploads/2021/08/mpr-guidance-note-2-verification-of-identity.pdf.
[56] Model Participation Rules Guidance Note 4, Right to deal https://www.arnecc.gov.au/wp-content/uploads/2021/08/mpr-guidance-note-4-right-to-deal.pdf.
[57] Model Participation Rules, rule 6.6.

Do you have a view about the approaches taken to preserve legal professional privilege in comparable common law countries, including the United Kingdom and New Zealand?

Are any of the six key AML/CTF obligations likely to particularly impact the relationship between a lawyer and their client?

Background: Three key requirements

96. Before we can answer these questions we must first define the critical obligations under the AML/CTF regime, namely:

    (a) the requirement to maintain an AML/CTF program;

    (b) the requirement (in certain circumstances) to make suspicious matter reports; and

    (c) becoming subject to the audit and information-gathering powers of AUSTRAC.

Implementation of an AML/CTF program

97. Section 81(1) of the AML/CTF Act sets out the obligation of a reporting entity to maintain an AML/CTF program. The purpose of identifying, mitigating and managing risks under Part A of a program is related to the obligation under s 36 of the AML/CTF Act for a reporting entity to monitor its customers. Chapter 8 of the Rules gives content to that obligation, by requiring Part A of a program to enable the reporting entity to understand (among other things) the nature of the business relationship with its customer types, to identify significant changes in money laundering and terrorism financing risk, and to include a requirement that, in determining an appropriate risk-based procedure for inclusion in Part B of a program, the reporting entity must have regard to the money laundering or terrorism financing risk relevant to the provision of the designated service.[58]

98. The 'applicable customer identification procedures' required under Part B of an AML/CTF program are set out in Ch 4 of the AML/CTF Rules. Those procedures require a reporting entity to identify the name, date of birth and residential address of the customer (if the customer is an individual who is not a sole trader), as well as the customer's business name, address of business and ABN (if the customer is a sole trader), and various company details including, for example, company name, registered-office address, and ACN (if the customer is a domestic company).[59]

99. The AML/CTF Rules require there be a procedure for verifying particular identification information, depending on the type of customer[60] and that the AML/CTF program include 'appropriate risk-based systems and controls' to determine whether further information about the customer should be collected and verified.[61]

100. A reporting entity is required to maintain records:

    (a) relating to the provision of a designated service to a customer for 7 years after the making of the record, unless an exemption under the AML/CTF Rules applies (such as for customer-specific documents and publicly-available statements);[62]

    (b) of the applicable customer identification procedure undertaken, and the information obtained in the course of carrying out that procedure for 7 years, from the date on which the reporting entity ceased providing any designated services to the customer;[63]

[58] AML/CTF Rules, rules 8.1.5 and 8.1.6.
[59] AML/CTF Rules, rules 4.2.3, 4.2.4 and 4.3.3.
[60] See AML/CTF Rules, r 4.2.6 for individuals and r 4.3.5 for domestic companies.
[61] See AML/CTF Rules, rr 4.2.5, 4.2.8 for individuals and rr 4.3.4, 4.3.6 for domestic companies.
[62] AML/CTF Act, s 107; AML/CTF Rules, rule 29.2.
[63] AML/CTF Act, ss 112, 113.

(c) of the adoption of its AML/CTF program for 7 years, ending after the day on which the adoption ceases to be in force.[64]

Suspicious matter reporting

101. Section 41 of the AML/CTF Act requires a reporting entity to provide AUSTRAC with a suspicious matter report (**SMR**) within 3 business days (or, in certain cases, 24 hours) if:

    (a) the reporting entity *commences or proposes to provide* a designated service to a person;

    (b) there is a *request* from the person to provide a service the reporting entity ordinarily provides; or

    (c) there is an *inquiry* from the person as to whether the reporting entity would be prepared to provide a service of a kind the reporting entity ordinarily provides;

    and the reporting entity suspects on reasonable grounds any of the matters set out in s 41(1)(d)-(j).

102. The matters set out in paragraphs (d)-(j) of s 41(1) are broad. They range from a suspicion that the person is 'not who they say they are' to a suspicion that the service proposed to be provided, requested or inquired of is 'preparatory' to the commission of a money laundering or terrorist financing offence. Under s 41(1)(f), a reporting obligation may arise if the reporting entity 'suspects on reasonable grounds that information that the reporting entity has concerning the provision, or prospective provision, of the service may either:

    (a) be relevant to an investigation of, or prosecution of, an offence as specified at s 41(1)(f)(i)-(iii); or

    (b) be of assistance in the enforcement of a law of the *Proceeds of Crime Act 2022* (Cth), regulations under that Act, or a corresponding state or territory law.

103. The formulation of s 41(1)(f), which provides that the reporting entity has information 'concerning the provision, or prospective provision, of the service' appears to contemplate information obtained in the course of providing a service. While the scope of this provision does not appear to have been considered by an Australian court, it would be strange if, given the breadth of s 41, information under s 41(1)(f) had to be limited to information concerning the precise service provided, rather than information which came to light in the course of providing that service.

104. Pursuant to Ch 18 of the AML/CTF Rules, a SMR must contain, among other things, a description of any designated service to which the suspicious matter relates, and a description of the reasonable grounds for the suspicion.[65]

105. Section 123 of the AML/CTF Act prohibits a reporting entity from disclosing that they have given an SMR or any information from which it could be reasonably inferred that the responsible entity has given, or is required to give, an SMR other than to an 'AUSTRAC entrusted person'. A responsible entity commits an offence by breaching s123 and is liable to imprisonment for 2 years.[66]

106. While s 124(1) of the AML/CTF Act provides that a SMR is not admissible in court or tribunal proceedings as evidence as to whether a SMR was prepared or given to AUSTRAC, or whether particular information was contained in a SMR, s 124(2) qualifies this, by providing that s 124(1) does not apply to proceedings for various specified criminal offences, or to proceedings in connection with a civil penalty order under s 175 of the AML/CTF Act.

[64] AML/CTF Act, s 117.
[65] AML/CTF Rules, rules 18.2(6) and (7).
[66] AML/CTF Act, s 123(11).

Auditing and information-gathering

107. AUSTRAC also has broad audit and information-gathering powers under the AML/CTF Act.

108. Under s 147, an authorised officer may enter a reporting entity's business at any reasonable time if the occupier has consented, or if entry is pursuant to a monitoring warrant. Upon entry, the officer may search the premises for compliance records, reports, or any other thing that may be relevant to the obligations of a reporting entity under the AML/CTF regime and inspect and copy documents relating to information provided under the AML/CTF regime.[67] An authorised person may also require a person to answer questions and produce any document relating to the operation of the AML/CTF regime.[68] If the authorised officer is entering pursuant to a monitoring warrant, failure to comply with s 150(2) is an offence, with an imprisonment term of 6 months.[69]

109. Under s 167, if an authorised person believes on reasonable grounds that a reporting entity has information or a document relevant to the operation of the AML/CTF regime, the officer may issue a notice requiring the reporting entity to provide any such information or documentation. The officer may inspect and make and retain copies of any documentation provided in response to a notice.[70] Non-compliance with a notice is an offence, with an imprisonment term of 6 months.[71]

Risk of disclosure of privileged communications

110. Legal professional privilege is a rule of substantive law which protects confidential communications between a lawyer and client made for the dominant purpose of the lawyer providing legal advice or legal services, or for use in actual or reasonably anticipated legal proceedings.[72]

111. If the definition of a reporting entity is expanded to include legal practitioners engaging in the proposed designated activities, legal practitioners will become subject to the obligations required as part of the implementation of an AML/CTF program (the **Preventative Measures**), SMR reporting obligations (**SMR Obligation**), and audit and information-gathering powers of AUSTRAC under the AML/CTF regime. These obligations and powers all pose concerns for the maintenance of legal professional privilege.

The Preventative Measures

112. While the Preventative Measures do not necessarily entail the communication of privileged materials, if extended to legal practitioners they will require a legal practitioner to keep records of information relating to the provision of a designated service for a period of 7 years. The obligation to keep records in s 107 of the AML/CTF Act is broadly expressed. It arguably includes privileged communications between a legal practitioner and their client, if those communications relate to the provision of any designated service by the legal practitioner.

113. In light of the broad audit and information-gathering powers of AUSTRAC, by which an officer may request any documentation 'relevant to the operation of the Act', there is a risk that a legal practitioner may be required to disclose records containing privileged information.

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[67] AML/CTF Act, s 148.
[68] AML/CTF Act, ss 150(1)-(2).
[69] AML/CTF Act, s 150(3).
[70] AML/CTF Act, s 170.
[71] AML/CTF Act, s 167(3).
[72] *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67 (**Esso**); see also *Evidence Act 1995* (Cth), ss 118-119.

SMR Obligation

114. The second risk to the disclosure of privileged materials arises from a reporting entity's obligations to issue an SMR in a broad range of circumstances. As noted above, the reporting obligation in s 41 may apply where a reporting entity has not yet commenced providing a designated service to a person, and may arise even if the reporting entity does not yet have a reasonable ground to suspect that the service is preliminary to, or may be relevant to, an investigation into a relevant offence. That is because a mere suspicion that a person has provided incorrect identity information is sufficient to trigger the reporting obligation.

115. As noted above in paragraph [103], the reporting obligation also appears to apply to information obtained *in the course* of providing a service.

116. A SMR must contain (among other things) a description of any designated service to which the suspicious matter relates, and a description of the reasonable grounds for the suspicion, both of which are likely to require the disclosure of privileged communications.

117. While s 124(1) of the AML/CTF Act provides some protection, by providing that a SMR is not admissible before a court or tribunal as evidence as to whether, among other things, particular information was contained in a SMR, this is subject to exceptions for proceedings relating to various criminal offences and civil penalty orders under the AML/CTF Act, and does not detract from the fact that s 41(2) would still require disclosure of privileged communications.

Audit and information-gathering

118. Finally, the audit and information-gathering powers of AUSTRAC pose a significant risk to the disclosure of privileged material. Beyond the disclosure of records referred to above in paragraph [113], the power of an officer to request any information or documentation relevant to the AML/CTF regime is exceptionally broad and would capture any legal advice provided in connection with the provision of a service regulated by the AML/CTF Act.

119. Without adequate protections, the features of the AML/CTF regime outlined above give rise to a significant incursion into a client's right to have a candid exchange with their legal representative.[73]

120. While s 242 of the AML/CTF Act provides that the Act 'does not affect the law relating to legal professional privilege', without further protections, that section is inadequate. As noted in our submission to the Senate Inquiry,[74] s 242 of the Act merely states that the substantive law with respect to legal professional privilege is not affected by the Act. That is not the same thing as providing that a reporting entity is exempt from its obligations to report suspicious matters or provide information or documents in circumstances where legal professional privilege would be disclosed. The effect of this is that legal practitioners subject to the AML/CTF regime will be subject to two irreconcilable obligations. The first of these is an obligation not to waive the protections afforded to a client in respect of privileged communications. The second is an obligation to comply with the broad reporting and information-gathering provisions of the AML/CTF Act, which could entail the disclosure of privileged communications.

121. The intended consequence of the AML/CTF regime is that it requires legal practitioners to report on the activities of their clients if the conditions in section 41(1) are satisfied. There is a distinction between this, and privilege not applying where the communication is to

[73] *Esso* at [111].
[74] Law Council of Australia, Submission, Senate Legal and Constitutional Affairs References Committee *Inquiry into the Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime* Document No 30 (15 September 2021) at [87] available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AUSTRAC/Submissions (accessed 10 June 2023).

facilitate the commission of a crime or fraud.[75] The AML/CTF regime requires disclosure in a broad range of circumstances, upon satisfaction of exceptionally low thresholds. The communications need not be in 'furtherance' of a crime or fraud. They must simply give rise to any one of a number of suspicions, which may or may not involve criminality.

122. That includes where there is a suspicion that a client or a potential client is not who they claim to be. One can imagine circumstances in practice where such a suspicion might arise because an individual has different names on different forms of identification. While this may be an indication of money laundering, it does not necessarily signify money laundering. There may be no criminality and yet the reporting obligation under s 41 would be triggered.

123. Similarly, a reporting obligation under s 41 is triggered where the reporting entity suspects that it has information concerning the provision of a service that may be relevant to the investigation of an offence. Section 41 therefore appears to apply to offences which have not yet occurred. It appears to apply even if the information does not concern the conduct of the reporting entity's client.

124. The reporting obligation under s 41 of the AML/CTF may also arise if a legal practitioner is advising a client on the criminality of conduct if the advice relates to a proposed designated activity. If a client were to seek advice in relation to a real estate scheme which would constitute fraud if carried out, it is arguable that even if the scheme has not been, and is not ultimately, carried out, at the point in time that the client proposes the scheme, the legal practitioner has information which 'may' be relevant to the investigation of that person for an offence.

125. The legislation, as currently drafted, would present a significant abrogation of legal professional privilege.

Ways in which legal professional privilege may be protected

126. To better identify protections for legal professional privilege, the consultation paper invites a comparative analysis particularly with the statutory anti-money laundering and counter terrorism financing regimes in place in New Zealand and the United Kingdom.

New Zealand

127. In New Zealand, the relevant legislation is the *Anti-Money Laundering and Countering Financing of Terrorism Act 2009* (**AML/CFT Act (NZ)**). The legislation applies to legal practitioners in respect of activities which broadly align with the proposed designated activities.

128. Under the AML/CFT Act (NZ), a reporting entity is required to:

(a) establish, implement and maintain a compliance programme including procedures, polices and controls to detect and manage and mitigate the risk of money laundering and financing of terrorism;[76]

(b) conduct a risk assessment before conducting any customer due diligence or establishing a programme under s56;[77]

(c) conduct customer due diligence if the reporting entity establishes a business relationship with a new customer, if the customer seeks to conduct an occasional transaction or activity through the reporting entity, or if there is a material change in information, or insufficient information in respect of an existing customer.[78] The obligation to conduct customer due diligence and monitor transactions to ensure

[75] *Baker v Campbell* (1983) 153 CLR 52; see also *Evidence Act 1995* (Cth), s 125(1).
[76] AML/CFT Act (NZ), s 56.
[77] AML/CFT Act (NZ), s 58.
[78] AML/CFT Act (NZ), ss 11, 14.

that they are consistent with the reporting entity's knowledge about a customer is an ongoing one;[79]

(d) keep records that are reasonably necessary to enable the transaction to be 'readily reconstructed' at any time, and keep records of suspicious activity reports, identification and verification, and other records relevant to the establishment of a business relationship and relating to risk assessments, for at least 5 years after the completion of the transaction, making of a report, business relationship or regular use of the records (as the case may be);[80] and

(e) where the reporting entity has reasonable grounds to suspect a transaction or proposed transaction is or may be relevant to investigation or prosecution of any person for a money laundering offence (among other things), no later than 3 working days after forming suspicion, report that activity.[81] Section 40(4) provides that this reporting obligation does not require any person to disclose information that the person believes on reasonable grounds is a privileged communication.

129. Further, while failure to report a suspicious activity under s 40 is an offence under s 92(1) of the Act, s 92(2) provides that '[i]t is a defence to a prosecution under this section if a reporting entity believes on reasonable grounds that the documents or information relating to the activity were privileged communications'.

130. A 'privileged communication' is defined in s 42 as:

(a) a confidential communication, passing between two lawyers, a lawyer and his or her client, or their agents, made for the purpose of obtaining or giving legal advice;

(b) a communication subject to the general law governing legal professional privilege; or

(c) a communication in specified sections of the Evidence Act.[82]

However, a communication is not privileged if, among other things, there is a *prima facie* case the communication was made for a dishonest purpose or to enable or aid the commission of an offence.[83]

131. Information-gathering powers are set out at sections 132, 133, and 143 of the Act, and include the powers to:

(a) on notice, require the production of all records, documents and information relevant to the supervision and monitoring of reporting entities;[84]

(b) at any reasonable time, enter a place for the purpose of conducting an on-site inspection of the reporting entity, and require the reporting entity or an employee to answer questions and provide any information reasonable required;[85]

(c) order production of or access to records, documents and information from the reporting entity that is relevant to analysing information received by the Commissioner under the Act (with or without court order).[86]

132. Each of the above sections provides that nothing in those sections requires any person to disclose any privileged communication. Where a person refuses to disclose information under these sections on the grounds that it is privileged, s 159A provides that that person,

[79] AML/CFT Act (NZ), s 31(2).
[80] AML/CFT Act (NZ), ss 49, 49A, 50, 51.
[81] AML/CFT Act (NZ), ss 39A, 40.
[82] AML/CFT Act (NZ), s 42(1).
[83] AML/CFT Act (NZ), s 42(2).
[84] AML/CFT Act (NZ), s 132(2)(a).
[85] AML/CFT Act (NZ), s 133.
[86] AML/CFT Act (NZ), s 143.

the Commissioner, or an AML/CTF supervisor may apply to a District Court judge for an order determining whether the privilege claim is valid.

133. There is a further information-gathering power under s 118 of the Act, where a search warrant is issued under s 117. That power authorises an enforcement officer to search a place for evidential material, inspect and copy any document, and require the occupier of the place to answer any questions. The Act does not provide any protection for privileged communications in such circumstances.

134. To ensure the protection of privileged communications in all circumstances where a risk of disclosure arises, the Australian regime, if extended to apply to legal practitioners carrying out the proposed designated activities, should extend the protection of legal professional privilege to circumstances where a search is conducted under a warrant.

135. In summary, in order to protect legal professional privilege, the AML/CTF Act would need to be drafted so as to provide for specific exceptions to the reporting requirements of legal practitioners and the audit and information-gathering powers of AUSTRAC. Using the New Zealand regime as guidance, legal professional privilege could be protected under the AML/CTF Act by:

    (a) incorporating a definition for 'privileged communications' which aligns with the common law right of legal professional privilege, and legal professional privilege as defined in the *Evidence Act 1995* (Cth);

    (b) making the reporting obligation in s 41 subject to an exception that a legal practitioner is not required to disclose any information that the practitioner believes, on reasonable grounds, is a privileged communication;

    (c) providing that it is a defence to prosecution under s 123(11) if a practitioner believes, on reasonable grounds, that information or documents relating to a 'suspicious matter' were privileged communications; and

    (d) providing that a legal practitioner is not required to disclose any privileged communication in respect of AUSTRAC's information-gathering powers under ss 148, 167 and 170.

136. In addition to the above, statutory protections for legal professional privilege would be required in the context of AUSTRAC's information-gathering and auditing functions, including in circumstances where a monitoring warrant is issued, similar to those that apply in the United Kingdom such that, specifically:

    (a) a person may not be required to produce information or documents or answer a question which that person would be entitled to refuse on the grounds of legal professional privilege; and

    (b) a statutory provision would apply to ensure that 'a warrant does not confer a right to seize privileged material'.

    While these would go some way in protecting privileged information, as discussed below these measures nevertheless arguably fail to adequately protect privilege in circumstances where a legal practitioner is subject to a search under regs 69 or 70 and has not been provided with notice of the materials seized.

United Kingdom

137. The anti-money laundering regime in the United Kingdom comprises the *Proceeds of Crime Act 2002* (UK) (**Proceeds of Crime Act**), the *Terrorism Act 2000* (UK) (**Terrorism Act**) and the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (UK) (**Regulations**).

138. The Regulations provide that obligations concerning customer due diligence, record keeping and investigation apply to 'relevant persons', which includes 'independent legal professionals'.[87] 'Independent legal professionals' is defined as 'a firm or sole practitioner who provides legal or notarial services to other persons' when participating in various financial or real property transactions.[88] Those transactions broadly mirror the proposed designated activities. There is an exception where a 'relevant person' under reg 8 engages in such an activity 'on an occasional or very limited basis', but a number of conditions need to be satisfied for the exception to apply, such that its practical operation is exceptionally narrow.[89]

139. Under the Regulations, a 'relevant person' is required to:

    (a) take appropriate steps to identify and assess the risk of money laundering or terrorism financing to which its business is subject, taking into account the information available and the size and nature of its business;[90]

    (b) keep up-to-date records of any steps taken to assess risk, and provide a risk assessment to the relevant supervisory authority on request;[91]

    (c) apply customer due diligence measures (including verification of identity) if they establish a business relationship with a customer, suspect money laundering or terrorist financing, or doubt the veracity of documentation or information obtained for identification or verification purposes;[92] and

    (d) keep records of customer due diligence, and supporting records in respect of a transaction (to enable the transaction to be reconstructed) for 5 years beginning on the date on which the relevant person knows or has reasonable grounds to believe that the transaction is complete or the business relationship has come to an end (subject to certain exceptions).[93]

140. Privilege is protected in relation to information-gathering, and suspicious activity reporting.

141. The Regulations provide for three main means by which information may be gathered:

    (a) First, a 'supervisory authority' may require a person who is or was a relevant person, by notice in writing, to provide specified information and documents. That includes a power to require the person to provide a copy of any suspicious activity disclosure made under the Proceeds of Crime Act or the Terrorism Act.[94]

    (b) Second, a duly authorised officer may at any reasonable time, enter the premises of a relevant person and take copies of documents found, if the officer has reasonable grounds to believe that the relevant person may have contravened the Regulations.[95]

    (c) Third, a justice may issue a warrant if satisfied that there are reasonable grounds for believing that, among other things, a relevant person has failed to comply with a notice under reg 66, in which case the executing officer may enter and search the premises, take copies of documents or information and require any person to provide an explanation of any relevant document or information.[96]

[87] Regulations, reg 8(2)(d).
[88] Regulations, reg 12(1).
[89] Regulations, reg 15(2)-(3).
[90] Regulations, reg 18(1)-(3).
[91] Regulations, regs 18(4), 18(6).
[92] Regulations, regs 27, 28.
[93] Regulations, regs 40(2)-(3).
[94] Regulations, regs 66(1), (1A).
[95] Regulations, reg 69.
[96] Regulations, reg 70.

142. Regulation 72 provides that, with respect to each of these powers, a relevant person may not be required to 'provide information, produce documents or answer questions which that person would be entitled to refuse to provide, produce or answer on grounds of legal professional proceedings in proceedings in the High Court', and that a warrant under reg 70 does not confer the right to seize such material.[97] It is submitted that the inclusion of similar provisions in respect of an authorised officer's powers under s 148 of the AML/CTF Act would afford some degree of protection where a practitioner is subject to a search by consent or by warrant under s 147.

143. However, there are still challenges to the practical application of these protections. The most significant of these is that a search may be conducted (for example, if by warrant) without providing notice to the legal practitioner. In that case, a legal practitioner may not have an opportunity to identify which materials may be subject to legal professional privilege so as to know which information or documentation he or she is entitled to refuse to provide. In circumstances where the legal practitioner commits an offence under s 150(3) of the AML/CTF Act for failure to comply with a request made under a monitoring warrant, there is a risk that legal practitioners will not stand in the way of the seizure of privileged materials, thereby undermining any protection provided for.

144. One way of addressing this would be for the AML/CTF Act to provide for a mechanism which deals specifically with searches under warrants, whereby:

    (a) all documentation seized pursuant to a search power under a monitoring warrant is 'sealed';

    (b) a legal practitioner is given a reasonable opportunity to review the seized material in order to determine whether to make a claim of legal professional privilege;

    (c) any material subject to a claim of privilege is provided to a court for determination of whether the material is in fact privileged; and

    (d) no copies or examination of that material is permitted prior to the court making that determination.

145. While there is no positive obligation to report suspicious activity under the regime in the United Kingdom, it is an offence under s 330 of the Proceeds of Crime Act if:

    (a) a person knows or suspects or has reasonable grounds to know or suspect that another is engaged in money laundering;

    (b) the information on which that knowledge or suspicion is based came to the person in the course of business; and

    (c) the person can identify the other person, and does not disclose the information on which his knowledge or suspicion is based.[98]

146. However, s 330(6) provides that a person does not commit an offence if the person has a reasonable excuse for not making the required disclosure, or if the person is a professional legal adviser and the information giving rise to the knowledge or suspicion information came to him in privileged circumstances.[99]

147. The definition of legal professional privilege under common law is not expressly incorporated into the meaning of 'privileged circumstances'. 'Privileged circumstances' is defined at s 330(10)-(11) of the Proceeds of Crime Act as a communication by a client in connection with the giving of legal advice, by a person seeking legal advice from the legal adviser, or by a person in connection with legal proceedings or contemplated legal

[97] The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (UK), regs 72(1) and (4).
[98] A similar offence exists under s 21A of the Terrorism Act.
[99] See also s 21A(5) of the Terrorism Act.

proceedings, but does not apply to communications made with the intention of furthering a criminal purpose.[100] It therefore appears that there may be circumstances in which a legal adviser has received information which is subject to legal professional privilege under the common law, but does not fall within the definition of 'privileged circumstances,' under the Proceeds of Crime Act, such as where a lawyer representing one client, holds information that is privileged as between another client and their lawyer, subject to a contractual provision that legal professional privilege is not waived.[101]

148. Arguably, the application of two standards of protection for privileged communications under the United Kingdom's anti-money laundering regime creates uncertainty as to the circumstances in which practitioners may be entitled to maintain a claim of privilege. Any protections included in the Australian regime should also be expressly framed to include legal professional privilege as it applies at common law, and under the Evidence Act, to avoid such uncertainty. This is the approach that has been adopted in New Zealand.

149. To provide protections for legal professional privilege under the AML/CTF regime would not undermine the regime, though it would limit its application. The fact that the United Kingdom and New Zealand have extended legislation to legal practitioners, while safeguarding legal professional privilege, speaks to this. Further, as noted above in paragraph [121], a communication will not be subject to a claim of legal professional privilege where the communication is to facilitate the commission of a crime or fraud. In such circumstances, a legal practitioner would be required to disclose the relevant communications, notwithstanding that they were made in the context of legal advice or legal proceedings.

150. Moreover, the Interpretative Note to FATF Recommendation 23 provides for this very exception, stating that:

> Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.[102]

151. Finally, such an approach is consistent with other statutory regimes. Under s 353–10 of the *Taxation Administration Act 1953* (Cth), the Commissioner of Taxation may by notice require a person to produce information, documentation or give evidence to the Commissioner. Under section 353–15, the Commissioner may enter premises and access, inspect and make copies of documents. An occupier's failure to provide assistance to the Commissioner is an offence. However, the Commissioner cannot compel an individual to provide information or documentation where the underlying communication is privileged.[103]

152. Similarly, under the *Independent Commission Against Corruption Act 1988* (NSW), the Commission shall 'set aside' a requirement to produce a statement of information, any document or other thing, and shall not exercise a power of entry, inspection and copying if it appears to a Commissioner that 'any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist' the requirement to produce, or inspect, and it does not appear to the Commissioner that the person consents to the production or inspection.[104]

153. Under Victoria's anti-corruption legislation, where a claim of privilege is made in relation to a request for a document or thing, IBAC must consider the claim without inspecting the document or thing, and, if it does not withdraw the production requirement, must apply to

[100] See also s 21A(8)-(9) of the Terrorism Act.
[101] Legal Sector Affinity Group (UK), Anti-Money Laundering Guidance for the Legal Sector, chapter 13, 'Legal Professional Privilege', p 163.
[102] FATF, *FATF Recommendations* (June 2021), p 90.
[103] Australian Government, Australian Taxation Office, Legal Professional Privilege Protocol, June 2022 at [7].
[104] *Independent Commission Against Corruption Act 1988* (NSW), ss 24(2), 25(2).

the Supreme Court of Victoria for determination of the privilege claim.[105] Where a search warrant has been executed and a claim of privilege is made, the searcher must cease exercising the search warrant in respect of the relevant document and require the material to be sealed, for delivery to, and determination by, the Supreme Court of Victoria.[106]

Implications for the duty of confidentiality

154. As we noted in our submission to the Senate Inquiry:[107]

(a) The duty of confidentiality is broader than the doctrine of legal professional privilege. Under s 117 of the *Evidence Act 1995* (Cth), a confidential communication is a communication made in such circumstances that, when it was made, the 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.

(b) While legal practitioners are subject to duties not to disclose information which is confidential to a client and acquired during the client's engagement,[108] there are a number of exceptions to this duty—most significantly, a legal practitioner may disclose confidential information if they are compelled by law to do so.[109]

155. For the reasons given above at [112]–[125], there is a risk that in complying with the reporting and disclosure obligations under the AML/CTF Act and AML/CTF Rules, a legal practitioner may be required to disclose confidential information. There is no protection in the AML/CTF Act or AML/CTF Rules, as presently drafted, which exempts reporting entities from providing information or documentation on the basis that such information is confidential.

156. In light of the exception to the duty of confidentiality which arises where a legal practitioner is compelled to disclose confidential information by law, the consideration of a duty of confidentiality differs from consideration of legal professional privilege; if the AML/CTF Act did not include protections for confidential information, the legal practitioner would not be acting in breach of their duty of confidentiality.

157. That is not to say that the disclosure of confidential information will have no implications on the duty of confidentiality.

158. Where confidential information is disclosed pursuant to the AML/CTF Act or AML/CTF Rules, it will lose its quality of 'confidentiality' and will therefore not be able to be the subject of a claim for legal professional privilege in the future. That is because in order for a communication to be privileged, it must be confidential.[110]

159. In circumstances where disclosure of information may be required for suspicious matter reporting under s 41 *prior* to a legal practitioner having even been retained to provide a designated service, or at *very early* stages of any retainer, there is a risk that the legal practitioner is not yet aware of the dominant purpose of the client's, or potential client's communication, and may not be in a position to assess whether the communication is subject to a claim for legal professional privilege. Given s 123 of the AML/CTF Act prohibits a reporting entity from disclosing to a customer that they have given a SMR, or disclosing any information from which it could be reasonably inferred that the responsible

[105] *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic) (**IBAC Act**), ss 59L, 59M.
[106] *IBAC Act*, ss 97, 100, 101.
[107] LCA, Submission, Senate Inquiry (15 September 2021) at [98]-[100].
[108] For example, the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW), rule 9.1; Legal Profession Uniform Conduct (Barristers) Rules 2015, rules 114, 115.
[109] Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW), rule 9.2.2; Legal Profession Uniform Conduct (Barristers) Rules 2015, rules 114, 115.

[110] *Esso* at [35]; *Evidence Act 1995* (Cth), ss 118, 119.

entity has given, or is required to give, a SMR (other than in very limited circumstances), seeking further clarity with a potential client as to the nature of any communications made for the purpose of assessing the privileged status of a communication may give rise to a risk of tipping off.

160. The inclusion of a protection, drafted in similar terms to s 114(5) of the *National Anti-Corruption Commission Act 2022* (Cth), providing that the fact that a person is not excused from making a disclosure does not otherwise affect a claim of legal professional privilege that anyone may make in relation to that disclosed material, may go some way in addressing this concern.

161. The record-keeping obligations imposed on reporting entities under the AML/CTF regime may also give rise to an increased risk that confidential information is leaked in a data breach.

162. Finally, the protection of confidentiality is not inconsistent with the FATF Recommendations. As noted in paragraph [150], the Interpretative Note to FATF Recommendation 23 provides for an exception to reporting of suspicious transactions where the relevant information was obtained in circumstances subject to professional secrecy.

Implications for the legal practitioner-client relationship of the Preventative Measures and the SMR Obligation

163. The hallmark of the practitioner-client relationship, and indeed, the administration of justice, is that a client can make full and frank disclosure to their lawyers.[111] This concept underpins the protection afforded to communications between legal practitioners and their clients by way of legal professional privilege.[112]

164. If the AML/CTF regime is extended to legal practitioners providing certain designated services, without affording adequate protections for legal professional privilege and confidentiality, this will impact the practitioner-client relationship in three ways.

165. First, as noted above in paragraphs [112]–[125] and [155], the regime creates a tension between the rights of a client to maintain privilege over communications with a practitioner made for the dominant purpose of seeking legal advice, the duty of confidentiality a practitioner owes to their client, and the obligation of a practitioner to disclose such information to a regulatory body, or otherwise be subject to civil or, in certain cases, criminal, penalties. Without protections contained in the AML/CTF regime to resolve that tension, the conflicting nature of those duties make the practitioner-client relationship untenable. While the AML/CTF regime does not require a reporting entity the subject of a SMR Obligation to cease acting for their client, there is a question as to whether, in light of this tension, a legal practitioner can properly act in interests of their client.

166. Second, as a matter of perception, the regime is likely to undermine the confidence that clients have in legal practitioners. In holding that the extension of Canada's Proceeds of Crime legislation (*Proceeds of Crime (Money Laundering) and Terrorist Financing Act* S.C. 2000, c. 17 to legal practitioners was unconstitutional, the Supreme Court of Canada in *Attorney-General of Canada v Federation of Law Societies of Canada* [2015] SCC 7; RCS 401, considered the impact that the legislation would have on the independence of the bar. Cromwell J (LeBel, Abella, Karakatsanis and Wagner JJ, agreeing) accepted the submission made by the Federation of Law Societies of Canada, that the mandatory record-keeping and disclosure obligations imposed on legal practitioners would require

[111] As submitted to the Senate Inquiry: LCA, Submission (15 September 2021) at [80]-[82], citing *Grant v Downs* (1976) 135 CLR 674; [1976] HCA 63.
[112] *Esso* at [111].

legal practitioners to 'act as a government repository' and thereby undermine the practitioner's duty of commitment to his or her client's cause.[113]

167. Third, as a result of that change in perception, as a matter of *practical operation*, clients with matters that fall within the scope of the AML/CTF regime may be reluctant to seek legal advice from, or disclose all relevant facts to, legal practitioners. This would significantly undermine the administration of justice, by affecting access to legal advice and representation.

168. Of critical concern is the fact that the matters that would be covered by the AML/CTF regime under the proposed designated activities are complex—they concern activities relating to interests in real estate and personal property, and the creation and structuring of companies and businesses. All of those activities are heavily regulated by law. Foreseeable consequences of failing to obtain legal advice, or failing to provide relevant information, in connection with such activities are:

    (a) non-compliance with the legal requirements governing such transactions, which may affect the validity or performance of the relevant transaction, and give rise to disputes between the parties—for example, a failure to provide all material information in the context of the purchase of real property may cause delays such that property settlement does not occur within the time stipulated by the contract; and

    (b) allegations of negligence, or breaches of duty, in connection with the entry into various transactions—for example, claims brought by beneficiaries for breach of trust.

169. While not all services provided by legal practitioners will fall within the scope of the proposed designated activities, these are nonetheless sufficiently broad to capture a significant proportion of work carried out by the legal profession. In this way, the impacts noted above are likely to be wide-reaching.

The 'six key obligations' and their impact on the legal practitioner-client relationship

170. Legal practitioners are already subject to extensive regulation:

    (a) As noted in paragraph [88], solicitors are subject to reporting obligations for 'significant cash transactions' (involving an amount of at least AUD$10,000, or its equivalent) under the *Financial Transaction Reports Act 1988* (Cth).[114]

    (b) Legal practitioners are subject to stringent requirements to conduct due diligence (including verification of identity) and keep records with respect to real property settlements.[115]

    (c) For jurisdictions applying the Uniform Law, the relevant local designated authority has the power to conduct an audit of the compliance of a law practice if the authority considers there are reasonable grounds to do so based on the conduct of the practice or a complaint against the practice, and an investigator may, by notice, require a lawyer to produce specified documents, information or otherwise assist in the investigation of the complaint.[116]

    (d) While not limited in application to legal practitioners, the Schedule to the Criminal Code Act 1995 (Cth) (the **Criminal Code**) criminalises dealing with proceeds of crime or financing terrorism.[117]

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[113] *Attorney-General of Canada v Federation of Law Societies of Canada* [2015] SCC 7; RCS 401, 433 [75], 435-7[80]-[84], 441-443 [97]-[103].
[114] *Financial Transaction Reports Act 1988* (Cth), s 15A.
[115] As discussed in paragraphs [86] to [92].
[116] See, for example, Legal Profession Uniform Law 2014 (NSW), s 256.
[117] Criminal Code, Chapter 5, Part 5.3 and Chapter 10, Part 10.2.

171. Considered in isolation, five of the 'six key obligations' namely the requirements of customer due diligence, ongoing customer due diligence, developing and maintaining an AML/CTF Program, record keeping, and enrolment and registration with AUSTRAC are unlikely to significantly impact on the relationship between a legal practitioner and their client. However, when these obligations are considered together with the additional reporting obligations under the AML/CTF regime, there is likely to be an adverse impact on the relationship between a legal practitioner and their client, for the reasons set out in paragraphs [163] to [169], above. Indeed, it is considered that the extension of the AML/CTF regime to legal practitioners for the proposed designated services would present significant risks to the maintenance of legal professional privilege and confidentiality. Those risks are likely to erode the relationship between a legal practitioner and its client by affecting the perception of legal practitioners as independent advisers, and, as a result, the willingness of individuals and companies to seek legal advice, thereby undermining the administration of justice.

172. While protections can be incorporated into the AML/CTF regime to ensure that these risks do not materialise (and to the extent the regime is extended, should be incorporated into the AML/CTF regime), the Law Council considers that there is a serious question about the work the extended regime would do in circumstances where AUSTRAC's information-gathering powers are significantly curtailed by those protections. The AML/CTF regime is a regime designed to bestow wide reporting obligations, and information-gathering powers, on AUSTRAC. If the protections necessary to protect legal professional privilege, confidentiality and the legal practitioner–client relationship are incorporated into that regime, the regime, as intended to operate, will have limited application.

173. The Law Council is committed to taking risk-based, proportionate action to effectively mitigate the risks of money laundering and terrorism financing. We anticipate that the augmentation of existing regulatory obligations (as outlined during the consultation process and in this submission) will be an important element of the profession's armoury in guarding against the risk of money laundering and terrorism financing. The vulnerabilities analysis of the national legal profession will inform this work, and the results of that analysis are expected to provide a solid foundation for risk-based augmentation and our ongoing discussions with the Department.

Advice on Proposed reforms to the AML/CTF Regime

A. Advice sought

1. We are asked to advise on the implications for legal professional privilege, confidentiality, and the legal practitioner-client relationship of foreshadowed amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**).
2. In particular, we are asked to address the following questions:
   (a) To what extent (if at all) could legal professional privilege be protected within an AML/CTF statutory regime that introduces the Preventative Measures and the SMR Obligation binding on part of the profession?
   (b) What are the implications for legal practitioners' duty of confidentiality of the foreshadowed Preventative Measures and the SMR Obligation, should they be imposed on part of the legal profession?
   (c) What are the potential implications for the legal practitioner-client relationship of the Preventative Measures and the SMR Obligation if imposed upon part of the profession?
   (d) How can the Government ensure legal professional privilege is maintained while also ensuring the known money laundering and terrorism financing risks are appropriately addressed?
   (e) What is Counsel's view as to the approaches taken to 'preserve legal professional privilege' in comparable common law countries, including the United Kingdom, New Zealand and Canada?
   (f) Are any of the six key AML/CTF obligations, if imposed upon part of the legal profession, likely to have an impact upon the relationship between a legal practitioner and their client? If so, what is the nature and significance of this potential impact?
3. Our responses to each of these questions are set out below.

B. Background

Recommendation of the Financial Action Task Force

4. The Financial Action Task Force (**FATF**) is the global money laundering and terrorist financing watchdog, which sets international standards aimed at preventing money laundering and terrorist financing. Australia is a member of the FATF and is considered a founding member.[1]
5. In 1990, the FATF drafted recommendations for the purpose of providing a framework of measures to combat money laundering and terrorist financing (**FATF Recommendations**).[2] The FATF Recommendations have been revised from time to time, but in their present form, encourage countries to implement measures, including:

[1] The Hon Mark Dreyfus KC MP, Media Release, 'Consultation on major reform of Australia's anti-money laundering and counter-terrorism financing laws', 20 April 2023.
[2] FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, updated February 2023 (**FATF Recommendations**), 7.

(a) the designation of an authority to assess risks associated with money laundering and terrorist financing;
(b) the implementation of legislation criminalising money laundering and terrorist financing;
(c) requiring certain institutions and professions to undertake customer due diligence, keep and maintain records of customer transactions, implement programmes against money laundering and terrorist financing and report suspicious transactions; and
(d) regulating and supervising the implementation of the FATF Recommendations.

6. FATF Recommendations 22 and 23 extend the obligations of due diligence, record-keeping, programme-implementation and suspicious transaction reporting to 'designated non-financial businesses and professions', including:
   (a) to lawyers, notaries and other independent legal professionals when they prepare for or carry out transactions concerning the following activities:
      i. buying and selling of real estate;
      ii. management of client money, securities or other assets;
      iii. management of bank, savings or securities accounts;
      iv. organisation of contributions for the creation, operation or management of companies; or
      v. creation, operation or management of legal persons or arrangements, and buying and selling of business entities; and
   (b) to trust and company service providers when they prepare for or carry out transactions for a client concerning the following activities:
      i. acting as a formation agent of legal persons;
      ii. acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;
      iii. providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;
      iv. acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement;
      v. acting as (or arranging for another person to act as) a nominee shareholder for another person.

   The activities at (a) and (b) above are referred to in this advice as the **Proposed Activities**.
7. FATF Recommendation 28 provides that 'designated non-financial businesses and professions' should be subject to 'effective systems for monitoring and ensuring compliance with AML/CTF requirements'.

Australia's AML/CTF regime

8. The AML/CTF Act received assent on 12 December 2006 and was introduced in order to implement the FATF framework in Australia.[3] The AML/CTF Act, together with the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No 1) (Cth) (**AML/CTF Rules**), comprise Australia's AML/CTF regime.
9. The legislative regime does not yet cover lawyers and other 'non-financial businesses and professions'.
10. In its Consultation Paper,[4] the Attorney-General's Department proposed to reform Australia's AML/CTF regime to cover legal, accounting, conveyancing and trust/company services when those services prepare or carry out transactions for clients relating to the Proposed Activities.[5] Under the proposed reforms, such service-providers would become 'reporting entities' under the AML/CTF regime. The Consultation Paper proposes to exclude representing a client in litigation from the scope of services covered by the extended regime.
11. The requirements that reporting entities are subject to under the current AML/CTF regime are summarised below.

(a) Implementation of an AML/CTF Program ('Preventative Measures')

12. The obligation of a 'reporting entity' to maintain an AML/CTF program is set out in s 81(1) of the AML/CTF Act, which provides:

> A reporting entity must not commence to provide a designated service to a customer if the reporting entity:
> (a) has not adopted; and
> (b) does not maintain;
> an anti-money laundering and counter-terrorism financing program that applies to the reporting entity.

13. A standard program for the purposes of s 81(1) comprises two parts. The primary purpose of 'Part A' of the program is to identify, mitigate and manage the risk the reporting entity may reasonably face that the provision by the reporting entity of designated services might involve or facilitate money laundering or financing of terrorism, while the primary purpose of 'Part B' of the program is to set out the applicable customer identification procedures for the purposes of the application of the AML/CTF Act to customers of the reporting entity: s 84.
14. While there are proposals to reform the AML/CTF Act by streamlining Part A and Part B into a single requirement,[6] this advice proceeds on the basis that the substance of the requirements under Part A and Part B will remain largely unchanged.
15. The purpose of identifying, mitigating and managing risks under Part A of a program is related to the obligation under s 36 of the AML/CTF for a reporting entity to 'monitor' its customers.

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[3] Second Reading Speech, Attorney-General Philip Ruddock MP, House of Representatives, *Parliamentary Debates* (1 November 2006), 1.
[4] Attorney-General's Department Consultation Paper, 'Modernising Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime', April 2023 (**Consultation Paper**).
[5] Consultation paper, 22.
[6] Consultation Paper, 7.

Chapter 8 of the Rules gives content to that obligation, by requiring Part A of a program to enable the reporting entity to understand (among other things) the nature of the business relationship with its customer types, to identify significant changes in money laundering and terrorism financing risk, and to include a requirement that, in determining an appropriate risk-based procedure for inclusion in Part B of a program, the reporting entity must have regard to the money laundering or terrorism financing risk relevant to the provision of the designated service: rr 8.1.5, 8.1.6.

16. The 'applicable customer identification procedures' required under Part B of an AML/CTF program are set out in Chapter 4 of the AML/CTF Rules. Those procedures require a reporting entity to identify the name, date of birth and residential address of the customer (if the customer is an individual who is not a sole trader), as well as the customer's business name, address of business and ABN (if the customer is a sole trader), and various company details including, for example, company name, registered-office address, and ACN (if the customer is a domestic company): rr 4.2.3, 4.2.4; 4.3.3.
17. The AML/CTF Rules require there be a procedure for verifying particular identification information, depending on the type of customer (see r 4.2.6 for individuals and r 4.3.5 for domestic companies), and that the AML/CTF program include 'appropriate risk-based systems and controls' to determine whether further information about the customer should be collected and verified (see rr 4.2.5, 4.2.8 for individuals and rr 4.3.4, 4.3.6 for domestic companies).
18. A reporting entity is required to maintain records:
    (a) relating to the provision of a designated service to a customer for 7 years after the making of the record, unless an exemption under the AML/CTF Rules applies (such as for customer-specific documents and publicly-available statements): s 107; r 29.2;
    (b) of the applicable customer identification procedure undertaken, and the information obtained in the course of carrying out that procedure for 7 years, from the date on which the reporting entity ceased providing any designated services to the customer: ss 112, 113;
    (c) of the adoption of its AML/CTF program for 7 years, ending after the day on which the adoption ceases to be in force: s 116.

(b) Suspicious Matter Reporting

19. Section 41 of the AML/CTF Act requires a reporting entity to provide AUSTRAC with a suspicious matter report (**SMR**) within 3 business days (or, in certain cases, 24 hours) if:
    (a) the reporting entity *commences or proposes to provide* a designated service to a person;
    (b) there is a *request* from the person to provide a service the reporting entity ordinarily provides; or
    (c) there is an *inquiry* from the person as to whether the reporting entity would be prepared to provide a service of a kind the reporting entity ordinarily provides;

and the reporting entity suspects on reasonable grounds any of the matters set out in s 41(1)(d)-(j).

20. Those matters are broad. They range from a suspicion that the person is 'not who they say they are' to a suspicion that the service proposed to be provided, requested or inquired of is 'preparatory' to the commission of a money laundering or terrorist financing offence. Under s 41(1)(f), a reporting obligation may arise if the reporting entity 'suspects on reasonable grounds that information that the reporting entity has concerning the provision, or prospective provision, of the service may either:
    (a) be relevant to an investigation of, or prosecution of, an offence as specified at s 41(1)(f)(i)-(iii); or
    (b) be of assistance in the enforcement of a law of the Proceeds of Crime Act 2022, regulations under that act, or a corresponding State or Territory law.
21. The formulation of s 41(1)(f), which provides that the reporting entity has information 'concerning the provision, or prospective provision, of the service' appears to contemplate information obtained in the course of providing a service. While the scope of this provision does not appear to have been considered by an Australian court, it would be strange if, given the breadth of s 41, information under s 41(1)(f) had to be limited to information concerning the precise service provided, rather than information which came to light in the course of providing that service.
22. Pursuant to Chapter 18 of the AML/CTF Rules, a SMR must contain, among other things, a description of any designated service to which the suspicious matter relates, and a description of the reasonable grounds for the suspicion: rr 18.2(6), (7), AML/CTF Rules.
23. Section 123 of the AML/CTF Act prohibits a reporting entity from disclosing that they have given an SMR or any information from which it could be reasonably inferred that the responsible entity has given, or is required to give, an SMR other than to an 'AUSTRAC entrusted person'. A responsible entity commits an offence by breaching s123 and is liable to imprisonment for 2 years: s 123(11).
24. While s 124(1) of the AML/CTF Act provides that a SMR is not admissible in court or tribunal proceedings as evidence as to whether a SMR was prepared or given to AUSTRAC, or whether particular information was contained in a SMR, s 124(2) qualifies this, by providing that s 124(1) does not apply to proceedings for various specified criminal offences, or to proceedings in connection with a civil penalty order under s 175 of the AML/CTF Act.

(c) Auditing and Information gathering

25. AUSTRAC also has broad audit and information-gathering powers under the AML/CTF Act.
26. Under s 147, an authorised officer may enter a reporting entity's business at any reasonable time if the occupier has consented, or if entry is pursuant to a monitoring warrant. Upon entry, the officer may search the premises for compliance records, reports, or any other thing that may be relevant to the obligations of a reporting entity under the AML/CTF regime and inspect and copy documents relating to information provided under the AML/CTF regime:

s 148. An authorised person may also require a person to answer questions and produce any document relating to the operation of the AML/CTF regime: ss 150(1)-(2). If the authorised officer is entering pursuant to a monitoring warrant, failure to comply with s 150(2) is an offence, with an imprisonment term of 6 months: s150(3).

27. Under s 167, if an authorised person believes on reasonable grounds that a reporting entity has information or a document relevant to the operation of the AML/CTF regime, the officer may issue a notice requiring the reporting entity to provide any such information or documentation. The officer may inspect and make and retain copies of any documentation provided in response to a notice: s 170. Non-compliance with a notice is an offence, with an imprisonment term of 6 months: s 167(3).

C. 'To what extent (if at all) could legal professional privilege be protected within an AML/CTF statutory regime that introduces the Preventative Measures and the SMR Obligation binding on part of the profession?'

Risk of disclosure of privileged communications

28. Legal professional privilege is a rule of substantive law which protects confidential communications between a lawyer and client made for the dominant purpose of the lawyer providing legal advice or legal services, or for use in actual or reasonably anticipated legal proceedings.[7]
29. If the definition of a reporting entity is expanded to include legal practitioners engaging in the Proposed Activities, legal practitioners will become subject to the obligations required as part of the implementation of an AML/CTF program (the **Preventative Measures**), SMR reporting obligations (**SMR Obligation**), and audit and information-gathering powers of AUSTRAC under the AML/CTF regime. These obligations and powers all pose concerns for the maintenance of legal professional privilege.

(a) Preventative Measures

30. While the Preventative Measures do not necessarily entail the communication of privileged materials, if extended to legal practitioners, they will require a legal practitioner to keep records of information relating to the provision of a designated service for a period of 7 years. The obligation to keep records in s 107 of the AML/CTF Act is broadly expressed. It arguably includes privileged communications between a legal practitioner and its client, if those communications relate to the provision of any designated service by the legal practitioner.
31. In light of the broad audit and information-gathering powers of AUSTRAC, by which an officer may request any documentation 'relevant to the operation of the Act', there is a risk that a legal practitioner may be required to disclose records containing privileged information.

[7] *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67 (**Esso**); see also *Evidence Act 1995* (Cth), ss 118-119.

(b) SMR Reporting

32. The second risk to the disclosure of privileged materials arises from a reporting entity's obligations to issue an SMR in a broad range of circumstances. As noted above, the reporting obligation in s 41 may apply where a reporting entity has not yet commenced providing a designated service to a person, and may arise even if the reporting entity does not yet have a reasonable ground to suspect that the service is preliminary to, or may be relevant to, an investigation into a relevant offence. That is because a mere suspicion that a person has provided incorrect identity information is sufficient to trigger the reporting obligation.
33. As noted above at paragraph [21], the reporting obligation also appears to apply to information obtained *in the course* of providing a service.
34. A SMR must contain (among other things) a description of any designated service to which the suspicious matter relates, and a description of the reasonable grounds for the suspicion, both of which are likely to require the disclosure of privileged communications.
35. While s 124(1) of the AML/CTF Act provides some protection, by providing that a SMR is not admissible before a court or tribunal as evidence as to whether, among other things, particular information was contained in a SMR, this is subject to exceptions for proceedings relating to various criminal offences and civil penalty orders under the AML/CTF Act, and does not detract from the fact that s 41(2) would still require disclosure of privileged communications.

(c) Audit and information gathering

36. Finally, the audit and information-gathering powers of AUSTRAC pose a significant risk to the disclosure of privileged material. Beyond the disclosure of records referred to above at paragraph [31], the power of an officer to request any information or documentation relevant to the AML/CTF regime is exceptionally broad, and would capture any legal advice provided in connection with the provision of a service regulated by the AML/CTF Act.
37. Without adequate protections, the features of the AML/CTF regime outlined above give rise to a significant incursion into a client's right to have a candid exchange with their legal representative.[8]
38. While s 242 of the AML/CTF Act provides that the Act 'does not affect the law relating to legal professional privilege', without further protections, that section is inadequate. As noted by the Law Council of Australia,[9] section 242 of the Act merely states that the substantive law with respect to legal professional privilege is not affected by the Act. That is not the same thing as providing that a reporting entity is exempt from its obligations to report suspicious matters or provide information or documents in circumstances where legal professional privilege would

[8] *Esso* at [111].
[9] Law Council of Australia, Synopsis and Submission to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime*, 15 September 2021 (**Submissions**), 25 at [87].

be disclosed. The effect of this is that legal practitioners subject to the AML/CTF regime will be subject to two irreconcilable obligations. The first being an obligation not to waive the protections afforded to a client in respect of privileged communications. The second being an obligation to comply with the broad reporting and information-gathering provisions of the AML/CTF Act, which could entail the disclosure of privileged communications.

39. The intended consequence of the AML/CTF regime is that it requires legal practitioners to report on the activities of their clients if the conditions in section 41(1) are satisfied. There is a distinction between this, and privilege not applying where the communication is to facilitate the commission of a crime or fraud.[10] The AML/CTF regime requires disclosure in a broad range of circumstances, upon satisfaction of exceptionally low thresholds. The communications need not be in 'furtherance' of a crime or fraud. They must simply give rise to any one of a number of suspicions, which may or may not involve criminality.
40. That includes where there is a suspicion that a client or a potential client is not who they claim to be. One can imagine circumstances in practice where such a suspicion might arise because an individual has different names on different forms of identification. While this may be an indication of money laundering, it does not necessarily signify money laundering. There may be no criminality and yet the reporting obligation under s 41 would be triggered.
41. Similarly, a reporting obligation under s 41 is triggered where the reporting entity suspects that it has information concerning the provision of a service that *may* be relevant to the *investigation* of an offence. Section 41 therefore appears to apply to offences which have not yet occurred. And as illustrated by Scenario 2 at Tab A of the Brief to Counsel (discussed further below at paragraphs [111] to [115]), it appears to apply even if the information does not concern the conduct of the reporting entity's client.
42. The reporting obligation under s 41 of the AML/CTF may also arise if a legal practitioner is advising a client on the criminality of conduct if the advice relates to a 'Proposed Activity'. To take the example of a client seeking advice on a real-estate scheme, which would constitute fraud if carried out, it is arguable that even if the scheme has not been, and is not ultimately, carried out, at the point in time that the client proposes the scheme, the legal practitioner has information which 'may' be relevant to the investigation of that person for an offence.
43. The legislation, as currently drafted, would present a significant abrogation of legal professional privilege.

Ways in which legal professional privilege may be protected

44. In order to protect legal professional privilege, the AML/CTF Act should be drafted so as to provide for specific exceptions to the reporting requirements of legal practitioners and the audit and information-gathering powers of AUSTRAC.
45. Using the New Zealand regime as guidance, legal professional privilege could be protected under the AML/CTF Act by:

[10] *Baker v Campbell* (1983) 153 CLR 52; see also *Evidence Act 1995* (Cth), s 125(1).

(a) incorporating a definition for 'privileged communications' which aligns with the common law right of legal professional privilege, and legal professional privilege as defined in the *Evidence Act 1995* (Cth);
(b) making the reporting obligation in s 41 subject to an exception that a legal practitioner is not required to disclose any information that the practitioner believes, on reasonable grounds, is a privileged communication;
(c) providing that it is a defence to prosecution under s 123(11) if a practitioner believes, on reasonable grounds, that information or documents relating to a 'suspicious matter' were privileged communications; and
(d) providing that a legal practitioner is not required to disclose any privileged communication in respect of AUSTRAC's information-gathering powers under ss 148, 167 and 170.

46. While the New Zealand regime does not appear to protect privileged communications where a search warrant is issued, it is submitted that any protections to legal professional privilege which apply to suspicious matter reporting obligations and information-gathering powers, should also extend to AUSTRAC's auditing functions (including in circumstances where a monitoring warrant is issued).
47. In the United Kingdom, the relevant regulations attempt to protect legal professional privilege where a search warrant has been issued in two ways. First, the regulations provide that a person 'may not be required' to produce information or documents, or answer a question which that person would be entitled to refuse to provide, on grounds of legal professional privilege. Second, the regulations provide that 'a warrant does not confer a right to seize privileged material'.[11] The inclusion of similar provisions in respect of an authorised officer's powers under s 148 of the AML/CTF Act would afford some degree of protection where a practitioner is subject to a search by consent or by warrant under s 147.
48. However, there are still challenges to the practical application of these protections. The most significant of these is that a search may be conducted (for example, if by warrant) without providing notice to the legal practitioner. In that case, a legal practitioner may not have an opportunity to identify which materials may be subject to legal professional privilege so as to know which information or documentation he or she is entitled to refuse to provide. In circumstances where the legal practitioner commits an offence under s 150(3) of the AML/CTF Act for failure to comply with a request made under a monitoring warrant, there is a risk that legal practitioners will not stand in the way of the seizure of privileged materials, thereby undermining any protection provided for.
49. One way of addressing this would be for the AML/CTF Act to provide for a mechanism which deals specifically with searches under warrants, whereby:
    (a) all documentation seized pursuant to a search power under a monitoring warrant is 'sealed';

[11] The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (UK), regulation 72(1),(4).

(b) a legal practitioner is given a reasonable opportunity to review the seized material in order to determine whether to make a claim of legal professional privilege;
(c) any material subject to a claim of privilege is provided to a court for determination of whether the material is in fact privileged; and
(d) no copies or examination of that material is permitted prior to the court making that determination.

50. To provide protections for legal professional privilege under the AML/CTF regime would not undermine the regime, though it would limit its application. The fact that the United Kingdom and New Zealand have extended legislation to legal practitioners, while safeguarding legal professional privilege, speaks to this. Further, as noted above at paragraph [39], a communication will not be subject to a claim of legal professional privilege where the communication is to facilitate the commission of a crime or fraud. In such circumstances, a legal practitioner would be required to disclose the relevant communications, notwithstanding that they were made in the context of legal advice or legal proceedings.
51. Moreover, the interpretative note to FATF Recommendation 23 provides for this very exception. That note provides:

> Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.[12]

52. Finally, such an approach is consistent with other statutory regimes. Under section 353-10 of the T*axation Administration Act 1953* (Cth), the Commissioner of Taxation may by notice require a person to produce information, documentation or give evidence to the Commissioner. Under section 353-15, the Commissioner may enter premises and access, inspect and make copies of documents. An occupier's failure to provide assistance to the Commissioner is an offence. However, the Commissioner cannot compel an individual to provide information or documentation where the underlying communication is privileged.[13]
53. Similarly, under the *Independent Commission Against Corruption Act* 1988 (NSW), the Commission shall 'set aside' a requirement to produce a statement of information, any document or other thing, and shall not exercise a power of entry, inspection and copying if it appears to a Commissioner that 'any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist' the requirement to produce, or inspect, and it does not appear to the Commissioner that the person consents to the production or inspection.[14]
54. Under Victoria's anti-corruption legislation, where a claim of privilege is made in relation to a request for a document or thing, IBAC must consider the claim without inspecting the document or thing, and, if it does not withdraw the production requirement, must apply to the

[12] FATF Recommendations, 90.
[13] Australian Government, Australian Taxation Office, Legal Professional Privilege Protocol, June 2022, [7].
[14] *Independent Commission Against Corruption Act* 1988 (NSW), ss 24(2), 25(2).

Supreme Court of Victoria for determination of the privilege claim.[15] Where a search warrant has been executed and a claim of privilege is made, the searcher must cease exercising the search warrant in respect of the relevant document and require the material to be sealed, for delivery to, and determination by, the Supreme Court of Victoria.[16]

55. The *National Anti-Corruption Commission Act 2022* (Cth) (**NACC Act**) has lesser protections. The Act provides that evidence disclosing legal advice must still be disclosed in a hearing (but that the hearing will be private): s 74. Further, a person is not excused from giving an answer or information or producing a document or thing as required by a direction to produce or a notice to produce on the ground that doing so would disclose a communication that is protected against disclosure by legal professional privilege: s 114(1). However, s114(5) provides that 'the fact that a person is not excused under subsection (1) from answering a question or giving information, or producing a document or thing, does not otherwise affect a claim of legal professional privilege that anyone may make in relation to that answer, information, document or thing'. In our view, if the protections noted above are not adopted in the AML/CTF regime, then a protection in terms of s 114(5) of the NACC Act should be included as a minimum degree of protection.

D. 'What are the implications for legal practitioners' duty of confidentiality of the foreshadowed Preventative Measures and the SMR Obligation, should they be imposed on part of the legal profession?'

Duty of confidentiality

56. As noted by the Law Council of Australia in its Submissions:[17]
    (a) The duty of confidentiality is broader than the doctrine of legal professional privilege. Under s 117 of the *Evidence Act 1995* (Cth), a confidential communication is a communication made in such circumstances that, when it was made, the 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.
    (b) While legal practitioners are subject to duties not to disclose information which is confidential to a client and acquired during the client's engagement,[18] there are a number of exceptions to this duty – most significantly, a legal practitioner may disclose confidential information if the solicitor is compelled by law to do so.[19]

[15] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (**IBAC Act**), ss 59L, 59M.
[16] *IBAC Act*, ss 97, 100, 101.
[17] Submissions, 28 at [98]-[100].
[18] e.g. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW), r 9.1; Legal Profession Uniform Conduct (Barristers) Rules 2015, rr 114, 115.
[19] Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW), r 9.2.2; Legal Profession Uniform Conduct (Barristers) Rules 2015, rr 114, 115.

Implications if AML/CTF regime extended to legal practitioners

57. For the reasons given above at [30]-[43], there is a risk that in complying with the reporting and disclosure obligations under the AML/CTF Act and AML/CTF Rules, a legal practitioner may be required to disclose confidential information. There is no protection in the AML/CTF Act or AML/CTF Rules, as presently drafted, which exempts reporting entities from providing information or documentation on the basis that such information is confidential.
58. In light of the exception to the duty of confidentiality which arises where a legal practitioner is compelled to disclose confidential information by law, the consideration of a duty of confidentiality differs from consideration of legal professional privilege; if the AML/CTF Act did not include protections for confidential information, the legal practitioner would not be acting in breach of their duty of confidentiality.
59. That is not to say that the disclosure of confidential information will have no implications on the duty of confidentiality.
60. Where confidential information is disclosed pursuant to the AML/CTF Act or AML/CTF Rules, it will lose its quality of 'confidentiality' and will therefore not be able to be the subject of a claim for legal professional privilege in the future. That is because in order for a communication to be privileged, it must be confidential.[20]
61. In circumstances where disclosure of information may be required for suspicious matter reporting under s 41 *prior* to a legal practitioner having even been retained to provide a designated service, or at *very early* stages of any retainer, there is a risk that the legal practitioner is not yet aware of the dominant purpose of the client's, or potential client's communication, and may not be in a position to assess whether the communication is subject to a claim for legal professional privilege. Given s 123 of the AML/CTF Act prohibits a reporting entity from disclosing to a customer that they have given a SMR, or disclosing any information from which it could be reasonably inferred that the responsible entity has given, or is required to give, a SMR (other than in very limited circumstances), seeking further clarity with a potential client as to the nature of any communications made for the purpose of assessing the privileged status of a communication may give rise to a risk of tipping off.
62. However, the inclusion of a protection, drafted in similar terms to s 114(5) of the NACC Act, providing that the fact that a person is not excused from making a disclosure does not otherwise affect a claim of legal professional privilege that anyone may make in relation to that disclosed material, may go some way in addressing this concern.
63. The record-keeping obligations imposed on reporting entities under the AML/CTF regime may also give rise to an increased risk that confidential information is leaked in a data breach.
64. Finally, the protection of confidentiality is not inconsistent with the FATF Recommendations. As noted above at paragraph [51], the interpretative note to FATF Recommendation 23 provides for an exception to reporting of suspicious transactions where the relevant information was obtained in circumstances subject to professional secrecy.

[20] *Esso* at [35]; *Evidence Act 1995* (Cth), ss 118, 119.

E. 'What are the potential implications for the legal practitioner-client relationship of the Preventative Measures and the SMR Obligation if imposed upon part of the profession?'

65. As noted by the Law Council of Australia in its Submissions, the hallmark of the practitioner-client relationship, and indeed, the administration of justice, is that a client can make full and frank disclosure to their lawyers.[21] This concept underpins the protection afforded to communications between legal practitioners and their clients by way of legal professional privilege.[22]
66. If the AML/CTF regime is extended to legal practitioners providing certain designated services, without affording adequate protections for legal professional privilege and confidentiality, this will impact the practitioner-client relationship in three ways.
67. First, as noted above at paragraphs [30]-[43] and [57], the regime creates a *tension* between the rights of a client to maintain privilege over communications with a practitioner made for the dominant purpose of seeking legal advice, the duty of confidentiality a practitioner owes to their client, and the obligation of a practitioner to disclose such information to a regulatory body, or otherwise be subject to civil or, in certain cases, criminal, penalties. Without protections contained in the AML/CTF regime to resolve that tension, the conflicting nature of those duties make the practitioner-client relationship untenable. While the AML/CTF regime does not require a reporting entity the subject of a SMR Obligation to cease acting for their client, there is a question as to whether, in light of this tension, a legal practitioner can properly act in interests of their client.
68. Second, as a matter of *perception*, the regime is likely to undermine the confidence that clients have in legal practitioners. In holding that the extension of Canada's Proceeds of Crime legislation (Proceeds of Crime (Money Laundering) and Terrorist Financing Act S.C. 2000, c. 17 to legal practitioners was unconstitutional, the Supreme Court of Canada in *Attorney-General of Canada v Federation of Law Societies of Canada* [2015] SCC 7; RCS 401 (***A-G of Canada***), considered the impact that the legislation would have on the independence of the Bar. Cromwell J (LeBel, Abella, Karakatsanis and Wagner JJ, agreeing) accepted the submission made by the Federation of Law Societies of Canada, that the mandatory record-keeping and disclosure obligations imposed on legal practitioners would require legal practitioners to 'act as a government repository' and thereby undermine the practitioner's duty of commitment to his or her client's cause.[23]
69. Third, as a result of that change in perception, as a matter of *practical operation*, clients with matters that fall within the scope of the AML/CTF regime may be reluctant to seek legal advice from, or disclose all relevant facts to, legal practitioners. This would significantly undermine the administration of justice, by affecting access to legal advice and representation.

[21] Submissions, 24 at [80]-[82], citing *Grant v Downs* (1976) 135 CLR 674; [1976] HCA 63.
[22] *Esso* at [111].
[23] *Attorney-General of Canada v Federation of Law Societies of Canada* [2015] SCC 7; RCS 401, 433 [75], 435-7 [80]-[84], 441-443 [97]-[103].

70. Of critical concern is the fact that the matters that would be covered by the AML/CTF regime under the Proposed Activities are complex – they concern activities relating to interests in real estate and personal property, and the creation and structuring of companies and businesses. All of those activities are heavily regulated by law. Foreseeable consequences of failing to obtain legal advice, or failing to provide relevant information, in connection with such activities are:
    (a) non-compliance with the legal requirements governing such transactions, which may affect the validity or performance of the relevant transaction, and give rise to disputes between the parties – for example, a failure to provide all material information in the context of the purchase of real property may cause delays such that property settlement does not occur within the time stipulated by the contract; and
    (b) allegations of negligence, or breaches of duty, in connection with the entry into various transactions – for example, claims brought by beneficiaries for breach of trust.
71. While not all services provided by legal practitioners will fall within the scope of the Proposed Activities, the Proposed Activities are nonetheless sufficiently broad to capture a significant proportion of work carried out by the legal profession. In this way, the impacts noted above are likely to be wide-reaching.

F. 'How can the Government ensure legal professional privilege is maintained while also ensuring the known money laundering and terrorism financing risks are appropriately addressed?'

72. There are two main avenues by which legal professional privilege may be maintained while addressing money laundering and terrorism financing risks.
73. A first, and in our opinion, preferable option is to exempt legal practitioners from the application of any extended AML/CTF regime, and rely upon the existing regulation of the legal profession to manage money laundering and terrorism financing risks.[24] This is the approach that has been adopted in Canada following the Supreme Court of Canada's decision in *A-G of Canada*. The law society of each Canadian province or territory has adopted rules under the relevant Legal Profession Act, based on model rules developed by the Federation of Law Societies of Canada. Pursuant to the model rules:
    (a) legal practitioners must not receive or accept cash in an aggregate amount greater than $7,500 Canadian in respect of any one client matter (though the payment of professional legal fees falls within an exception);[25] and
    (b) legal practitioners are required to identify and verify clients where instructions involve the receiving, paying or transferring of funds (subject to certain exceptions).[26]
74. The Law Societies under the relevant Legal Profession Act have broad powers of investigation. For example, in British Columbia, the Law Society is empowered to require a

[24] Canada has been rated as being 'partially compliant' with FATF Recommendations 22 and 28, and 'largely compliant' with FATF Recommendation 23.
[25] Model Rule on Cash Transactions (amended 19 October 2018), ss 1, 4.
[26] Model Rule on Client Identification and Verification (amended 14 March 2023), ss 2(1), 3.

lawyer whose competence to practise law is under investigation to answer questions and provide access to information, files or records in the lawyer's possession or control,[27] and to apply to the Supreme Court for an order that files or records be seized,[28] even where such information or documentation is confidential or privileged.[29]

75. Similarly, in Australia, the legal profession is subject to extensive regulation:
    (a) Solicitors are subject to reporting obligations for 'significant cash transactions' (involving an amount of at least AUD$10,000, or its equivalent) under the *Financial Transaction Reports Act 1988* (Cth).[30]
    (b) Legal practitioners are subject to stringent requirements to conduct due diligence (including verification of identity) and keep records with respect to real property settlements.[31]
    (c) For jurisdictions applying the Uniform Law, the relevant local designated authority has the power to conduct an audit of the compliance of a law practice if the authority considers there are reasonable grounds to do so based on the conduct of the practice or a complaint against the practice,[32] and an investigator may, by notice, require a lawyer to produce specified documents, information or otherwise assist in the investigation of the complaint.[33]
    (d) While not limited in application to legal practitioners, the Schedule to the Criminal Code Act 1995 (Cth) (**Criminal Code**) criminalises dealing with proceeds of crime or financing terrorism.[34]
76. The second option is to extend the application of the AML/CTF regime to legal practitioners, but implement the protections discussed above at paragraphs [37] to [49] to preserve a client's right to legal professional privilege, notwithstanding that the transactions for which legal advice is sought may fall within the scope of the regime. For the reasons noted above at paragraphs [60] to [63], those protections should also be extended to confidential information.
77. As noted above at paragraph [50], communications made in furtherance of criminal activity are not protected by legal professional privilege. This means that any provisions exempting practitioners from disclosure obligations on the grounds of legal professional privilege would not go so far as to protect communications in furtherance of a criminal purpose. A qualification to that effect could also be included in respect of any protection included in the AML/CTF regime for disclosure of confidential information. In this way, the protections would strike a more appropriate balance between, on the one hand, ensuring that the legal profession is regulated under the regime (in recognition of the fact that aspects of legal work are susceptible to facilitating money laundering and terrorist financing), and on the other

[27] Legal Profession Act [SBC 1998] CHAPTER 9 (**Legal Profession Act SBC**), s 27(2)(c).
[28] Legal Profession Act SBC, s 37.
[29] Legal Profession Act SBC, s 88(1.1).
[30] *Financial Transaction Reports Act 1988* (Cth), s 15A.
[31] See e.g. NSW Participation Rules for Electronic Conveyancing (Version 6) made pursuant to section 23 of the Electronic Conveyancing National Law (NSW), rr 6.5 and 6.6.
[32] See e.g. Legal Profession Uniform Law 2014 (NSW), s 256.
[33] Legal Profession Uniform Law 2014 (NSW), s 371.
[34] Criminal Code, Chapter 5, Part 5.3 and Chapter 10, Part 10.2.

hand, recognising the rights of a client to engage in confidential communications with a legal representative for the purpose of obtaining legal advice.

78. However, in our opinion, if this second option is adopted, there is a real question as to what work the extension of the AML/CTF regime to legal practitioners would do, in circumstances where many of the communications between a client and their legal practitioner are likely to be (and we submit, should be) protected by legal professional privilege and subject to duties of confidentiality. The extended regime would simply operate to subject legal practitioners to onerous record-keeping obligations, without facilitating the provision of further information to AUSTRAC. If the regime is extended *without* protections for legal professional privilege and confidentiality, it would cause extensive damage to the client-legal practitioner relationship, and undermine the administration of justice. In those circumstances, and given the obligations already in place for legal practitioners, we consider that self-regulation, similar to the approach adopted by Canada, is the most appropriate course of action.

G. 'What is Counsel's view as to the approaches taken to 'preserve legal professional privilege' in comparable common law countries, including the United Kingdom, New Zealand and Canada?'

79. The United Kingdom and New Zealand have extended their respective anti-money laundering regimes to include legal practitioners. As noted above, following the decision of *A-G of Canada*, the anti-money laundering regime does not extend to legal practitioners in Canada, and regulation occurs on a provincial and territorial level by each law society. The approaches of each jurisdiction are discussed below.

United Kingdom

80. The anti-money laundering regime in the United Kingdom comprises the *Proceeds of Crime Act 2002* (UK) (**Proceeds of Crime Act**), the *Terrorism Act 2000* (UK) (**Terrorism Act**) and the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (UK) (**Regulations**).
81. The Regulations provide that obligations concerning customer due diligence, record keeping and investigation apply to 'relevant persons', which includes 'independent legal professionals': r 8(2)(d). 'Independent legal professionals' is defined as 'a firm or sole practitioner who provides legal or notarial services to other persons' when participating in various financial or real property transactions: r 12(1). Those transactions broadly mirror the Proposed Activities. There is an exception where a 'relevant person' under r 8 engages in such an activity 'on an occasional or very limited basis', but a number of conditions need to be satisfied for the exception to apply, such that its practical operation is exceptionally narrow: r 15(2)-(3).
82. Under the Regulations, a 'relevant person' is required to:
    (a) take appropriate steps to identify and assess the risk of money laundering or terrorism financing to which its business is subject, taking into account the information available and the size and nature of its business: r 18(1)-(3);

(b) keep up to date records of any steps taken to assess risk, and provide a risk assessment to the relevant supervisory authority on request: rr 18(4), 18(6);

(c) apply customer due diligence measures (including verification of identity) if they establish a business relationship with a customer, suspect money laundering or terrorist financing, or doubt the veracity of documentation or information obtained for identification or verification purposes: rr 27, 28; and

(d) keeps records of customer due diligence, and supporting records in respect of a transaction (to enable the transaction to be reconstructed) for 5 years beginning on the date on which the relevant person knows or has reasonable grounds to believe that the transaction is complete or the business relationship has come to an end (subject to certain exceptions): r 40(2)-(3).

83. Privilege is protected in relation to information-gathering, and suspicious activity reporting.

84. The Regulations provide for three main means by which information may be gathered:

(a) First, a 'supervisory authority' may require a person who is or was a relevant person, by notice in writing, to provide specified information and documents. That includes a power to require the person to provide a copy of any suspicious activity disclosure made under the *Proceeds of Crime Act* or the *Terrorism Act*: r 66(1), (1A).

(b) Second, a duly authorised officer may at any reasonable time, enter the premises of a relevant person and take copies of documents found, if the officer has reasonable grounds to believe that the relevant person may have contravened the Regulations: r 69.

(c) Third, a justice may issue a warrant if satisfied that there are reasonable grounds for believing that, among other things, a relevant person has failed to comply with a notice under r 66, in which case the executing officer may enter and search the premises, take copies of documents or information and require any person to provide an explanation of any relevant document or information: r 70.

85. Regulation 72 provides that, with respect to each of these powers, a relevant person may not be required to 'provide information, produce documents or answer questions which that person would be entitled to refuse to provide, produce or answer on grounds of legal professional proceedings in proceedings in the High Court', and that a warrant under r 70 does not confer the right to seize such material.

86. While this goes some way in protecting privileged information, as noted above at paragraphs [47] to [48], it arguably fails to adequately protect privilege in circumstances where a legal professional is subject to a search under rr 69 or 70 and has not been provided with notice of the materials seized.

87. While there is no positive obligation to report suspicious activity under the regime in the United Kingdom, it is an offence under s 330 of the Proceeds of Crime Act if:

(a) a person knows or suspects or has reasonable grounds to know or suspect that another is engaged in money laundering;

(b) the information on which that knowledge or suspicion is based came to the person in the course of business; and

(c) the person can identify the other person, and does not disclose the information on which his knowledge or suspicion is based.[35]

88. However, s 330(6) provides that a person does not commit an offence if the person has a reasonable excuse for not making the required disclosure, or if the person is a professional legal adviser and the information giving rise to the knowledge or suspicion information came to him in privileged circumstances.[36]
89. The definition of legal professional privilege under common law is not expressly incorporated into the meaning of 'privileged circumstances'. 'Privileged circumstances' is defined at s 330(10)-(11) of the Proceeds of Crime Act as a communication by a client in connection with the giving of legal advice, by a person seeking legal advice from the legal adviser, or by a person in connection with legal proceedings or contemplated legal proceedings, but does not apply to communications made with the intention of furthering a criminal purpose.[37] It therefore appears that there may be circumstances in which a legal adviser has received information which is subject to legal professional privilege under the common law, but does not fall within the definition of 'privileged circumstances,' under the Proceeds of Crime Act, such as where a lawyer representing one client, holds information that is privileged as between another client and their lawyer, subject to a contractual provision that legal professional privilege is not waived.[38]
90. Arguably, the application of two standards of protection for privileged communications under the United Kingdom's anti-money laundering regime creates uncertainty as to the circumstances in which practitioners may be entitled to maintain a claim of privilege. Any protections included in the Australian regime should also be expressly framed to include legal professional privilege as it applies at common law, and under the Evidence Act, to avoid such uncertainty. This is the approach that has been adopted in New Zealand, discussed below.

New Zealand

91. The relevant legislation is the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. The legislation applies to legal practitioners in respect of activities which broadly align with the Proposed Activities.
92. Under the Act, a reporting entity is required to:
    (a) establish, implement and maintain a compliance programme including procedures, polices and controls to detect and manage and mitigate the risk of money laundering and financing of terrorism: s 56;
    (b) conduct a risk assessment before conducting any customer due diligence or establishing a programme under s56: s 58;

[35] A similar offence exists under s 21A of the Terrorism Act.
[36] See also s 21A(5) of the Terrorism Act.
[37] See also s 21A(8)-(9) of the Terrorism Act.
[38] Legal Sector Affinity Group (UK), Anti-Money Laundering Guidance for the Legal Sector, Chapter 13, 'Legal Professional Privilege', 163.

(c) conduct customer due diligence if the reporting entity establishes a business relationship with a new customer, if the customer seeks to conduct an occasional transaction or activity through the reporting entity, or if there is a material change in information, or insufficient information in respect of an existing customer: ss 11, 14. The obligation to conduct customer due diligence and monitor transactions to ensure that they are consistent with the reporting entity's knowledge about a customer is an ongoing one: s 31(2);

(d) keep records that are reasonably necessary to enable the transaction to be 'readily reconstructed' at any time, and keep records of suspicious activity reports, identification and verification, and other records relevant to the establishment of a business relationship and relating to risk assessments, for at least 5 years after the completion of the transaction, making of a report, business relationship or regular use of the records (as the case may be): ss 49, 49A, 50, 51; and

(e) where the reporting entity has reasonable grounds to suspect a transaction or proposed transaction is or may be relevant to investigation or prosecution of any person for a money laundering offence (among other things), no later than 3 working days after forming suspicion, report that activity: ss 39A, 40. Section 40(4) provides that this reporting obligation does not require any person to disclose information that the person believes on reasonable grounds is a privileged communication.

93. Further, while failure to report a suspicious activity under s 40 is an offence under s 92(1) of the Act, s 92(2) provides that '[i]t is a defence to a prosecution under this section if a reporting entity believes on reasonable grounds that the documents or information relating to the activity were privileged communications'.

94. A 'privileged communication' is defined in s 42 as:

(a) a confidential communication, passing between two lawyers, a lawyer and his or her client, or their agents, made for the purpose of obtaining or giving legal advice;

(b) a communication subject to the general law governing legal professional privilege; or

(c) a communication in specified sections of the Evidence Act: s 42(1).

However, a communication is not privileged if, among other things, there is a prima facie case the communication was made for a dishonest purpose or to enable or aid the commission of an offence: s 42(2).

95. Information-gathering powers are set out at sections 132, 133, and 143 of the Act, and include the powers to:

(a) on notice, require the production of all records, documents and information relevant to the supervision and monitoring of reporting entities: s 132(2)(a);

(b) at any reasonable time, enter a place for the purpose of conducting an on-site inspection of the reporting entity, and require the reporting entity or an employee to answer questions and provide any information reasonable required: s 133;

(c) order production of or access to records, documents and information from the reporting entity that is relevant to analysing information received by the Commissioner under the Act (with or without court order): s 143.

96. Each of the above sections provides that nothing in those sections requires any person to disclose any privileged communication. Where a person refuses to disclose information under these sections on the grounds that it is privileged, s 159A provides that that person, the Commissioner, or an AML/CTF supervisor may apply to a District Court judge for an order determining whether the privilege claim is valid.
97. There is a further information-gathering power under s 118 of the Act, where a search warrant is issued under s 117. That power authorises an enforcement officer to search a place for evidential material, inspect and copy any document, and require the occupier of the place to answer any questions. The Act does not provide any protection for privileged communications in such circumstances.
98. To ensure the protection of privileged communications in all circumstances where a risk of disclosure arises, the Australian regime, if reformed to apply to legal practitioners carrying out the Proposed Activities, should extend the protection of legal professional privilege to circumstances where a search is conducted under a warrant.

Canada

99. As noted above at paragraph [73], legal practitioners are not subject to Canada's proceeds of crime legislation, on the basis that the extension of such legislation to legal practitioners was held to. be unconstitutional. The approach adopted by Canada is summarised above at paragraphs [73] to [74].
100. For the reasons given above, we consider that that approach is preferable to the approach adopted by the United Kingdom, or New Zealand.

United States of America

101. For completeness, we note that the legal profession in the United States of America is not subject to an AML/CTF regime. Similar to the position in Canada, the legal profession is self-regulating, and legal practitioners in each state are subject to rules of professional conduct. However, there is little regulation with respect to money-laundering risks. The FATF has evaluated the United States as 'non compliant' with respect to FATF Recommendations 22, 23 and 28.

H. 'Are any of the six key AML/CTF obligations, if imposed upon part of the legal profession, likely to have an impact upon the relationship between a legal practitioner and their client? If so, what is the nature and significance of this potential impact?'

102. The six key AML/CTF obligations referred to in the Australian Government Attorney-General's Department Consultation Paper, are:
(a) customer due diligence;

(b) ongoing customer due diligence;
(c) reporting;
(d) developing and maintaining an AML/CTF Program;
(e) record keeping; and
(f) enrolment and registration with AUSTRAC.

103. Considered in isolation, the requirements of customer due diligence, ongoing customer due diligence, developing and maintaining an AML/CTF Program, record keeping, and enrolment and registration with AUSTRAC are unlikely to significantly impact on the relationship between a legal practitioner and their client. As noted above at paragraph [75], legal practitioners are already subject to stringent requirements to conduct due diligence (including verification of identity) and keep records with respect to real property settlements.

104. However, when these obligations are considered together with the additional reporting obligations under the AML/CTF regime, there is likely to be an impact on the relationship between a legal practitioner and their client, for the reasons set out at Part E, above.

I. Scenarios

105. We refer to the four scenarios provided at Tab A, pages 27-28 of the Brief to Counsel. Our comments with respect to each scenario are set out below, on the assumption that the AML/CTF regime is extended to apply to legal practitioners for the Proposed Activities.

Scenario 1

106. FATF Recommendation 22 extends money laundering and terrorist financing obligations to lawyers in respect of 'managing client money, securities or other assets'. '[C]lient' should be read as attaching to each of 'money', 'securities', and 'other assets'. That is consistent with the Consultation Paper's description of the proposed reforms as including 'lawyers… when they prepare or carry out transactions for clients'.[39] In assisting with the sale of large machinery, the law practice is arguably undertaking an activity which involves the management of client assets, so as to fall within the scope of the Proposed Activities. Further, the law practice has received $60,000 into its trust account, in connection with the provision of legal services. The scenario would therefore fall within any AML/CTF regime as extended to apply to the Proposed Activities.

107. The law practice would therefore be subject to, among other things, the reporting obligations in the AML/CTF Act. Here, the facts give rise to a SMR reporting obligation under s 41(2) of the AML/CTF Act, as:
(a) the facts indicate that the client has been onboarded, and it appears that the law firm has commenced to provide, or proposes to provide, a service to the client, satisfying s 41(1)(a) of the AML/CTF Act; and
(b) the law practice's audits indicate that the client is not who they say they are, satisfying the condition under s 41(1)(d) of the AML/CTF Act.

[39] Consultation Paper, 22.

That would be sufficient to trigger a reporting obligation under s 41(2), but here the law practice also has additional information – namely, the client appears to have been involved in a scam. For that reason, the condition in s 41(1)(f)(iii) is also likely to be satisfied, because the law practice suspects on reasonable grounds that information it has concerning the provision, or prospective provision, of a service may be relevant to investigation of, or prosecution of, a person for an offence against a law of the Commonwealth or of a State or Territory. As noted above at [21], we consider that information 'concerning' the provision of a service is likely to include information obtained in the course of providing that service.

108. The law practice has received $60,000 into the practice's trust account (on behalf of the client, and for the sale of large machinery) and subsequently negotiated with the bank for the return of those funds to the originating party, who was the victim of the scam.

109. In circumstances where the law practice is required to submit a SMR, the application of s 123 of the AML/CTF Act would place the law practice in a difficult position, as the law practice would be unable to disclose to its client the reason why the funds are no longer in the trust account. The exceptions to the application of s 123(1) which would permit disclosure do not appear to apply on these facts.

110. The conduct in the scenario would also be covered by s 400.5 of the Criminal Code, which provides that a person commits an offence if the person deals with money, which at the time of the dealing had a value of $50,000 or more, and which is, and which the person believes to be (or is reckless to the fact that it is), the proceeds of an indictable crime. The significance of this is twofold:

    (a) First, the law practice's act of dealing with the money in their trust account may give rise to an offence – in which case, the appropriate course would likely be for the law firm to have retained the money in their trust account until a procedure had properly been conducted to determine the rightful owner; and

    (b) Second, this provision of the Criminal Code would apply even if the AML/CTF regime was not amended to extend to legal practitioners – which emphasises the point raised above at [75] regarding the adequacy of the existing regulations in place.

Scenario 2

111. Assuming that the settlement funds will be paid through the law firm's trust account, the provision of services by the lawyer in connection with the lease dispute appears to fall within the scope of the Proposed Activities, such that the lawyer would be subject to any extended application of the AML/CTF regime.

112. The facts likely give rise to an SMR reporting obligation under s 41(2) of the AML/CTF Act, because it appears that s 41(1)(f) (where a reporting entity suspects on reasonable grounds that information the lawyer has concerning the provision, or prospective provision, of the service may be relevant to the investigation or prosecution of various specified offences) is satisfied. That is because:

(a) For the reasons given at paragraph [21] above, we consider that information concerning the provision of a service includes information obtained in the course of providing that service;

(b) Here, the lawyer is aware that the counterparty to the settlement has requested that the settlement amount be paid to an individual who is part of a known motorcycle gang;

(c) While in real life, more details would no doubt be available, the facts provided in the scenario could well give rise to a suspicion that the information the lawyer has:

i. is relevant to the investigation or prosecution of an offence against a law of the Commonwealth or of a State or Territory (so as to satisfy s 41(1)(f)(iii)); or

ii. may be of assistance in the enforcement of the *Proceeds of Crimes Act 2002* (Cth) or regulations under that Act (so as to satisfy s 41(1)(f)(iv)).

(d) Finally, the reporting obligation in s 41(2) may apply even though the client's conduct is not in issue. That is because the relevant condition to be satisfied is that there is 'information… relevant to the investigation or prosecution of *an* offence'. The section does not specify that the client must be suspected of committing the particular offence.

113. If the lawyer submits a report under s 41(2), it may be that the lawyer is able to rely on an exception to the tipping off prohibition under s 123(4), to dissuade the client from proceeding with the settlement. This would be on the basis that:

(a) the reporting entity is a legal practitioner;

(b) the information relates to the affairs of the legal practitioner's client; and

(c) the disclosure is made for the purposes of dissuading the legal practitioner's client from engaging in conduct that could constitute an offence (of dealing with money that may become an instrument of crime).

114. The effect of filing an SMR under s 41 may be that the money intended to be for the purpose of settlement will be seized by a regulator.

115. If the lawyer allows the settlement to occur, this may constitute an offence under s 400.4 of the Criminal Code, on the basis that the lawyer has dealt with money with a value of more than $100,000, there is a risk that the money will become an instrument of crime, and the lawyer is reckless as to that fact.

Scenario 3

116. The service falls within the scope of the Proposed Activities because it concerns the sale of a company.

117. An SMR reporting obligation under s 41(2) of the AML/CTF Act is likely to arise on the basis that s 41(1)(f)(iii) is satisfied, as:

(a) For the reasons given at paragraph [21] above, we consider that information concerning the provision of a service includes information obtained in the course of providing that service;

(b) In the course of conducting due diligence on the client's subsidiary, the law firm has identified COVID-19 support payments to fictitious employees of the subsidiary;

(c) That gives rise to a suspicion on reasonable grounds that the information the law firm has may be relevant to the investigation or prosecution of an offence.

118. The tipping off provisions in s 123 would therefore operate to prevent the law firm from being able to disclose to the client any information which would indicate it has given, or is required to give, a SMR.

119. Finally, a conflict arises in relation to the law firm's reporting obligations under s 41 of the AML/CTF Act, the client's right to legal professional privilege, and the law firm's duty of confidentiality, because the information grounding the relevant suspicion (and reporting obligation) was provided to the law firm as part of a request for advice, and legal services, in connection with the sale of the subsidiary..

Scenario 4

120. The service falls within the scope of the Proposed Activities because it concerns contributions (via a loan arrangement) for the operation of a new legal entity, and the provision of the law firm's office as the registered address of the new entity.

121. As a reporting entity, the law firm is required to collect identification information in respect of the beneficial ownership of a potential customer, either before the provision of a service, or as soon as practicable after the service has been provided: r 4.12.1 of the AML/CTF Rules. Here, the potential client's reticence to provide that information may give rise to a suspicion that the client is not who they claim to be, for the purpose of s 41(1)(d). This may give rise to a reporting obligation under s 41(2), even though the facts indicate that there is not yet a retainer in place, because the potential client has r*equested* the law firm's services in relation to the loaning of funds for the new entity. Provided that this is a service of a kind ordinarily provided by the firm, s 41(1)(c) would be satisfied.

122. The surrounding facts may also lead the firm to suspect on reasonable grounds that the prospective provision of the service may be relevant to the investigation of an evasion or attempted evasion of a taxation law, or the avoidance of sanctions, thereby triggering a reporting obligation under s 41(1)(f)(iii).

123. In light of s 123, unless a disclosure was made for the purpose of dissuading the client from engaging in conduct that could constitute a relevant offence, then the firm would be prohibited from disclosing information to the client under s 123(1).

124. The reporting obligation under s 41(2) would also give rise to a conflict between the client's right to legal professional privilege, and the law firm's duty of confidentiality, because the law firm's suspicion would be based on information that was provided to it in the course of a request for legal advice.

J. Concluding remarks

125. The extension of the AML/CTF regime to legal practitioners for the Proposed Activities would present significant risks to the maintenance of legal professional privilege and confidentiality. Those risks are likely to erode the relationship between a legal practitioner and its client by affecting the perception of legal practitioners as independent advisers, and, as a result, the willingness of individuals and companies to seek legal advice, thereby undermining the administration of justice.

126. While protections can be incorporated into the AML/CTF regime to ensure that these risks do not materialise (and to the extent the regime is extended, should be incorporated into the AML/CTF regime), there is a serious question about the work the extended regime would do in circumstances where AUSTRAC's information-gathering powers are significantly curtailed by those protections. The AML/CTF regime is a regime designed to bestow wide reporting obligations, and information-gathering powers, on AUSTRAC. If the protections necessary to protect legal professional privilege, confidentiality and the legal-practitioner – client relationship are incorporated into that regime, the regime, as intended to operate, will have limited application.

127. In those circumstances, and given the extent to which legal professionals are already regulated in Australia, the AML/CTF Act should not be extended to legal practitioners providing the Proposed Activities. Rather, the legal profession should continue its current mix of external and internal regulation. That is effectively very like the approach which has been adopted by Canada, and in our view, would adequately address money laundering and terrorism financing risks, while protecting the legal practitioner-client relationship, that is a fundamental aspect of our legal system.

23 June 2023

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