



Law Council
OF AUSTRALIA

Response to Consultation Paper

Legal practitioners and conveyancers: a model for regulation under Australia's anti-money laundering and counter- terrorism financing regime

Attorney-General's Department

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About the Law Council of Australia

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

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

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

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

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

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

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Executive Summary

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to provide this submission in response to the Consultation Paper *Legal Practitioners and conveyancers: a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime* (**Consultation Paper**).
2. The Law Council deplores financial criminality and is committed to raising awareness within the Australian legal community of the risks of unwitting involvement in money laundering and other criminal conduct.
3. The Consultation Paper is one of seven concurrent consultations¹ that seek public views on proposed reforms to Australia's anti-money laundering and counter-terrorism financing (**AML/CTF**) regime. The term of the consultations is inadequate and the timing (which has taken in Christmas and the holiday period) is at odds with the Government's Regulation Guidelines.
4. The Law Council is concerned the Report on the *Statutory Review of the Anti- Money Laundering and Counter-Terrorism Financing Regime* (**Report on the Statutory Review**) - about which there has been no attempt to consult with the community over which regulation is proposed- has made insufficient critical analysis of the efficiency and effectiveness of Australia's AML/CTF regime to responsibly ground some of its proposals. In particular, the Statutory Review does not provide a justifiable basis for the extension of Australia's underperforming regime to the legal profession.
5. One difficulty that arises in attempting to assess the efficiency and effectiveness of the operation of Australia's AML/CTF laws is that this is typically estimated by the Financial Action Task Force (**FATF**) based on the regime's level of regulatory compliance with the FATF's Recommendations (notwithstanding the effect on compliance of fines and penalties). This concern is common amongst the international community for whom the current FATF evaluation methodology does not provide a meaningful assessment of whether the implementation of the FATF's Recommendations is in fact reducing the incidence of money laundering, terrorism financing or predicate offending.²
6. The FATF's Recommendations remain the dominant response of member countries (including Australia) to money laundering. However, to date the reduction of financial crime because of a FATF-based response appears to remain elusive. Empirical and anecdotal evidence shows the implementation of the FATF Recommendations has not led to *'any decline in money laundering and over the period from 1995 to 2006 the level of money laundering may have actually increased in the OECD countries'*.³

¹ See Attorney General's Department at <https://www.ag.gov.au>

² T Halliday, M Levi, P Reuter, *Global surveillance of dirty money: Assessing assessments of regimes to control money-laundering and combat the financing of terrorism*, (Centre on Law and Globalization 30 January 2014 at 48 available at

http://www.lexglobal.org/files/Report_Global%20Surveillance%20of%20Dirty%20Money%201.30.2014.pdf L Hoffman *A Critical Look At the Response to Combat Trade Based Money Laundering* Texas International Law Journal 2014 Vol 48 235

³ P Holt *Money Laundering: the Global Responses and its Likely Effectiveness*, October 2015 available at https://www.researchgate.net/publication/282854829_Money_laundering_the_global_response_and_its_likely_effectiveness

7. Concerns about effectiveness abroad (and domestically) are compounded by the need for robust systemic quantitative analysis of the regime's strengths and weaknesses. Costs are substantial whether construed broadly or narrowly, and without attention to economic and financial costs the broader intent of the FATF's 2012 Standards⁴ and 2013 Methodology⁵ to produce effective outcomes is undermined.⁶ Little evidence appears to be available to demonstrate that the costs of the regime produce commensurate benefits in FATF member states or in any other jurisdiction.⁷
8. While there are few empirical indications that FATF based laws are impacting on the level of financial crime, there is growing evidence that, in application, such laws can have deleterious and unintended consequences. In terms of the proposed further regulation of legal practitioners, the AML/CTF regime creates requirements of disclosure that are inconsistent with client legal privilege⁸, fiduciary obligations of confidentiality and with the duty of commitment/loyalty with a client's lawful instructions.
9. The AML regulation of lawyers would raise a range of concerns including:
 - threatening the operation of the doctrine of client legal privilege⁹;
 - eroding client confidentiality and the concept of independent legal advice because of the operation of suspicious matter reporting and information gathering under the notice requirements of the AML/CTF regime;¹⁰
 - creating irreconcilable conflicts of interest where a suspicious matter report is required to be lodged, which will require a legal practitioner to terminate

⁴ According to the Financial Action Task Force, the **40 Recommendations** that form the basis of the standards provide a complete set of counter-measures against money laundering covering the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation. They have been recognised, endorsed, or adopted by many international bodies http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

⁵ The Financial Action Task Force's 2013 *Methodology* is used by FATF and FATF regional bodies for Assessing Compliance with the *FATF Recommendations* and the *Effectiveness of AML/CFT Systems* <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf>

⁶ T Halliday, M Levi, P Reuter, *Global surveillance of dirty money: Assessing assessments of regimes to control money-laundering and combat the financing of terrorism*, (Centre on Law and Globalization 30 January 2014 available at http://www.lexglobal.org/files/Report_Global%20Surveillance%20of%20Dirty%20Money%201.30.2014.pdf

⁷ T Halliday, M Levi, P Reuter, *Global surveillance of dirty money: Assessing assessments of regimes to control money-laundering and combat the financing of terrorism*, (Centre on Law and Globalization 30 January 2014 at 48 available at http://www.lexglobal.org/files/Report_Global%20Surveillance%20of%20Dirty%20Money%201.30.2014.pdf

⁸ Also referred to as legal professional privilege, the privilege is described as being a "fundamental and general principle of the common law." *Baker v Campbell* (1983) 153 CLR 52, 116-17; *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475, 490 per Deanne J. and of 'fundamental importance to the protection and preservation of the right, dignity and equality of the ordinary citizen under the law' Jeremy Bentham, *Rationale of Judicial Evidence* (1827) Vol VII, 474 (Banning ed), extracted in M Pirsig and K Kirwin, *Professional Responsibility: Cases and Materials* (4th ed, 1984) 113-14.

⁹ S 242 of the AML/CTF Act provides that the law does not affect client legal privilege. Nevertheless it has been judicially observed the law inherently risks breaching solicitor-client privilege" and that the provisions "wrongly" transferred the burden of protecting solicitor-client privilege onto lawyers as there is no requirement that notice be given to clients who may therefore be unaware that their privilege is under threat and 'A reasonable and informed person, thinking the matter through, would perceive that these provisions are inconsistent with the lawyer's duty of commitment to the client's cause' per Cromwell J in *Canada (Attorney-General) v Federation of Law Societies of Canada* 2015SCC 7.

¹⁰ For example under sections 167 and 202 of the AML/CTF Act.

- the client retainer agreement for reasons that cannot be disclosed to the client under pain of the legal practitioner committing an offence;
- creating a chilling effect on the client's willingness to provide otherwise protected information openly and frankly resulting in damage to the lawyer client relationship which will impede the legitimate and efficient delivery of legal services;
 - changing the role of legal practitioners in the Australian system of justice from trusted advisor to that of informant to law enforcement;
 - imposing dual regulation on legal practitioners (as a matter of principle as well as practice);
 - increasing compliance burdens and costs associated with operating a legal practice and providing legal services.
10. Applying AML/CTF regulation to the legal profession has raised similar challenges to those that have played out in other jurisdictions, such as the United Kingdom and Canada.
 11. In Canada the threat to client legal privilege, the damage that would result to the lawyer client relationship and the inconsistency with ethical obligations were considered matters of fundamental justice sufficient to warrant the exemption of the legal profession from AML/CTF regulation.¹¹
 12. In terms of anticipated costs, the Law Council provides (below at Part 5) the preliminary findings of a study of the anticipated compliance costs should the legal profession in Australia be AML regulated. Such costs are estimated at about \$2.11 billion annually.¹² Accordingly, the cost of legal services will inevitably rise significantly, many law practices are likely to become unprofitable and close (particularly in regional areas) and significantly greater strain will be placed on government-funded legal assistance services, further undermining access to justice.
 13. The Consultation Paper proposes that Australian legal practitioners should be regulated under AML/CTF legislation based on theoretical and largely situational risks identified by the FATF that lawyers involved in certain transactional work may face.¹³ If lawyers are at high risk (of involvement in financial crime), it is the Law Council's view those risks are mitigated and offset by the highly effective and comprehensive legal profession regulatory regime (and the requirements of other laws). Like all members of the community, legal professionals are subject to the criminal law that punishes offences of money laundering and terrorism financing whether they do so knowingly or whether their conduct is negligent or reckless in allowing or facilitating financial crime. Yet in the decade since Australia implemented AML/CTF legislation, these apprehended risks have not eventuated. Despite repeated requests by the Law Council, authorities have not provided any evidence of lawyer involvement, wittingly or otherwise, to support any contention that further regulation of legal practitioners is required or appropriate.

¹¹ *Canada (Attorney-General) v Federation of Law Societies of Canada* 2015SCC 7.

¹² Though final analysis of the findings of the costs study are not available as at 31 January 2017, it is anticipated the findings of the study will be available to inform the AGD's proposed cost benefit analysis of a preferred regulatory model.

¹³ Law Society England and Wales reflecting on situational risk said: *..it is not generally accepted that simply because accounts clerks have increased opportunity to steal from their employer or pharmacists have increased access to prescription medication which they could be selling illegally, they should all be treated as high risk.* . <http://www.lawsociety.org.uk/support-services/risk-compliance/anti-money-laundering/documents/financial-action-taskforce-consultation-response-2011/>

14. The Consultation Paper makes no attempt to examine whether the existing legal profession regulatory framework provides sufficient mitigation of the risks, or to identify regulatory gaps which are alleged may exist. It fails to acknowledge legal professionals are comprehensively regulated pursuant to detailed state/territory-based legal profession regulatory schemes.
15. Neither does the Consultation Paper appear to give consideration of a range of Commonwealth legislative frameworks¹⁴ and state/territory initiatives which already apply a range of due-diligence procedures and reporting obligations in many of the areas intended to be captured by the proposed extension of the AML/CTF regime - an omission of analysis that suggests the paper's argument that there exists a regulatory need is inadequate and necessarily incomplete.
16. It is the Law Council's key submission that legal practitioners in Australia should not be made subject to the regulatory requirements of the AML/CTF regime.

¹⁴ Including for example Foreign Investment Review Board approval and Foreign Resident Capital Gains Withholding Tax in relation to risks that money is laundered through real estate.

Recommendations

Recommendation 1

Whether or not the Australian Government decides to implement the recommendations of the Report on the Statutory Review, the Australian Government should require the Attorney-General's Department and AUSTRAC to collect and report to Parliament on an annual basis, through the Minister for Justice, the following aspects of Australia's AML/CTF regime:

- the number of investigations, prosecutions and convictions for money laundering and terrorism financing offences;
- the amount seized in relation to investigations, prosecutions, and convictions for money laundering and terrorism financing offences; and
- total expenditure by each federal department and agency in combatting money laundering and terrorist financing; and
- estimate of the compliance costs faced by the regulated community.

Such an approach is consistent with the principles of evidence-based regulatory policy development and adheres to the 2014 Red Tape Cutting Initiative.

Recommendation 2

Legal practitioners in Australia do not need to be made subject to CDD or the regulatory obligations of reporting entities under the AML/CTF Regime.

Recommendation 3

Should the Australian Government decide to extend to AML/CTF regime to legal practitioners and require the reporting of confidential information, that a true exclusion for information which comes to the legal practitioner in privileged circumstances be provided that builds and preserves the partial protection already afforded under section 242 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).

Recommendation 4

Making lawyers less susceptible to inadvertent or unintentional involvement in money laundering or terrorism financing is best realised through raising awareness, education and provision of guidance. Such awareness education and guidance would include AML/CTF specific content in mandatory Continuing Professional Development materials, Legal Practice Management Coursework and legal practice training courses.

Recommendation 5

The Australian Government should not extend the obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) to the independent referral bar as the obligations, particularly those stipulated in sections 41 and 123, are inconsistent with the fundamental values of practice as a barrister and will act to compromise the effective administration of justice.

Recommendation 6

The Australian Government allow provision in the legislation for members of the independent bar to rely on customer due diligence being completed by a solicitor or

some other third party who may also be a 'designated service' provider under section 6 of the Act.

Recommendation 7

Should the government extend CDD obligations to legal practitioners that those obligations be relaxed where legal practitioners are engaged at short notice for urgent matters.

Recommendation 8

The Australian Government exempt members of the independent bar from the requirement to be enrolled on the Reporting Entities Roll as long as they are enrolled with their respective State or Territory professional association.

Recommendation 9

The Australian Government monitor the impact of changes to regulation for an AML/CTF purpose on the legal assistance sector and the providers of pro bono legal services.

Recommendation 10

The Australian Government take no action that changes the regulation of legal practitioners.

Alternatively, if action is to be taken it should be through amendment of regulations in State based legislative schemes done through a proper collaborative design process to provide enforcement and supervision mechanisms consistent with other obligations on legal practitioners.

If action is taken to extend the obligation of reporting entities under the AML/CTF Act to legal practitioners, that client legal privilege and the role of the legal practitioner are preserved to the fullest extent possible and undermined no more than is necessary to combat the perceived risks.

Part 1: Purpose and Best Practice Consultation

Key Points

- Consultation on reforms to the AML/CTF regime is inadequate.
- The Report on the Statutory Review of the AML/CTF Regime failed to address requirements of the Replacement Explanatory Memorandum to the AML/CTF Bill 2006.
- No overall decrease in predicate offending, and proceeds of crime confiscations are low.
- The Government has over focused on Australia's compliance with international standards, rather than on the AML/CTF regime's cost efficiency and effectiveness.

17. The Department of Prime Minister and Cabinet's Office of Best Practice Regulation requires Australian Government policy makers to adhere to the 10 principles for consultation promulgated in the *Australian Government Guide to Regulation (Guide to Regulation)*. Of particular relevance are the following:
 - **Principle 5- Policy makers to consult in a genuine and timely way with affected businesses, organisations and individuals.**
 - **Principle 6- Policy makers must consult with each other to avoid creating cumulative or over lapping regulatory burdens.**
18. The Attorney- General's Department (AGD) in November 2016 released a Project Plan and in late November and December released seven consultation papers that purport to seek public feedback on proposed reforms to Australia's AML/CTF regime. Even papers released in mid-December fall due for return 31 January 2017.
19. The Christmas holiday shut down period and the public holidays observed over the consultation period by many businesses and organisations, (including for example the Law Council and legal services commissions) mean that the effective consultation period is significantly and unreasonably truncated.
20. In Australia, law practices overwhelmingly comprise small and micro businesses. 83.4% of private law firms¹⁵ and all practising barristers¹⁶ are sole practitioner/principal businesses. Like most businesses (other than perhaps those in retail and hospitality sectors), legal professionals take advantage of the court shut down period to holiday with their families.
21. Accordingly, the undue haste with which the consultation has been undertaken, as well as the poor timing and intrinsically inadequate period for consultation has unreasonably restricted participation by members of the public and legal practitioners in a process by which reform can meaningfully be considered.

¹⁵ URBIS for the Law Society of New South Wales, *2011 National Profile*, October 2012 at page i

¹⁶ Australian Bar Association, *Statistics 2015*, 30 June 2015 at page 3 (6005 practising barristers)

Part 1.2 Conduct of the consultation

The Report on the Statutory Review

22. The Consultation Paper refers to the Report on The Statutory Review prepared by the AGD and the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) released in April 2016. It became apparent by the release of the Consultation Papers, that the Government has uncritically accepted the 84 recommendations of the Report on the Statutory Review.
23. In developing the Report on the Statutory Review, the AGD and AUSTRAC appear to have selectively focussed on some of the recommendations made by the FATF's Mutual Evaluation Report on Australia's AML/CTF regime (FATF's 2015 MER) at the expense of the requirements imposed by the Replacement Explanatory Memorandum to the (then) AML/CTF Bill of 2006.
24. The Replacement Explanatory Memorandum to the third and final version of the (then) Anti- Money Laundering Counter- Terrorism Financing Bill 2006¹⁷ made clear the Australian Government's aims in implementing the *Anti- Money Laundering Counter- Terrorism Financing Act 2006* (Cth) (AML/CTF Act) included to increase the extent to which Australian law gives effect to the FATF's Recommendations.¹⁸
25. The Government implemented the AML/CTF Act in 2006 on 'the prima facie plausibility of the claim that adherence to the [FATF's] Standards would help reduce money laundering and the financing of terrorism, and collaterally the reduction of serious crimes for gain and terrorism.'¹⁹
26. Accordingly and because the passage of the AML/CTF Bill was controversial, the Replacement Explanatory Memorandum promised that the efficiency and effectiveness of the AML/CTF model implemented would be comprehensively assessed and reviewed by reference to specified indicia, including for example:
- criminal convictions (for the predicate or money laundering offence) to which these reports contributed;
 - the value of criminal assets confiscated and the cash forfeited to which these reports contributed; and,
 - disruptions of criminal activity.'²⁰
27. When the FATF's 2015 MER considered some of these indicia, it observed that:
- *'...statistics crucial to tracking the overall effectiveness and efficiency of the system related to ML investigations, prosecutions, convictions, and property confiscated are not maintained nationally...'*²¹

¹⁷ Parliament of Australia, *2004-2006 Anti-Money Laundering and Counter- Terrorism Financing Bill 2006; Replacement Explanatory Memoranda* available at

<https://www.legislation.gov.au/Details/C2006B00175/Download>

¹⁸ Parliament of Australia, *2004-2006 Anti-Money Laundering and Counter- Terrorism Financing Bill 2006; Replacement Explanatory Memoranda* page 15 available at

<https://www.legislation.gov.au/Details/C2006B00175/Download>

¹⁹ T Halliday, M Levi, and P Reuter, "Global Surveillance of Dirty Money: Assessing Assessments of Regimes to Control Money-Laundering and Combat the Financing of Terrorism," Center on Law and Globalization, January 30, 2014, available at

²⁰ Ibid n 12 at page 19 <https://www.legislation.gov.au/Details/C2006B00175/Download>

²¹ MER 2015 at page 130

- *'...there are very limited mechanisms or metrics actively in place to measure how efficient or effective the AML/CTF system is, including how well it addresses ML/TF risks.'*²²

Has the AML/CTF regime impacted on money laundering and terrorism financing?

28. In terms of ML and TF offences, the FATF's MER 2015 found:

- 'Australia has prosecuted nine individuals for TF and convicted three. All nine of these prosecutions were for section 102.6(1) CC [Criminal Code]—making funds available to a terrorist organisation.'²³
- 'Australia has improved in terms of obtaining ML convictions, and is achieving reasonable results in relation to the key risk and those geographic areas where Australia is focusing on ML, but the **overall results are lower than they could be** relative to the nature and scale of the risks. The authorities have applied a range of sanctions for ML offences to natural persons, but no corporations have been prosecuted for ML offences.'²⁴

29. Transparency International Australia (and others) has criticised the narrow focus of Australia's AML/CTF regime which TIA described as *'the headline-grabbing areas of drugs, fraud, tax evasion and terrorist activity, at the expense of far greater sources of money-laundering hazard such as foreign property investment.'*²⁵

No overall decrease in indictable offences

30. The FATF's 2015 MER said:

- 'Australia focuses on what it considers to be the main three proceeds generating predicate threats (drugs, fraud and tax evasion).'²⁶
- *'...predicate crimes may be decreasing in some areas (e.g. some frauds), the overall incidence, particularly for drug trafficking (the main threat), is not.'*²⁷

31. Specifically the type of fraud that appears to have reduced is referred to as 'welfare fraud'.

32. In terms of the amounts of the proceeds of crime that have been confiscated pursuant to the AML/CTF regime (a key indicia of effectiveness) the FATF's 2015 MER found:

- *'...The quantum of proceeds confiscated is relatively low in the context of Australia's ML/TF risk and has only increased modestly since the last FATF assessment, which suggests that criminals retain much of their profits.'*²⁸

²² MER 2015 at [2.26]

²³ MER 2015 at page 71 [4.8]

²⁴ MER 2015 at page 8 [10]

²⁵ G Lane Property News *Is Australian Property a Haven for Money Laundering?* 12 May 2015 available at <https://sourceable.net/m/single/?name=is-australian-property-a-haven-for-money-laundering/>

²⁶ MER 2015 at page 5

²⁷ MER 2015 at [2.27] this is based on risks identified in the National Risk Assessments the FATF requires domestic authorities to conduct. In the US' NMLRA identified at a high level the predicate ML crimes to threaten the US financial system to include fraud, drug trafficking, human smuggling, organised crime and public corruption available at <http://www.mondaq.com/unitedstates/x/405664/Money+Laundering/Treasury+Department+Issues+Comprehensive+Assessment+Of+US+Money+Laundering+And+Terrorist+Financing+Risk> .

Is Australia meeting international standards?

Technical Compliance and Effectiveness

33. Though described as mature and robust, Australia's AML/CTF regime when assessed by the FATF in 2015 was found *compliant* or *largely compliant* with just 24 of the FATF's 40 Recommendations- this is a relatively modest improvement on the 2005 assessment of *compliant* or *largely compliant* with 18 of 40 Recommendations.
34. The FATF's 2013 Methodology²⁹ evaluates the effectiveness of the implementation of a country's AML/CTF regime.³⁰ Pursuant to the Methodology such 'effectiveness' is assessed against eleven standards that measure the '*adequacy of the implementation of the FATF Recommendations, and identifies the extent to which a country achieves a defined set of outcomes*' referred to as Immediate Outcomes.³¹ Overall, Australia's AML/CTF regime was awarded *high* or *substantial* level of effectiveness in 5 of the 11 Immediate Outcomes.³²
35. It has been observed that the FATF's focus on effectiveness '*...does not in any way determine the effectiveness of the AML/CTF [regime] in reducing money laundering or terrorism financing*'.³³ Rather this is a measure of how well the AML/CTF standards have been implemented, as their actual effectiveness in terms of reducing money laundering or terrorism is assumed - the prima facie plausibility assumption of the FATF.³⁴
36. In the absence of meaningful efficiency and effectiveness data that AML/CTF laws actually reduce financial crime, researchers³⁵ including the International Monetary Fund,³⁶ query whether:
- focussing on AML/CTF compliance ensures progress in the mitigation of real money laundering and terrorism financing risk;³⁷

²⁸ MER 2015 at [3.79]

²⁹ Financial Action Task Force 2013 *Methodology For Assessing Compliance With The FATF Recommendations And The Effectiveness of AML/CTF Systems* available at <http://www.fatf-gafi.org/media/fatf/content/images/FATF%20Methodology%2022%20Feb%202013%20.pdf>

³⁰ Financial Action Task Force, *Effectiveness Has Moved to The Top of the FATF Agenda* <http://www.fatf-gafi.org/documents/documents/effectivenesshasmovedtothetopofthefatfagenda.html>

³¹ See footnote 4 (at page 5)

³² Financial Action Task Force *Mutual Evaluation Assessment Report 2015*, April 2015 at page 12 to 17, available at <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf>

³³ P Holt *Money Laundering: the Global Responses and its Likely Effectiveness*, October 2015 https://www.researchgate.net/publication/282854829_Money_laundering_the_global_response_and_its_likely_effectiveness

³⁴ P Holt *Money Laundering: the Global Responses and its Likely Effectiveness*, October 2015

³⁵ T Halliday, M Levi, P Reuter, *Global surveillance of dirty money: Assessing assessments of regimes to control money-laundering and combat the financing of terrorism*, (Centre on Law and Globalization 30 January 2014 at 6 available at http://www.lexglobal.org/files/Report_Global%20Surveillance%20of%20Dirty%20Money%201.30.2014.pdf ; Todd Doyle, *Cleaning Up Anti-Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law*, Houston Journal of International Law January 2002 303-307 available at <http://www.hjil.org/articles/hjil-24-2-doyle.pdf>. The Economist *Looking In The Wrong Places* October 2005 available at <http://www.economist.com/node/5053373>

³⁶ C V Yepes, *Compliance with the AML/CTF International Standard: Lessons from a Cross-Country Analysis* (International Monetary Fund- Working Paper WP/11/117 July 2011 .

³⁷ C V Yepes *Compliance with the AML/CTF International Standard: Lessons from a Cross-Country Analysis* (International Monetary Fund- Working Paper WP/11/117 July 2011 at 14

- to what extent compliance with the FATF's standards is effective in lessening a country's vulnerability to money laundering and terrorism financing;³⁸ and
- there is a resulting decline in global levels of compliance with the recommendations.³⁹

Proportionality

37. Discussion or information on benefits and costs of any AML/CFT regime are limited or non-existent. One comprehensive study⁴⁰ found that:

- even though the FATF proceeds as if these rules have produced only public benefits, to date there is no substantial effort by any international organization, including the International Monetary Fund, to assess either the costs or the benefits of the regulatory framework;⁴¹
- little consideration has been given to the costs of implementing an AML/CFT regime, and little evidence has been adduced to demonstrate that the costs produce commensurate benefits in their own or any other jurisdiction;⁴² and
- costs are substantial whether construed broadly or narrowly and without attention to economic and financial costs, the broader intent ... to produce effective outcomes is undermined.⁴³

³⁸ C V Yepes *Compliance with the AML/CTF International Standard: Lessons from a Cross-Country Analysis* (International Monetary Fund- Working Paper WP/11/117 July 2011 at 25

³⁹ P Holt at n 34, 6; Jackie Johnson J, *Third round FATF mutual evaluations indicate declining compliance* (Journal of Money Laundering Control Vol 11 Issue 1 2008) 49

⁴⁰ T Halliday, M Levi, and P Reuter, "Global Surveillance of Dirty Money: Assessing Assessments of Regimes to Control Money-Laundering and Combat the Financing of Terrorism," Center on Law and Globalization, January 30, 2014

⁴¹ T Halliday, M Levi, and P Reuter, "Global Surveillance of Dirty Money: Assessing Assessments of Regimes to Control Money-Laundering and Combat the Financing of Terrorism," Center on Law and Globalization, January 30, 2014, p. 7, H Geiger and O Wuensch 2007, *The Fight Against Money Laundering. An Economic Analysis of a Cost-Benefit Paradoxon* Journal of Money Laundering Control, Vol 10(1), pp. 100-102.; Podpiera, R., 2004, "Does Compliance with Basel Core Principles Bring any Measurable Benefits?" IMF Working Paper WP/04/204.

⁴² T Halliday, M Levi, P Reuter, *Global surveillance of dirty money: Assessing assessments of regimes to control money-laundering and combat the financing of terrorism*, (Centre on Law and Globalization 30 January 2014 at 48

⁴³ T Halliday, M Levi, P Reuter, *Global surveillance of dirty money: Assessing assessments of regimes to control money-laundering and combat the financing of terrorism*, (Centre on Law and Globalization 30 January 2014 at 48

Recommendation 1

Whether or not the Australian Government decides to implement the recommendations of the Report on the Statutory Review, the Australian Government should require the Attorney-General's Department and AUSTRAC to collect and report to Parliament on an annual basis, through the Minister for Justice, the following aspects of Australia's anti Money laundering and Counter Terrorism Financing regime:

- the number of investigations, prosecutions and convictions for money laundering and terrorism financing offences;
- the amount seized in relation to investigations, prosecutions, and convictions for money laundering and terrorism financing offences; and
- total expenditure by each federal department and agency in combatting money laundering and terrorist financing; and
- estimate of the compliance costs faced by the regulated community.

Such an approach is consistent with the principles of evidence-based regulatory policy development and adheres to the 2014 Red Tape Cutting Initiative.

Part 2: Regulation of Australian Lawyers

Key points

- Australia's legal profession is already comprehensively regulated and has appropriate and necessary checks and balances.
- There are already regulations in place which target services that may be vulnerable to ML/TF such as those relating to foreign investment.
- There is no evidence that Australian lawyers are involved in ML/TF.
- Legal profession regulators, working with the Attorney-General's Department and AUSTRAC, reviewed all complaints data against lawyers in a three-year period. No case of ML or TF was identified- all were dismissed.
- The Supreme Court of Canada has recognised the utmost importance of client legal privilege and has stated that there are more proportionate and less drastic measures available to prevent money laundering and terrorist financing.
- AML regulation of UK Lawyers has not reduced the incidences of property title fraud and as such, the Law Council does not agree with the AGD's claim that robust due diligence processes mitigate the risks associated with the full spectrum of ML/TF.
- UK firms spend more money on compliance with their AML regime than the benefit obtained by the government and, due to the risks to UK lawyers, they are turning away legitimate work.

Australian Lawyers are Comprehensively Regulated

38. The Consultation Paper provides little or no analysis of the existing regulatory framework within which legal services are delivered to assess whether in practice, there are regulatory gaps that the extension of the AML/CTF legislation would address.
39. It has been judicially observed that the professional activities of Australian lawyers are regulated and controlled more than any other profession or vocation.⁴⁴ This is reflected in the volume and complexity of existing legal profession regulation under Australia's unique and comprehensive state/territory based legal profession legislative package which operates in every Australian jurisdiction.⁴⁵
40. The Standing Committee of Attorneys-General in 2006 released the Legal Profession Model Laws (subsequently adopted throughout Australia) upon painstaking consideration of the necessary checks and balances (including fraud risks) required by the updated regulatory framework. Since then, the Legal Profession Uniform Law (**the Uniform Law**)⁴⁶ has created a common legal services market across NSW and

⁴⁴ *Re Bannister (1975)* 5 ACTR 100 at 104 per Fox J

⁴⁵ *Legal Profession Act 2006* (ACT); *Legal Profession Uniform Law* (NSW); *Legal Profession Law Application Act 2014* (NSW); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (QLD) *Legal Practitioners' Act 1981* (SA); *Legal Profession Act 2007* (Tas); *Legal Profession Uniform Law* (Vic); *Legal Profession Law Application Act 2014* (Vic); *Legal Profession Act 2008* (WA).

⁴⁶ commenced on 1 July 2015

Victoria, encompassing almost three quarters of Australia's lawyers. The Uniform Law uniformly regulates the legal profession across the two jurisdictions, governing matters such as practising certificates conditions, maintaining and auditing of trust accounts, continuing professional development requirements, complaints handling processes, billing arrangements and professional discipline issues.

41. It is a condition of obtaining and annually renewing their practicing certificates that Australian legal practitioners obtain Professional Indemnity Insurance cover for which they are assessed and profiled for possible involvement in fraud, negligence and other risks. It is worthy of mention that in most jurisdictions premiums are dropping for PII based on practitioners' claims history and risk profiling.⁴⁷
42. Further it is understood that as a result of concerns about a lack of evidence of lawyer involvement in financial crime, legal profession regulators⁴⁸ working with the AGD and AUSTRAC reviewed all complaints data against lawyers in a three year period, looking for potential money laundering involvement. The review identified 17 cases where there was the possibility of involvement in money laundering, all of which were dismissed on closer inspection.

Systematisation of risk and reporting to law enforcement on clients

43. The Consultation Paper appears to assume that AML/CTF regulation will promote the *systemisation of risk and reporting* to AUSTRAC. However the paper fails to consider whether there are alternative, less intrusive means of achieving this objective (such as through of education and risk awareness raising programs or appropriate reforms to legal profession legislation). The Consultation Paper refers only to the prescriptive obligations of Customer Due Diligence (**CDD**) and suspicious matter reporting contained in the AML/CTF legislation.
44. In this regard it is relevant to note that lawyers in some countries such as Singapore, Hong Kong and the UK have been subject to AML obligations for some time. In other countries such as the United States, China, Korea and Australia lawyers are not subject to AML regulatory obligations. In yet other jurisdictions, the legal profession in Belgium Jamaica and Canada has challenged the extension of AML legislative obligations. This suggests that the AML regulation of legal practitioners has not met with unanimous support in FATF member countries, particularly where there has been judicial consideration of the issues in more recent times (Canada and Jamaica).
45. Most recently, the Canadian Supreme Court considered the impact of money laundering regulation predominantly on lawyer-client confidentiality (other ethical duties were also considered). By way of a unanimous decision of the full court, Canada's Supreme Court in February 2015 determined lengthy litigation between the Canadian legal profession and the government over duties imposed on lawyers by money laundering legislation.⁴⁹
46. The Canadian Government sought to extend lawyer regulations,⁵⁰ imposing identity verification and record keeping obligations, giving the Financial Transaction Reports Analysis Centre (**FINTRAC**) wide powers to examine client records and inquire into

⁴⁷ For example in Queensland in 2015 20% drop in premiums of solicitors.

⁴⁸ Including the independent legal services commissioners and their counterparts.

⁴⁹ *Canada (Attorney-General) v Federation of Law Societies of Canada* 2015 SCC 7

⁵⁰ Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations SOR/2002-184

the business and affairs of law practices and their clients. This included the power to search and make copies of lawyers' records and require lawyers to provide FINTRAC with information upon request in circumstances where lawyers who violate the legislative scheme are liable to significant fines and incarceration.

47. The court noted particularly (but not exclusively) that the expectation of privacy for communications subject to client legal privilege is invariably high and the main driver of this expectation is the fiduciary nature of the client lawyer relationship and not the context in which the state seeks to intrude into that 'specifically protected zone'.⁵¹ The legislative scheme's search and seizure powers combined with inadequate protections for client legal privileged information constituted a significant limitation on the constitutionally guaranteed right to be free of unreasonable search and seizures.
48. Specifically, the court held there were more proportionate and less drastic measures available to pursue the legitimate objective of preventing money laundering and terrorist financing. The Supreme Court concluded the provisions in issue failed the proportionality test and could not be demonstrably justified in a free and democratic society.⁵²
49. The court noted clients and the broader public must be confident that lawyers are committed to furthering their clients' legitimate interests and are free from competing obligations that may interfere with this duty.⁵³ The duty was described as critical to both the representation of individual clients and public confidence in the administration of justice '*as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients...*'.⁵⁴

Risk systemisation through the AML/CTF regime

50. The AGD's Consultation Paper at page 7 asserts that robust due diligence mitigates the risks associated with the full spectrum of ML/TF facilitation, illustrating this point by reference to a 2016 case determined in the Supreme Court of the ACT.⁵⁵ The Consultation Paper claims the case evinces that:

'Robust due diligence processes mitigate the risks associated with the full spectrum of ML/TF...'; and

*'...presiding judge, Mossop AsJ, was critical in his judgment of the failure of the real estate agent and the solicitor to undertake sufficient checks to identify that their instructions were being provided by the owner of the properties.'*⁵⁶

⁵¹ Ibid n 49 at para 38

⁵² Ibid n 49 at para 24

⁵³ Ibid n 49 at para 96

⁵⁴ Ibid n 49 Cromwell J speaking for the court at para 84

⁵⁵ *Astell v Australian Capital Territory* [2016] ACTSC 238

⁵⁶ Attorney Generals' Department Consultation Paper; *Legal Practitioners and Conveyancers: a model for regulation under Australia's anti-money laundering and counter- terrorism financing regime* November 2016 at page 7

51. With respect, the case does not support the contention that the due diligence processes of the AML/CTF regime mitigate the risks of money laundering or terrorism financing.
52. While not strictly a case on money laundering, the discussion on the case in the Consultation Paper attempts to illustrate how lawyers (because they do not come under the identification and verification procedures of the AML/CTF regime) are allowing money laundering or terrorism financing to occur. However it is observed that the systemisation of CDD in jurisdictions such as the UK where lawyers come under the AML/CTF framework has not prevented the proliferation of similar frauds.
53. In Australia, '*cases involving signature of an instrument by an imposter...are few and far between*⁵⁷, fraud investigators describe the *incidence of such scams here as '...very very rare*⁵⁸ indicating that it '*...doesn't happen every day*⁵⁹.
54. In Australia, two similar cases occurred in Western Australia prior to 2013, while the ACT Attorney-General has described Astell's case as the first of its kind to take place in the ACT.⁶⁰ The earlier Western Australian cases are credited for prompting the introduction in 2014 of verification of identity checks pursuant to the Electronic Conveyancing Laws⁶¹ that have since been adopted into the legislation of every jurisdiction. According to the Western Australian Department of Commerce, fraud awareness and identity verification checks (together with provision of guidance notes by major fraud squad detectives to the property industry sector) '*have successfully stopped several recent attempts*⁶².... Western Australian Commissioner for Consumer Protection Driscoll said this '*proves that scam attempts can be detected and foiled from the start.*⁶³

⁵⁷ N Skead and P Carruthers, *Fraud Against the Registrar- An Unnecessary, Unhelpful and Perhaps, No Longer Relevant Complication in the Law On Fraud Under the Torrens System* Monash University Law Review 2014 Vol 40 No 3 at page 839 available at <http://www.austlii.edu.au/au/journals/MonashULawRw/2014/32.pdf>; P Watkins *Fraud In Conveyancing* A paper presented at the Australian Institute of Conveyancers, National Conference March 2007 at page 7; N Skead and P Carruthers, *150 years on; the Torrens Compensation Provisions in the 'last resort' Jurisdictions* (2011)19 Australian Property Law Journal 174

⁵⁸ According to WA Police (Major Fraud Squad) Detective Senior Sergeant Pete Davies who is reported in Australian Broadcasting Corporation *Allegations Another House Sold Without Owner Knowing* 10 August 2011 available at <http://www.abc.net.au/news/2011-08-10/house-sold-from-under-owner/2833664>

⁵⁹ Australian Broadcasting Corporation *Allegations Another House Sold Without Owner Knowing* 10 August 2011 available at <http://www.abc.net.au/news/2011-08-10/house-sold-from-under-owner/2833664>

⁶⁰ Australian Broadcasting Corporation, *Scammers Sell Canberra House Without Owner's Knowledge* 24 July 2014 available at '<http://www.abc.net.au/news/2014-07-23/north-canberra-house-sold-in-real-estate-fraud/5617164>

⁶¹ In NSW for example the *Real Property Amendment (Electronic Conveyancing) Act 2015* introduced an amendment that allows the Registrar General to make Conveyancing Rules. The Conveyancing Rules largely parallel provisions in the Participation Rules for electronic conveyancing which also apply to paper based transactions. The Conveyancing Rules standardise formal verification of identity and authority requirements (right to deal) across all conveyancing including:

- Requirements for verification of identity;
- Requirements for verifying authority;
- Supporting evidence requirements.

⁶² According to WA Police (Major Fraud Squad) Detective Senior Sergeant Pete Davies in the Western Australia Department of Commerce's article *Real Estate Scam Attempt Thwarted* May 2014 available at <http://bizline.commerce.wa.gov.au/announcements/real-estate-scam-attempt-thwarted>

⁶³ Western Australia Department of Commerce, *Real Estate Scam Attempt Thwarted* May 2014 contains the quote of the Commissioner for Consumer Protection which is available at <http://bizline.commerce.wa.gov.au/announcements/real-estate-scam-attempt-thwarted>

Lawyers in the UK are subject to the full spectrum of ML/TF due diligence processes

55. In the UK, lawyers have been fully regulated for AML since 2001.⁶⁴ As members of the regulated community, they are compelled by law to undertake 'the full spectrum of ML/TF due diligence processes' to which the AGD refers. Yet the incidence of title fraud⁶⁵ in the UK is described as '*substantial and growing*'⁶⁶. For instance

- In 2004-2005 there were 15 claims of property title fraud made against the Land Registry;⁶⁷ in 2008/2009 there were 62 cases⁶⁸ and in 2009/2010 there were 53;⁶⁹
- In 2004-2005 the Land Registry paid compensation of £491,656;⁷⁰ in 2008/2009 the compensation paid was £4.9 million pounds.⁷¹ However; from 2006 to 2011 the Land Registry is estimated to have paid out more than £26 million in compensation;⁷² from 2012 to 2015 the Land Registry's Indemnity Fund received more than £59 million⁷³ with the total of claims received in 2014 alone being £23.3 million.⁷⁴

56. Notwithstanding stringent identification and verification requirements under AML regulation in the UK (that applies to lawyers, real estate agents and others in the regulated sector), the incidence of scamming by which criminals impersonating home owners transfer ownership of land and property to themselves or sell property, does not appear to have abated because of those measures.⁷⁵

57. Conclusions that could be drawn from this discussion are that:

- the systemisation of risks under the AML/CTF regime does not necessarily deliver mitigation of the risks. If systemisation and CDD had this effect, then the UK should have eliminated or reduced the incidence of the risk because of the counter measures that apply in that jurisdiction;
- specific state/territory reforms introduced to address the regulatory gap highlighted by the handful of title cases that occurred in Australia have been effective. These measures operate within a broader framework of other

⁶⁴ AML obligations under UK domestic law as a result of the European Commission's Second Money Laundering Directive and later Third Money Laundering Directive (via the *Proceeds of Crime Act 2002* (UK) and the Money Laundering Regulations 2003 (Money Laundering Regulations 2007).

⁶⁵ Whereby fraudsters pass themselves off as land owners and offer the land as security for a loan, or sell it to a third party, pocket the cash and disappear.

⁶⁶ T Boyles, *Your Home Could Be Stolen* Express News UK 6 March 2011 available at <http://www.express.co.uk/news/uk/232866/Your-home-could-be-stolen>

⁶⁷ T Boyles, *Your Home Could Be Stolen* Express News UK 6 March 2011

⁶⁸ S Goodley, *Property Title Fraud Costs Land Registry 26 m in Compensation*, the Guardian 15 May 2011 available at <https://www.theguardian.com/money/2011/may/15/land-registry-title-fraud-compensation>

⁶⁹ T Boyles, *Your Home Could Be Stolen* Express News UK 6 March 2011

⁷⁰ T Boyles, *Your Home Could Be Stolen* Express News UK 6 March 2011

⁷¹ S Goodley, *Property Title Fraud Costs Land Registry 26 m in Compensation*, the Guardian 15 May 2011

⁷² S Goodley, *Property Title Fraud Costs Land Registry 26 m in Compensation*, the Guardian 15 May 2011

⁷³ G Norwood, *Title Fraud Costing Land Registry Millions' Claim*, Estate Agent, Today 4 August 2015 available at <https://www.estateagenttoday.co.uk/breaking-news/2015/8/title-fraud-costing-land-registry-millions-claim>

⁷⁴ G Norwood, *Title Fraud Costing Land Registry Millions' Claim*, Estate Agent, Today 4 August 2015

⁷⁵ British Broadcasting Corporation, *Watchdog; Identity Fraud* March 2011

<http://www.bbc.co.uk/programmes/articles/Pmw0JZLRc3T2NGT8nv78JJ/identity-fraud>; Express News UK, *Your Home Could Be Stolen* 6 March 2011 available at <http://www.express.co.uk/news/uk/232866/Your-home-could-be-stolen>

regulatory obligations and requirements that together appear to have prevented further occurrences in Australia.

58. The Law Council does not agree with the AGD's claim that risk systemisation under the AML/CTF regime mitigates the risks associated with the full spectrum of ML/TF because the cause-effect relationship is more complicated than this in regulatory policy.

Recommendation 2

Legal practitioners in Australia do not need to be made subject to CDD or the regulatory obligations of reporting entities under the AML/CTF Regime.

Question 1

What services provided by legal practitioners pose a ML/TF risk?

59. The FATF states that legal professionals pose a high risk of being involved in ML. In some of the 37 FATF jurisdictions, this is perhaps the case. However in Australia, there is little or no evidence or cases to support the contention that the FATF's theoretical presumed risk actually eventuates.
60. An absence of evidence, research or cases about lawyers' actual involvement in ML/TF does not necessarily mean that it does not occur. However the lack of evidence suggesting a significant problem indicates that if it does occur, it is not of a systemic scale that would be addressed by the requirements of the AML/CTF regime.
61. Further, specific tailored regulatory requirements have in recent years already been imposed to services thought to be particularly vulnerable to misuse for ML/TF purposes (for example foreign acquisition of Australian real estate and tax evasion-see further below).
62. The absence of a systemic issue in Australia is perhaps the result of domestic conditions such as Australia's unique and comprehensive co-regulatory model of legal profession regulation as well as other obligations that arise both under Commonwealth and state/territory initiatives. For example the requirements of the Model Participation Rules for Identification and Verification arising from the implementation of the Electronic Conveyancing National Law that have been adopted in every state/territory jurisdiction, are being extended over both electronic and paper-based transactions.

Question 2

Do any of these services pose a low ML/TF risk in the Australian context?

63. This is difficult to assess in terms of publicly accessible information. The Law Council:

- has made repeated requests (formal and informal-including Freedom of Information requests) on the Australian Transaction Reports and Analysis Centre, the Attorney General's Department, the Australian Institute of Criminology and others for information about lawyer involvement in ML or TF. None has ever been provided;
- understands that as a result of a concern about a lack of evidence, the legal profession regulators and the AGD and AUSTRAC reviewed all complaints against lawyers in a three year period looking for potential money laundering involvement. The review identified 17 cases where there was the possibility of involvement in money laundering, all of which were dismissed on closer inspection;
- has established that the 'cases' used in publications such as for example AUSTRAC's 2015 *Strategic Analysis Brief, Money Laundering Through Legal Practitioners* contain international cases that do not involve Australian professionals, others pre- date the commencement of the AML/CTF Act and regulatory legislative scheme. Other case examples are hypothetical constructs that authorities use as proxies because they are pressed to identify any case involving legal practitioners- as such, allegations of involvement rest on matters that are outdated, overstated or that emanate from sources that rely either on lightly analysed lists of cases in multiple jurisdictions⁷⁶ or assertions citing closed source material which cannot be tested.⁷⁷

Question 3

What are the effects of requiring legal practitioners to comply with AML/CTF obligations when performing services that may pose an ML/TF risk?

- Regulating lawyers for AML/CTF would have significant effects on lawyers, regulators, clients/users of legal services and other members of the community more generally.

Cost and Burden

- Lawyers in the United Kingdom have been subject to AML Regulation since 2001. According to surveys on the effects of requiring lawyers in the UK to comply with AML/CTF obligations:

⁷⁶ See for example Financial Action Task Force *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals 2013* available 24 May 2015 at <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf>

⁷⁷ For example, in Australia, the Australian Transaction Reports and Analysis Centre develops two classified reports being the National Threat Assessment On Money Laundering and the National Risk Assessment.

- 'when multiplied out across 150,000 regulated entities, the private sector is investing more in the UK's anti- money laundering regime than the UK government is recovering because of it.'⁷⁸
 - 'The increased focus on anti money laundering has made firms more aware of the risks they face from criminals and more alert to the reputational damage which some clients pose. It has led them to turn away more work, not on the basis of potential money laundering, but because of professional and reputational concerns'.⁷⁹
 - UK lawyers have indicated they 'do not generally believe that compliance with the exacting technical requirements of the Regulations is delivering any real benefits'.⁸⁰
- In 2011, surveys of UK law practices indicated:
 - 60 per cent of respondents were obliged to rely on commercial e-verifiers to help identify politically exposed persons (PEPs); and
 - 33 per cent of respondents had turned down work because of the perceived risk posed by PEPs – rather than because they actually suspected money laundering.
 - '...Commercial providers are very costly. Small firms can be spending a few hundred pounds a year simply to prove that they do not have a secret PEP in their client base. Larger firms can find themselves spending hundreds of thousands of pounds in licence fees and thousands of pounds in search fees each year...'⁸¹
 - '... the opening of a new international corporate client matter can cost in the region of £5,000 due to the chargeable time lost by fee earners and compliance staff in chasing documents and undertaking research, even in circumstances that generally would not be considered to give rise to a risk of money laundering. Even for smaller law firms, the opportunity cost of time spent on conducting due diligence checks on any client who is other than the absolute standard, is more than the fees they are able to charge for the work being undertaken. This either results in them taking on the client at a loss in the hope of future work or in simply turning away possible legitimate business....'⁸²

⁷⁸ The Law Society of England and Wales, *The Costs and Benefits of Anti- Money Laundering Compliance for Solicitors* December 2009 available at <http://www.lawsociety.org.uk/support-services/risk-compliance/anti-money-laundering/documents/law-society-response-to-the-hm-treasury-money-laundering-review-2009/>

⁷⁹ The Law Society of England and Wales, *The Costs and Benefits of Anti- Money Laundering Compliance for Solicitors* December 2009

⁸⁰ The Law Society of England and Wales, *The Costs and Benefits of Anti- Money Laundering Compliance for Solicitors* December 2009.

⁸¹ The Law Society of England Wales, *Financial Action Task Force Consultation Response*, January 2011 at page 14 available at: http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_taskforce_lawsocietyresponsetofatfconsultation.authcheckdam.pdf

⁸² The Law Society England and Wales, *Development of a 4th Money Laundering Directive: Response to the European Commissions review of third money laundering directive*, June 2012 at pages 10-11 available at <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/documents/EU-consultation->

The creation of two classes of confidentiality

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

Client due diligence and managing risk

65. If the intention of CDD and internal risk management regulation under the AML/CTF legislation is to influence a legal practitioner's behaviour and attitudes about identifying and mitigating risks, then that regulation is otiose. Legal practitioners are inculcated with and influenced by a more fundamental, sophisticated, multi-faceted and extensive set of ethical duties and professional obligations that shape and define their attitudes and professional behaviour to client due diligence and internal risk management. Further, the ethical duties and other professional obligations of legal practitioners are supplemented by specific requirements of state and territory laws regulating legal practice and the provision of legal services.
66. There is nothing especially different from an ethics and professional obligations perspective about money laundering or terrorism financing compared to any other illegal activity or improper purpose a client might have in contemplation. Being alert to and managing the risk of being an instrument to a client achieving an illegal or improper purpose is a normal professional obligation of a legal practitioner. Consistent with this professional obligation, a legal practitioner will take whatever steps are necessary to identify the client and associated entities, to make such initial and ongoing enquiries as are sufficient to identify and understand the client's purpose, and to terminate the retainer so as to not assist a client in achieving an illegal or improper purpose. This is woven into the principles expressed by a number of Australian Solicitors' Conduct Rules, notably the solicitor's duty to the court and the administration of justice; the duty to avoid any compromise to his or her integrity and professional independence; the duty to not engage in conduct that would demonstrate the solicitor is not a fit and proper person to practise law; the duty to follow (only) a client's lawful, proper and competent instructions; the duty to deliver legal services competently, diligently and to avoid any compromise to his or her integrity and professional independence; the right to terminate the engagement for just cause and on reasonable notice; and the duty to exercise reasonable supervision over solicitors and all other employees engaged in the provision of legal services for a matter.
67. It is within this broad framework that the Law Council has consistently stated that the most appropriate approach to promoting effective client due diligence and risk management is through information and education.

[response-2012/](http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/documents/EU-consultation-response-2012/) <http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/documents/EU-consultation-response-2012/>

Question 4

To what extent are due diligence obligations captured by existing regulation for legal practitioners?

68. Lawyers typically make such due diligence enquiries as circumstances dictate, pursuant to cautious business practices. This means the level and extent of enquiries are tailored to each client/matter on a case by case basis. In this sense, requirements are not prescribed as such, which means that risk management plays an active role in determining risk and response - a more dynamic process than a mere 'tick box' exercise.
69. Further, firms in the business sector (who are properly informed) are better placed to determine "client on boarding" requirements which achieve equilibrium between adequate risk management, operational effectiveness and customer experience.
70. In other words while AML and Know Your Client ("KYC") measures might be thought to inform a significant portion of de-risking, from a commercial point of view, commercial factors can also be determinants of risk elements. If it is deemed a major factor, it raises instant questions because the pure concept of really knowing your client and avoiding money laundering is a community-based responsibility⁸³ and an important factor in law practice reputational culture as well.
71. The observations of the legal profession in the UK on being regulated to apply prescribed due diligence requirements are as follows:

'A law firm will need to know who their client is, simply to send the client letters, serve documents, complete court forms, complete a transaction and provide full and proper advice on legal issues.'

'The extra identity specifically required by the Regulations and required at the start of the business relationship rather than as the retainer progresses, was not seen by firms to be of benefit to them. We are not aware of any firm making a SAR [suspicious activity report] simply as a result of extra identity information. SARs are usually made because of information relating to the nature of the retainer and the way that it proceeds'

'When looking at SARs from solicitors, neither the Law Society nor FATF have been able to obtain any example of where even one report from a lawyer and a lawyer alone has actually made a difference to serious and organised money laundering'

'...the majority of these reports relate to minor tax evasion, small scale opportunistic mortgage fraud by individuals (rather than criminal syndicates) or minor regulatory or environmental breaches uncovered during mergers and acquisitions.'⁸⁴

⁸³ B Evans *The Client On Boarding Challenge: Getting to Grips with 2016's AML and KYC Risks* Reuters Thompson Webinar December 2015

⁸⁴ The Law Society of England and Wales, *The Costs and Benefits of Anti- Money Laundering Compliance for Solicitors* December 2009 available at <http://www.lawsociety.org.uk/support-services/risk-compliance/anti-money-laundering/documents/law-society-response-to-the-hm-treasury-money-laundering-review-2009/>

Part 3: Existing Laws That Regulate Legal Practitioners

Key points

- Australian legal practitioners are heavily regulated. They are duty bound to take positive steps if they suspect or become aware of a client's criminal intentions. Law practice trust accounts are subject to strict accounting procedures, oversight and controls. Conveyancing is already strictly regulated.
- Further, legal practitioners are subject to AML/CTF offences that target conduct other than knowing participation and intention to commit ML or TF. It is enough if they are negligent or reckless in their acts or omissions (Division 400 of the Schedule to the *Criminal Code Act 1995*).
- There are other mechanisms that in practice mitigate the risks of ML or TF occurring or that make it likely to be detected (examples include in the Family Court of Australia federal judicial officers have a public duty, in appropriate cases, to report or refer litigants for investigation/prosecution and the preapproval of the Foreign Investment Review Board.)

72. The Consultation Paper mentions the regulatory authorities, legislation, regulation and rules that specifically govern the practice of law in Australia, concluding that the *regulatory framework for legal practitioners is extensive and robust*.
73. The Consultation Paper nevertheless expresses the concern that regulation does not address the specific risk that services provided by legal practitioners may be misused for ML/TF purposes without the lawyer's knowledge. In particular the regulatory obligations relating to trust accounts are suggested to be inadequate because they do not oblige lawyers to examine the purpose source and legitimacy of the funds and the client's proposed transaction. The implication being, that as lawyers are not subject to obligations to make particular prescriptive enquiries, they are at risk of unwittingly facilitating ML/TF through law practice trust accounts.
74. However it is the Law Council's view that properly informed of the risks, legal practitioners are best placed to determine the enquiries necessary to safeguard law practice trust accounts from criminal misuse. Legal practitioners are motivated to avoid the irreparable reputational damage of being drawn unwittingly into their clients' attempted criminality.
75. Because of their role in the administration of justice, lawyers are under positive and enforceable obligations including, the duty to obey and uphold the law. The duty arises in many contexts and it means that lawyers:
- must not (themselves) engage in conduct that is dishonest, illegal or, unprofessional or that may otherwise bring the profession into disrepute or that is prejudicial to the administration of justice;
 - must not further their clients' causes by unfair or dishonest means; and

- must not assist or seek to induce a breach of the law by clients, other lawyers and third parties more generally.⁸⁵
76. A lawyer that becomes aware that a client is engaging in unlawful conduct must counsel the client against such conduct without participating in the conduct- whether by assisting or being seen to be tolerating the activity. Just cause for terminating a retainer agreement may arise where a client insists on some step being taken which in the solicitor's opinion is dishonourable or where the client hinders and prevents the solicitor from continuing to act as he or she should act, or unreasonably refuses to act in accordance with the lawyer's advice.⁸⁶
 77. The concept of 'just cause' for terminating the retainer, (particularly where the client disregards the lawyer's advice with a view to contravening the law or an obligation to a third party) rests on the principle that the lawyer's duty to the court is paramount even where this duty is inconsistent with the lawyer's duty to the client.⁸⁷
 78. Legal practitioners who do become involved in their client's unlawful acts are likely face the prospect of civil liability, criminal culpability as well disciplinary consequences.⁸⁸ Trust accounting regulation is procedurally detailed and rigorous and solicitors' trust accounts are subject to regular independent external examination and audit. Regulatory authorities with oversight of lawyers' trust accounts are empowered to conduct investigations of accounts at any time in relation to allegations or suspicions regarding trust money, trust property, trust accounts or any other aspect of the affairs of a law practice. In appropriate circumstances regulatory authorities can take over the management of the trust account or law practice including control of the funds- a prospect, criminals are likely to find daunting.
 79. Finally, like all members of the community, legal practitioners need only have acted negligently (in undertaking enquiries carelessly) or recklessly (in failing to make sufficient or adequate enquiries about the legitimacy of a client's transaction) in order to be liable for participation in money laundering offences.
 80. Federal money laundering offences are contained in Division 400 of the Schedule to the *Criminal Code Act 1995* ("Criminal Code"). Division 400 *Criminal Code* is drafted in very broad terms as the offences have criminalised activities which go beyond traditional notions of money laundering, especially when used in combination with Commonwealth revenue and financial reporting offences⁸⁹ (as predicate offences). It has been argued the scope of the regime is too broad to be consistent with the

⁸⁵ See G Dal Pont, *Lawyers Professional Obligations* 5th edition 2013 at page 615. Professor Dal Pont mentions that in addition to legal consequences, breaching conduct also generates a disciplinary consequences see for example *Legal Practitioners Complaints Committee v Segler* (2009)67 SR (WA) 280

⁸⁶ A. L. Smith L. J. *Underwood, Son & Piper v Lewis* (1894) 2 QB 306 at 314 In *Super 1000 Pty Ltd v Gzell J* also noted "where a solicitor is prevented by the client from properly carrying out the duties required by the retainer good cause for termination is established.

⁸⁷ Mason CJ observed in *Giannerelli v Wraith* (1988) 165 CLR 543, 556' *The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary.'*

⁸⁸ G Dal Pont, *Lawyers Professional Obligations* 5th edition 2013 at page 617

⁸⁹ M Leighton-Daly, "Money laundering offences: Out with certainty, in with discretion?," *Revenue Law Journal* (2015) Vol. 24: Iss.1, Article 6 at page 3.

political ideal of the rule of law and that prosecutorial discretion alone is an inadequate counter measure.⁹⁰

81. For example Section 400.3 *Criminal Code* creates offences (where the relevant property is worth \$1,000,000 or more) and provides:

(1) A person is guilty of an offence if:

(a) the person deals with money or other property; and

(b) either:

(i) the money or property is, and the person believes it to be, proceeds of crime; or

(ii) the person intends that the money or property will become an instrument of crime; and

(c) at the time of the dealing, the value of the money and other property is 1,000,000 or more.

Penalty: Imprisonment for 25 years, or 1500 penalty units, or both.

(2) A person is guilty of an offence if:

(a) the person deals with money or other property; and

(b) either:

(i) the money or property is proceeds of crime; or

(ii) there is a risk that the money or property will become an instrument of crime; and

*(c) the person is **reckless** as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and*

(d) at the time of the dealing, the value of the money and other property is 1,000,000 or more.

Penalty: Imprisonment for 12 years, or 720 penalty units, or both.

(3) A person is guilty of an offence if:

(a) the person deals with money or other property; and

(b) either:

(i) the money or property is proceeds of crime; or

⁹⁰ M Leighton-Daly, "Money laundering offences: Out with certainty, in with discretion?," *Revenue Law Journal* (2015) Vol. 24: Iss.1, Article 6 at page 1.

(ii) there is a risk that the money or property will become an instrument of crime; and

*(c) the person is **negligent** as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and*

(d) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

Penalty: Imprisonment for 5 years, or 300 penalty units, or both (emphasis added).

82. The point to note is that criminal liability under section 400(3) (and Division 400 offences) of the *Criminal Code* substitutes the customary element of a guilty mind (*mens rea*) with recklessness or negligence on the part of the accused.
83. The traditional criminal law convention that a person must have a guilty mind or *mens rea* ('*fault elements*' in the Federal sphere – see Division 5 *Criminal Code* 35 – such as intention, knowledge or dishonesty) in order to commit an offence is not necessarily available as a counterbalance to the breadth of criminalisation resulting from Division 400 of the *Criminal Code*. The effect of the operation of these provisions, collectively, is novel, arbitrary criminalisation that is counterbalanced only by prosecutorial discretion.⁹¹
84. Lawyers who inadvertently or unwittingly allow acts of money laundering to occur as a result of failing to make proper enquiries (because they not required to by regulation) are liable to prosecution under Division 400. Yet after a decade of the AML/CTF Act and despite the application of Division 400 *Criminal Code*, there have been no convictions of an Australian lawyer under these provisions of which the Law Council has been made aware.

Professional Obligations

85. The fabric of ethical duties and professional obligations of lawyers in Australia, and other nations that share our common law heritage, is woven from three intersecting relationships – the relationship between the lawyer and the court; the relationship between the lawyer and the client; and the relationship between the lawyer and other lawyers. Rules of court, common law and equity, and rules of professional conduct have evolved to guide lawyers through the complexities within and at the intersections of these intersecting relationships, preserving a set of core principles that balance and prioritise competing ethical duties and professional obligations, the administration of justice and the public interest.
86. There is no question that legislatures can (within constitutional boundaries) intervene so as to “regulate” aspects of lawyers’ professional relationships. Any regulatory model put forward by the federal government for extending the full AML/CTF regime to the legal profession is, in effect, a proposal to modify the relationships between the lawyer and the state, and will necessarily have ramifications for the three other relationships. Extending the full AML/CTF regime to the legal profession will change

⁹¹ M Leighton-Daly, “*Money laundering offences: Out with certainty, in with discretion?*,” *Revenue Law Journal* (2015) Vol. 24: Iss.1, Article 6 at page 15

a lawyer's duties to the Supreme Court, a lawyer's obligations in connection with conflicts of interest, a lawyer's duties to clients and the existing ethical standards required to be observed by lawyers.

87. While it is certainly the case that legislatures can significantly alter and even set aside long established rules and principles, legislatures have wisely been reluctant to do so in a blunt exercise of legislative force. Instead, the approach has been to acknowledge, preserve and work within the four intersecting relationships, respecting and balancing the differing roles, duties, obligations, spheres of authority, and rights and privileges of the courts, of lawyers, of clients and of the state. For example, the *Legal Profession Uniform Law* (which applies in Victoria and New South Wales) contains the following provisions:

Section 3 - Objectives

The objectives of this Law are to promote the administration of justice and an efficient and effective Australian legal profession, by -

(a)-(e) ...

(f) providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.

Section 6 - Definitions

professional obligations includes—

(a) duties to the Supreme Courts; and

(b) obligations in connection with conflicts of interest; and

(c) duties to clients, including disclosure; and

(d) ethical standards required to be observed—

that do not otherwise arise under this Law or the Uniform Rules.

Fraud Risk Mitigation in Real Estate Transactions

88. The FATF has identified the use of real estate as a key ML/TF method that commonly relies or requires the services of a legal practitioner. In some Australian jurisdictions this also requires the involvement of a real estate agent in the formation of the purchase transaction.⁹²
89. In the Australian context the risks of this method are now considerably reduced as there requirements for the identification and verification of the identity of parties to a transaction as a part of the title transfer process. The Consultation Paper mentions at page 7 Astell's 2016 case which arose as a result of fraud committed in 2013. In late 2014, stringent new rules (including for identification and verification) came into operation that mitigate fraud risks (in real estate transfers). The application of the

⁹² In Queensland, real estate agents form the contracts of sale between purchaser and seller and have a specific exclusion from legal professional regulation legislation to permit them to do so.

requirements has already proved effective against similar attempted frauds and which obviate the need for AML regulation which would duplicate an existing regulatory burden.⁹³

90. Additionally, the FATF considers foreign purchase of real estate a serious risk as a money laundering method. Foreign purchasers of real estate in Australia must obtain a prior approval of a proposed transaction from the Foreign Investment Review Board (FIRB). The FIRB website provides the following assistance to would-be foreign purchasers:

*"Foreign persons must have received foreign investment approval **before** they acquire an interest in residential real estate."⁹⁴*

91. The relevant fee for obtaining such an approval is between \$5,000 and \$91,300, for properties up to \$10 million. The FIRB process establishes an initial *de facto* risk assessment of foreign real property transactions from the perspective that "Foreign investment is important to help grow our economy and provide jobs".⁹⁵
92. In Australia, foreign purchasers of real estate must pose a lower risk of ML/TF than in other jurisdictions given such purchasers have already received Government approval for their transactions prior to settlement occurring.
93. The Law Council notes the Government has come under significant criticism for failing to enforce the existing requirements of the foreign investment rules. A 2014 House of Representatives inquiry⁹⁶ revealed that there had been no prosecutions for a breach of the rules since 2006 and that the penalties where imposed, were manifestly inadequate.
94. The latest international Corruption Perception Index (CPI) released by Transparency International on 25 January 2017, which measures public sector corruption, found Australia's score remained the same as in 2015 after three consecutive years of decline to its present score - which ranks Australia at only 13th position.⁹⁷ (Prior to 2015 Australia had been in the top ten cleanest jurisdictions for many years). Transparency International Australia in 2015 launched a push to support for greater transparency in legislation and its application including fraud from foreign individuals using Australia as a place to hide money, about which Transparency International Chairman Anthony Whealy QC said:

It comes down to our laws and enforcement bodies...Where are the prosecutions? Who is being sent to jail? The perception is we are too inert...⁹⁸

⁹³ The Verification of Identity Standards (VOI Standards) set out in Schedule 8 of the Model Participation Rules (Rules) of the Electronic Conveyancing National Law impose a range of stringent requirements including new and more effective verification of identity standard that replaces the traditional 100 point system of identification.

⁹⁴ FIRB, Residential real estate - overview [GN1], at <https://firb.gov.au/resources/guidance/gn01/>
⁹⁵ http://firb.gov.au/files/2015/09/FIRB_fact_sheet_residential.pdf

⁹⁶ Parliament of Australia House of Representatives Standing Committee on Economics *Report on Foreign Investment in Residential Real Estate* November 2014

⁹⁷ D Kitney *Federal Government Under Fresh Pressure to Act on Corruption* The Australian, 25 January 2017.

⁹⁸ Mr Whealy QC is quoted in D Kitney *Federal Government Under Fresh Pressure to Act on Corruption* The Australian, 25 January 2017.

95. Good policy development requires that the performance of existing regulatory laws and procedures (particularly those designed to mitigate risks of fraud and money laundering) should be properly audited and critically assessed to inform the nature of regulatory gaps and the need for further reform.

Question 5

To what extent do existing mechanisms that require regulatory oversight of legal practitioners mitigate ML/TF risks that may be posed by the services they provide?

96. The Consultation Paper refers specifically to risks relating to solicitors' trust accounts. In November 2016 the Law Society England and Wales' Submission on Transposition of the 4th ML Directive⁹⁹ responded to a similar concern relating to what are the money laundering and terrorist financing risks related to pooled client accounts and what mitigating actions should be taken

97. A summary of the LSEW's answer is as follows:

Pooled client accounts (PCAs) are accounts held by legal professionals with a financial institution to hold client monies on "trust" or for a purpose designated by the client. Money will either be held or received for payment of costs incurred by the legal professional on behalf of the client or for specific transactions on which the legal professional is advising, for example to hold completion monies in routine conveyancing transactions.

'PCAs have always been considered low-risk for ML/TF purposes and there have been no events or data to suggest that the status of PCAs should be changed from their current position. ...we believe that PCAs should continue to be explicitly regarded as low risk ..for the reasons set out below.

'... A legal professional is required by law to have a separate client account to hold client monies, to keep full accounts of those monies and to have those accounts independently audited at least once every 12 months. Accordingly, there are already strict controls in place. No funds should pass through a client account without being attached to an underlying legal transaction and the lawyer is required to maintain full records of these funds. If there is any "misuse" of a client account i.e. use of the account for any non-permitted purpose, this will be detected by the firm's systems and/or by the independent auditor.

... It is also worth highlighting that under the existing framework in which PCAs are classified as SDD, financial institutions are permitted to seek further information where they have concerns about a particular fund transfer. We see no reason to move away from this approach which would essentially classify every transfer into a PCAs as being higher risk.

98. The existing legal profession regulatory regime in Australia for trust money and trust accounts imposes statutory duties on a range of persons and entities, including approved deposit-taking institutions and trust account examiners (i.e. banks and independent auditors of law practices accounts) to give written notice to the

⁹⁹ Legal practitioners in the United Kingdom have been regulated for AML since 2001.

regulatory authority as soon as they become aware that there may be an irregularity in any of a law practice's trust accounts or trust ledger accounts.

Question 6

To what extent are due diligence obligations captured by existing regulation for legal practitioners at the national state and territory level?

99. As exemplified by the issues that arose in Astell's case above, it is the Law Council's view that there are disadvantages in relying heavily on prescribed due diligence requirements. Legal practitioners in Australia are required to perform sufficient and adequate due diligence as the circumstances and laws that govern the area of activity require. AUSTRAC's website states the purpose of the AML/CTF regime's CDD requirements is so that a *reporting entity* can be reasonably satisfied an individual customer is who he/she claims to be.
100. In practice, each client and each product or service line carries different risks and as a result different opportunities arise for mitigating those risks. In the legal sector this will be depend on a law practice's size, type of clients, nature of transactions and the practice area engaged in.
101. For example legal practitioners perform stringent identification and verification of identity screening when a transaction involves the transfer of land or for purchase of a business (see above on Electronic Conveyancing National Law). When assisting a client subject to FIRB application a legal practitioner may need to obtain and submit a passport or visa documents. Identity and verifying documents are also required to prepare certain legal documents, to apply for certain licences, prepare wills etc.
102. Some enquiries may exceed CDD requirements such as trust account regulations that require that a law practice must ensure it does not receive trust money under a false name. Or where a person on whose behalf trust money is received is known by more than one name, the law practice must record all names by which a person is known. These obligations require specific enquiries to be performed.
103. Other obligations such as Rule 93 of the Legal Profession Uniform General Rules 2015 require law practices to maintain a register of files opened irrespective of whether the law practice receives trust money. The details to be entered into the register require identification details including name address; the date instructions are received and a description of the purpose of the services.
104. In the United Kingdom it was reported in November 2016 that:
- More than 30 % of surveyed law practices said their annual salary cost of people employed to undertake CDD work exceeded £100,000 in 2015 with 22 % spending more than £200,000 in the same period; and
 - 84% of firms expect their total CDD costs will rise, 29% of whom expected their total CDD costs to rise by more than 10%¹⁰⁰. While these figures are not strictly relevant to the question, they serve to inform on the effect of CDD requirements on law practices.

¹⁰⁰ Law Society England and Wales *HM Treasury Consultation on the Transposition of the Fourth Money Laundering Directive* November 2016 at page 4 and 5

Question 7

Is there evidence of a systemic problem with legal practitioners allowing ML or TF to occur by failing to institute adequate measures?

105. It is alleged by AGD and AUSTRAC's that legal practitioners are systemically involved in money laundering.
106. However despite several requests (formal and informal) and Freedom of Information applications on the AGD, AUSTRAC, Department of Foreign Affairs and Trade and the Australian Institute of Criminology, there are few if any cases or empirical findings to evince the legal profession's level of involvement in financial crime.

Question 8

Is more regulatory oversight of legal practitioners justifiable?

107. No evidence has been presented or sound rationale made that justifies an increase in the regulatory oversight of legal practitioners. The Law Council has been unable to establish the alleged systemic level of involvement of legal practitioners in money laundering which would counter balance the significant cost and burden of AML regulation in Australia.
108. In Canada in 2015 the Supreme Court of Canada considered the proposed AML regulation of the Canadian legal profession including whether further oversight was appropriate. The court determined:
- there were more proportionate and less drastic measures available to pursue the legitimate objective of preventing money laundering and terrorist financing; and
 - the provisions in issue failed the proportionality test and could not be demonstrably justified in a free and democratic society.¹⁰¹

¹⁰¹ Ibid n 49 at para 24

Part 4: Obligations of the AML/CTF Regime

Key points

- The cost and burden of compliance with the AML/CTF regime have not abated over the years due to continued regulatory changes.
- There have been reports about the loss of business due to the inability of those subject to the regime to manage risks of potential non-compliance.
- In Canada, notwithstanding that lawyers are not subject to the obligations of reporting under its AML/CTF regime, the country was found to have made significant progress with its AML/CTF legal and institutional framework.
- In the UK, however, current data suggests that the inclusion of lawyers in the regime has had little impact. Further, recent reports in that country have revealed major problems with the regime's effectiveness in crime prevention and cost recovery.

109. The Consultation Paper summarises the requirements of the existing AML/CTF regime in Australia. The Law Council is concerned that in application the AML/CTF regime is complex and burdensome. A sense of this can be gleaned from the magnitude of compliance costs and burdens which the regulated community must bear. A highly lucrative AML regulatory compliance services industry sector has emerged across the world in response to the implementation of the Financial Action Task Force Recommendations.

110. Part 1 of the Law Council's submission has raised concerns for the efficiency and effectiveness of the AML/CTF regime based on the assessments of the FATF and the AGD/AUSTRAC's Statutory Review Report. However, concerns about performance are exacerbated by information about the costs of AML compliance.

111. In particular it might have been expected that investment in AML compliance would begin to plateau after a few years. However this has proven not to be the case in Australia or anywhere else. The reasons generally cited for this are the pace and impact of regulatory change¹⁰² and increased regulatory expectations¹⁰³ pursuant to an almost continuous reform of the legislative scheme and consequently amendments to the requirements imposed on the regulated community.

112. Recent surveys have found:

- Fifty-nine percent of commercial banks expect to increase their spend on AML systems in the coming years: AML platforms are the third oldest currently installed technologies at commercial banks today, yet are

¹⁰² KPMG Risk Consulting *Global Anti-Money Laundering Survey 2014* at page 36-38 available at <https://www.kpmg.com/KY/en/IssuesAndInsights/ArticlesPublications/PublishingImages/global-anti-money-laundering-survey-v3.pdf>

¹⁰³ In 2014- 2015 alone there were 18 amendments to the AML/CTF Act, or Rules about which consultations were conducted. It is difficult to imagine how reporting entities can keep up with the rate of changes let alone participate in the consultation process while running a business.

consistently ranked as among the highest value technologies for their ability to guard banks against crippling fines'.¹⁰⁴

- AML is on the Board's agenda: Increased regulatory scrutiny has made anti money laundering efforts a strategic priority for senior management at the majority of commercial banks. Eighty-eight percent of executives agreed that their Board of Directors are taking an active interest in reducing compliance risk.¹⁰⁵
- Increased regulatory expectations continue to represent the greatest AML compliance challenge. As in previous years, three-quarters of AML professionals report increased personal workloads and comparable proportions predict further increases in department workloads:
 - ...More than 85% of respondents work in companies with client-screening technology solutions in place...
 - ...Over 70% adhere to standards of either 10% or 25% beneficial ownership verification...
 - ...More than one-third of respondents report their companies have exited a full business line or segment of business in the past 12 months due to perceived regulatory risk and/or the organization's inability to manage the risk.....¹⁰⁶
- Seventy-eight percent of survey respondents reported increases in their total investment in AML activity, with 74 percent also predicting further increases in AML investment over the next three years. The most significant increase in investment occurred in the AsPAC region where 39 percent of respondents reported over 50 percent increase in AML investment. The average rate of investment globally was 53 percent compared to a prediction of 40 percent in 2011.¹⁰⁷

Question 9

What lessons can be learned from the experience of regulating legal practitioners under AML/CTF regimes in other jurisdictions?

113. The observed lack of effectiveness, absence of positive cost benefit outcome and absence of verifiable information about the alleged involvement of legal practitioners has led at least two jurisdictions to challenge the extension of obligations pursuant to the AML/CTF legislation to legal practitioners.¹⁰⁸

¹⁰⁴ CEB *Combatting Rising Threats with Aging Infrastructure* AML Market Update February 2016 page 3

¹⁰⁵ CEB *Combatting Rising Threats with Aging Infrastructure* AML Market Update February 2016 page 6

¹⁰⁶ Dow Jones ACAMS 2015 Global AML Survey 2015 Findings available at <http://images.dowjones.com/company/wp-content/uploads/sites/15/2015/03/Dow-Jones-ACAMS-AML-Survey-2015.pdf>

¹⁰⁷ KPMG Risk Consulting *Global Anti-Money Laundering Survey 2014* at page 29 available at <https://www.kpmg.com/KY/en/IssuesAndInsights/ArticlesPublications/PublishingImages/global-anti-money-laundering-survey-v3.pdf>

¹⁰⁸ See for example February 2015 decision of the Full Court of the Supreme Court of Canada in *Canada (Attorney General) v. Federation of Law Societies of Canada* ending a 15 year dispute between Canadian lawyers and the federal government with respect to the ability of the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") to, among other things, search and seize files from lawyers' offices

114. United Kingdom lawyers became regulated for AML in 2001 and in Canada the legal profession was exempted from the AML regulatory regime of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act 2000 (PCMLTFA)* under injunction commencing 2001. The UK and Canadian AML/CTF regimes are assessed by the FATF against the FATF Recommendations.
115. In September 2016 the FATF released its report on the Mutual Evaluation Assessment of Canada's AML/CTF regime that showed a marked improvement, notwithstanding the exemption of lawyers.
116. The United Kingdom's AML regime will be assessed by the FATF in 2017. However, as outlined below, it is considered that AML regulation of lawyers has had little impact on the regime's effectiveness in the UK.

United Kingdom

117. In 2009 the UK Government undertook to 'make a serious attempt to calculate the cost/benefit of the reporting of suspicious activities by the United Kingdom private regulated sector.'¹⁰⁹ As far as can be determined if the cost benefit analysis was performed, its results have never been made public.
118. In 2016 the House of Commons' Home Affairs Committee released a report on Proceeds of Crime¹¹⁰ described as shocking '...saying that the current system for detecting money laundering in the UK is a failure...[and refers to] the London property market as a prime piece of evidence.'¹¹¹

Suspicious Activity Reporting

*'...the ELMER system for Suspicious Activity Reports (SARs) is heavily overloaded and therefore rendered completely ineffective...The failure of ELMER has made the [suspicious activity reporting]SARs system a futile and impotent weapon in the global fight against money laundering and corruption.'*¹¹²

*the system currently processes 381,882 SARs despite being designed to manage only 20,000 and, of this figure, only 15,000 looked at in detail.'*¹¹³

without a warrant and hand out penalties to lawyers for non-compliance such as a fine of up to \$500,000 or 5 years in jail, or both.

¹⁰⁹ UK Government (see question 212).

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238526/7718.pdf As far as can be determined this was never completed. If it was, the results were not made public

¹¹⁰ UK Parliament, House of Commons Home Affairs Committee; *Proceeds of Crime* Fifth Report 2016-2017 available at <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/25/25.pdf>

¹¹¹ J Goldsmith Money Laundering Developments Law Gazette of the Law Society England and Wales 19 July 2016 available at <https://www.lawgazette.co.uk/comment-and-opinion/money-laundering-developments/5056659.article#commentsJump>

¹¹² UK Parliament, House of Commons Home Affairs Committee; *Proceeds of Crime* Fifth Report 2016-2017 page 11 and 12 available at <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/25/25.pdf>

¹¹³ UK Parliament, House of Commons Home Affairs Committee; *Proceeds of Crime* Fifth Report 2016-2017 page 35 at <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/25/25.pdf>

Money Laundering Through Real Property

*'...money laundering takes many complicated forms...from complex financial vehicles and tax havens around the world through to property investments in London... ..just 335 out of some 1.2 million property transactions last year were deemed to be suspicious... at the moment it is far too easy for someone intent on laundering money to buy a property with their ill-gotten gains, and rent it out in a very buoyant and robust letting market, and take in clean money in perpetuity*¹¹⁴

Confiscation of proceeds of crime

119. In December 2013 the National Audit Office (UK) released a damning report into the use of Confiscation Orders in the Criminal Justice System.¹¹⁵ The report observed that confiscation orders are the main way through which the government carries out its policy to deprive criminals of the proceeds of crimes including ML and predicate crime.¹¹⁶ The report found that:

- the confiscation orders system designed to ensure crime does not pay provide neither value for money nor a credible deterrent as perpetrators keep all but 26p in every £100 generated by the criminal economy...with only 2% paying in full
- only about 26p in every £100 of criminal proceeds was actually confiscated in 2012-13...
- ...fundamental problem is a lack of strategic direction... compounded by poor information, lack of knowledge, outdated IT systems, data errors and ineffective sanctions...¹¹⁷

120. While the estimated loss to the economy (UK) through fraud in 2012-2013 stood at £52bn, enforcement agencies collected just £133m, which cost taxpayers an estimated £102m in administration costs to recoup, said the National Audit Office (NAO).¹¹⁸

121. In July 2016 the House of Commons' Home Affairs Select Committee Report on Proceeds of Crime found that despite some reforms to the incentive system for recovering proceeds of crime, the Government has failed to satisfy the National Audit Office (NAO) that the system is fit for purpose, and that significant weaknesses remain.¹¹⁹ The House of Commons Home Affairs Committee report recommended:

'...that the Home Office publishes annual statistics on the wider elements of its performance in depriving criminals of their gains. These should include measures against all three of the Home Office's stated aims:

¹¹⁴ UK Parliament, House of Commons Home Affairs Committee; *Proceeds of Crime* Fifth Report 2016-2017 page 25 at <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/25/25.pdf>

¹¹⁵ UK Government, National Audit Office *Report Criminal Justice System Confiscation Orders* December 2013 available at <https://www.nao.org.uk/wp-content/uploads/2013/12/10318-001-Confiscation-Book-ES.pdf>

¹¹⁶ UK Government, National Audit Office *Report Criminal Justice System Confiscation Orders* December 2013 available at <https://www.nao.org.uk/wp-content/uploads/2013/12/10318-001-Confiscation-Book-ES.pdf>

¹¹⁷ A Morse, 'Head of the National Audit Office, 17 December 2013 available at <https://www.nao.org.uk/press-release/confiscation-orders/>

¹¹⁸ UK Government, National Audit Office *Report Criminal Justice System Confiscation Orders* December 2013 at p 4 available at <https://www.nao.org.uk/wp-content/uploads/2013/12/10318-001-Confiscation-Book.pdf>

¹¹⁹ UK Parliament, House of Commons Home Affairs Committee; *Proceeds of Crime* Fifth Report 2016-2017 page 18 available at <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/25/25.pdf>

- to deny criminals the use of their assets;
- to recover the proceeds of crime; and
- to deter and disrupt criminality.

These publications should encompass a measure of how crime rates have been influenced by denying criminals their assets, as well as complete lists of all assets seized from criminals over the course of the year.¹²⁰

Canada

122. In Canada, the Standing Senate Committee on Banking, Trade and Commerce (the Committee) in 2013 reported on the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act 2000*¹²¹. The Committee focused on three areas in the broad context of ensuring that the Regime provides “value for money” to the Canadian taxpayer.

- desired structure and performance;
- the appropriate balance between sharing of information and the protection of personal information; and
- optimal scope and focus.

123. Importantly, the Committee insisted that improvement of the POCMLTF could only be achieved by critical analysis of the performance of the regime. The Committee made 18 Recommendations, two of which required the collection of data about certain indicia as follows.

Recommendation 2

The federal government require the supervisory body to report to Parliament annually, through the Minister of Finance, the following aspects of Canada’s anti-money laundering and anti-terrorist financing regime:

- the number of investigations, prosecutions and convictions;
- the amount seized in relation to investigations, prosecutions and convictions;
- the extent to which case disclosures by the Financial Transactions and Reports Analysis Centre of Canada were used in these investigations, prosecutions and convictions; and
- total expenditures by each federal department and agency in combatting money laundering and terrorist financing.

Recommendation 3

The federal government ensure that, every five years, an independent performance review of Canada’s anti-money laundering and anti-terrorist financing regime, and its objectives, occurs. The review could be similar to the 10-year external review of the regime conducted in 2010, and could be undertaken by the Office of the Auditor

¹²⁰ UK Parliament, House of Commons Home Affairs Committee; *Proceeds of Crime* Fifth Report 2016-2017 page 27 at <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/25/25.pdf>

¹²¹ Standing Senate Committee on Banking and Trade and Commerce *Follow the Money; is Canada Making Progress in Combatting Money Laundering and Terrorist Financing? Not really*, 2013, available at <http://www.parl.gc.ca/Content/SEN/Committee/411/BANC/rep/rep10mar13-e.pdf>

General of Canada. The first independent performance review should occur no later than 2014.¹²²

Other assessments that drive improvement

124. The Parliament of Canada undertakes a comprehensive review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* every five years and the Office of the Privacy Commissioner of Canada is required to conduct a privacy audit of FINTRAC every two years. Among other periodic reports,¹²³ reviews and audits, the regime's performance is statutorily mandated to be reviewed every five years.
125. Internationally, Canada's regime is assessed by the FATF against the FATF standards and is subject to the FATF's follow-up process. In September 2016 the FATF released its report on the Mutual Evaluation Assessment of Canada's AML/CTF regime. Notwithstanding that lawyers are not subject to the obligations of *reporting entities* under PCMLTF, since its previous assessment in 2007, Canada was found to have *made significant progress in bringing its AML/CTF legal and institutional framework in line with the standard*.¹²⁴
126. By undertaking annual reviews of the efficiency and effectiveness indicia (as recommended by the 2013 Statutory Review Report) Canada appeared better able to address regulatory gaps. Canada was found *compliant or largely compliant* against 29 of the FATF's 40 Recommendations (+ 11).
127. The lessons to be learned from other jurisdictions is that the regulation of lawyers under the AML/CTF regime does not of itself appear to improve the effectiveness or performance of the AML regime of that jurisdiction. The (UK) House of Commons has called for annual statistics about performance indicators to be reviewed to focus further developments. Similar measures were put into operation in Canada after 2013 Statutory Review of the AML/CTF regime which appears to have improved the performance of the Canadian AML regime.

¹²² Standing Senate Committee on Banking and Trade and Commerce *Follow the Money; is Canada Making Progress in Combatting Money Laundering and Terrorist Financing? Not really*, 2013, page vi available at <http://www.parl.gc.ca/Content/SEN/Committee/411/BANC/rep/rep10mar13-e.pdf>

¹²³ See, for example, the Department of Finance Canada's [2014-15 Report on Plans and Priorities](#), which explains the AML/ATF regime's spending plans, priorities and expected results, as well as its [Departmental Performance Report](#), available for 2013-14.

¹²⁴ Financial Action Task Force Anti-Money Laundering and Counter Terrorist Financing Measures Canada Mutual Evaluation Report September 2016 page 4 available at <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf>

Part 5: How would AML/CTF Obligations Impact on the Legal Profession?

Key Points

- Regulating legal practitioners for AML/CTF would result in erosion of client legal privilege and invalidate confidentiality.
- There are approximately 10,000 law firms in Australia, with 5% of these classified as larger firms and 15% as medium firms. The remaining are small firms. The anticipated set up and annual compliance costs for the AML/CTF regime for legal practices are:
 - For larger firms, around \$748,000 per year;
 - For medium sized firms, around \$523,000 per year; and
 - For smaller firms, around \$119,000 per year.
- This means that set up and compliance cost will amount to 10% of the entire revenue of the legal profession. This will severely affect the profession's ability to provide services to clients.
- Subjecting solicitors and members of the Bar to AML/CTF obligations would hinder the administration of justice and increase costs for the client. In particular barristers because they obtain instructions from solicitors, do not handle trust accounts or keep files are an even lower risk of ML or TF – the manner in which they practice also makes them more susceptible to the costs and burdens of AML regulation.
- Lawyers may seek to reduce their exposure to risks by exiting areas of higher risk in a wholesale fashion, rather than judging the risks of clients on a case-by-case basis

Client Professional Privilege

The [legal professional] privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers.¹²⁵

128. The concept of client professional privilege is complex and so prior to addressing the impact any proposed extension of the Act will have on legal professionals, it is necessary to clarify the key principles of privilege and the reasons why its integrity must be preserved.

129. In Australia, the privilege of communications between clients and a legal adviser (solicitor and barrister) derives from legislation and the common law. Sections 118

¹²⁵ Gleeson CJ, Gaudron and Gummow JJ *Esso Australia Resources v Commissioner of Taxation* [1999] HCA 67

and 119 of the *Evidence Act 1995* (Cth)¹²⁶ sets out the privilege as it relates to advice and litigation and are as follows:¹²⁷

Section 118 Legal Advice:

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

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

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

Section 119 Litigation:

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

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

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

130. Sections 118 and 119 are limited to the adducing of evidence and would not, for example, extend to ancillary procedures in litigation such as discovery. However, the legislative provisions did not supplant common law legal professional privilege which extends to such procedures.¹²⁸ In *Esso v Commissioner of Taxation* the High Court noted the following reasons as to why the relationship between a client and legal practitioner has the benefit of privilege:

1. It exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers;¹²⁹ and

¹²⁶ Equivalent Acts in State and Territory jurisdictions are, *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2011* (ACT) and *Evidence (National Uniform Legislation) Act 2011* (NT).

¹²⁷ The privilege does not extend to where advice is sought to further a fraud, crime of other unlawful purpose, see *R v Cox & Railton* (1884) 14 QBD 153; *R v Bell* (1980) 146 CLR 141. There are also statutory exceptions, see eg, *Evidence Act 1995* (NSW) sections 121-126.

¹²⁸ *Esso Australia Resources v Commissioner of Taxation* [1999] HCA 67; 201 CLR 40.

¹²⁹ *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674.

2. A person should be entitled to seek and obtain legal advice for the purposes of the conduct of actual or anticipated litigation, without the apprehension of being prejudiced by subsequent disclosure of the communication.¹³⁰

Principles of Legal Professional Privilege:

- The authority is derived from statute and common law;
- It is a privilege that lies with the client, the legal adviser observes the privilege for the client's benefit;
- privilege can only be waived by the client and not the legal adviser; and
- It is attached to communications and what falls within that privilege is a question of fact.

131. In addition to the statutory and common law requirements of client legal privilege, Rule 61 of the *Barristers Rules*¹³¹ provides the following:

61. A barrister must take care to ensure that decisions by the barrister to make allegations or suggestions under privilege against any person:

- (a) are reasonably justified by the material then available to the barrister;*
- (b) are appropriate for the robust advancement of the client's case on its merits; and*
- (c) are not made principally in order to harass or embarrass a person.*

Client legal privilege and the Act

132. If legal practitioners are required to comply with the Act, the obligations are such that it will erode a client's right to client legal privilege and negatively impact on the relationship a client has with his or her legal practitioner, whether it be a solicitor or barrister. It is important to emphasise that client legal privilege is a privilege that lies with the client. That is, a solicitor and barrister is required to observe client legal privilege, they do not have the right to waive it and they do not have a discretion to decide when such privilege will and will not apply. A solicitor and barrister is bound to preserve the client's privileged communications in relation to advice and litigation of a matter. Should the Act impose obligations on solicitors and barristers that diminishes client legal privilege, it would be in direct conflict with their professional obligations. Moreover, it would affect the confidence that clients have in the legal profession and broader access to justice principles.

133. At present section 41 of the Act stipulates what a reporting entity has to do if it forms a reasonable suspicion that the circumstance presented by an individual falls into one or more of the wide circumstances outlined in ss41(1)(d) to (j). A standard of reasonable suspicion is one that is too low to justify diminishing the integrity of legal professional privilege which exists to promote respect for and observance of the law.

¹³⁰ *Baker v Campbell* [1983] HCA 39; (1983) 153 CLR 52.

¹³¹ Legal Profession Uniform Conduct (Barristers Rules) 2015.

134. Section 242 of the Act states that the law relating to legal professional privilege is not affected by the Act. For the reasons given above we submit that this should be maintained but, insofar as the legislation is extended to legal practitioners then it should be expressed in terms of an exception. That is, no reporting obligation should attach to communications that are subject to legal professional privilege. Moreover, it is important that the protection is not limited to information obtained in the course of litigation leaving information gained by a legal practitioner in relation to non-litigation advice work unprotected. In practice maintaining such a distinction is problematic, for example, in the case of barristers often some initial advice on a matter will be a prelude to litigation.

135. Nevertheless, notwithstanding an express exception, the operative sections of the Act which includes identification verification¹³², ongoing customer due diligence¹³³ and reporting suspicious matters¹³⁴, act to diminish the unique relationship that exists between a lawyer and client, part of which involves legal professional privilege. For example, section 41 of the Act sets out the obligation to report suspicious matters, the scope of this section is wide and it is invoked the moment a person inquires or requests a service from a reporting entity. This includes circumstances where a contract for service has not yet been entered into. It appears that leaving a message on a reporting entity's voicemail or sending an email to a reporting entity inquiring about fees for service would suffice in engaging section 41.

136. It is true that client legal privilege can attach to communications made prior to the legal practitioner and client entering into a retainer, it extends to potential clients and to the extent a retainer is necessary, it is met where the client has a genuine belief that it is entitled to the legal advice.¹³⁵ However, it has been said that what passes between a client and lawyer must be for the purposes of retaining the legal practitioner.¹³⁶ In a broader statement Bromberg J said:

'Communications between a solicitor and a potential client which reveal the nature of the legal advice sought to be the subject of the retainer are privileged'.¹³⁷

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

138. There is a degree of fluidity to relationships in legal practice that do not exist within the financial sector which makes application of the Act difficult. If a client is not able to rely on the security of client legal privilege from the very outset of their relationship with their solicitor or barrister, it risks diminishing the effective and

¹³² Section 35 of the Act.

¹³³ Section 36 of the Act.

¹³⁴ Section 41 of the Act.

¹³⁵ *Grofam Pty Ltd v Australia and New Zealand Banking Group Ltd* (1993) 45 FCR 445 at 456.

¹³⁶ See *Minter v Priest* [1929] 1 KB 655 at 666 per Lord Hanworth MR (overruled on other grounds [1930] AC 558).

¹³⁷ in *Kirby v Centro Properties Ltd (No 2)* (2012) 87 ACSR 229 at [18]

proper administration of justice resulting in significant flow on of costs to law enforcement, the legal system, government and the community.

139. It is also important to note that privilege can vary over time. For example, as Young J points out *'if a company is the solicitor's client and that company becomes defunct, there is no basis for upholding a claim of privilege at the instance of the persons who were once interested in the company'*,¹³⁸ as it was the company who was the client. So although such privilege can apply in some circumstances to third parties¹³⁹ there will be instances where that will not be the case. The fact that privilege attached to a communication can vary with time places an intolerable burden on legal practitioners insofar as AML/CTF reporting obligations are concerned. In this example the solicitor to the company might need to keep a track of all his or her past corporate clients and if one goes defunct revisit the file and see if any communication could have been the subject of a report.

Confidentiality

140. The duty of confidentiality is a broader requirement imposed on legal practitioners compared to that of client legal privilege. A communication, including documents exchanged during the course of the barrister, solicitor and client relationship may be confidential but it may not necessarily fall within the confines of client legal privilege. The distinction is dependent on the purpose of the communication and whether it was for the dominant purpose of obtaining legal advice or advice in anticipation or in the course of litigation.¹⁴⁰
141. The obligation to keep communications with a client confidential assists in the promotion of clients making full and frank disclosure to their solicitor or barrister. It is based on a secure knowledge that their legal representative will not disclose to a third party discussions or documents. It is similar to the fundamental characteristics of legal professional privilege with the distinct difference being that the duty of confidentiality applies to all communications regardless of whether it is for the purpose of legal advice or advice in anticipation or in the course of litigation.
142. Barristers Rule 114 provides the parameters in which barristers may be allowed to disclose confidential material.

114. A barrister must not disclose (except as compelled by law) or use in any way confidential information obtained by the barrister in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep the information confidential unless or until:

- (a) the information is later obtained by the barrister from another person who is not bound by the confidentiality owed by the barrister; or*
- (b) the person has consented to the barrister disclosing or using the information generally or on specific terms.*

¹³⁸ in *Global Funds Management (NSW) Ltd v Rooney* (1994) 36 NSWLR 122 at 130, (citing *Baker v Evans* (1987) 77 ALR 565 at 567).

¹³⁹ *Hicks v Trustees Executors & Agency Co Ltd* (1900) 25 VLR 668 at 671.

¹⁴⁰ *Eso Australia Resources v Commissioner of Taxation* [1999] HCA 67; 201 CLR 49.

143. Section 117 of the *Evidence Act 1995* (Cth) defines 'confidential communication' as communication made in such circumstances that, when it was made a person who made it or the person to whom it was made was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.¹⁴¹
144. As noted above, AML/CTF Act section 242 provides that it does not affect legal professional privilege. This implies that while it will not affect legal professional privilege, there may be circumstances where obligations under the Act may infringe upon the duty of confidentiality so that reporting under the Act will form an exception based on legal compulsion. Moreover, any protection given to the legal practitioner under the Act for disclosing confidential communications to the relevant authority may result in the legal practitioner being liable to third parties unless specific protection is provided for under the Act. For example assume A and B as joint venturers approach C for legal advice. During the course of their conversation C obtains confidential information that results in C reporting B. That information may also be confidential in C's relationship with A and the disclosure a breach of C's duty to A.
145. It is important to note that the duties of a barrister or solicitor cannot be ranked in order of importance but rather as duties that exist as pillars that complete the foundations on which the relationship a legal practitioner has with his or her clients, other legal practitioners, with the courts (as officers of the court) and to the greater community. Duties such as client legal privilege, confidentiality, to the client and court should be considered equally and each are significant cornerstones in the advancement of the administration of justice for the public interest. Should the Act require legal practitioners to report suspicious matters that may fall outside client legal privilege but within the realms of confidentiality, it would act to disturb the relationship of trust, integrity and honesty that underpins that relationship. This in turn risks encroaching on the public interest and the manner in which justice is administered more broadly.
146. Additionally, at times, it is unclear what communications fall within client legal privilege and/or confidentiality. Such distinctions have been the subject of litigation over the years. The lack of clarity around the scope of client legal privilege and/or confidentiality, coupled with the subjective test contained in section 41 of the Act under which designated services providers are required to report, risks leaving legal practitioners vulnerable. If a legal practitioner fails to report, there may be penalties under the Act but, if they report under section 41 but the communication was subject to client legal privilege, then they may be exposed to disciplinary processes through their respective professional associations.

¹⁴¹ This is similarly defined in equivalent State and Territory legislation and are contained in, section 117 of the *Evidence Act* (NSW); section 117 of the *Evidence Act 2008* (Vic); section 117 of the *Evidence Act 2001* (Tas); section 117 of the *Evidence Act 2011* (ACT) and section 117 of the *Evidence (National Uniform Legislation) Act 2011* (NT).

Question 10

How would AML/CTF obligations impact on client confidentiality and other ethical obligations of legal practitioners? In particular, how would the AML/CTF obligations impact on legal professional privilege?

147. The Consultation Paper investigates the impact that the extension of the AML/CTF regime to legal practitioners would have on client legal privilege and confidentiality. It is suggested that the extension of the regime to legal practitioners would not only erode those principles but impinge upon the trust and confidence that underpins the relationship between a legal practitioner and his or her client and which is fundamental to the administration of justice.
148. While the paper supports the need to preserve the current carve out for client legal privilege contained in section 242, it is suggested that that carve out be clearly expressed as an exclusion from reporting obligations and not be limited to communications made in the course of litigation. Client legal privilege cannot be used to cloak illegality and impropriety and does not apply when advice is sought to further or facilitate fraud, a crime or unlawful purpose. The policy for a carve out in relation to litigation is therefore just as applicable to all communications subject to client legal privilege. In addition, if confidential communications that are not the subject of client legal privilege are reportable it needs to be recognised that it can be difficult in practice to draw a line between that which is confidential and that which is privileged.
149. More fundamentally, client legal privilege attaches to communications so long as the client's intention in seeking the advice is to effect lawful outcomes.¹⁴² Legal professional privilege is a privilege of the client, the legal practitioner merely observes the privilege. Usually it is a court that will decide whether the privilege applies. The legal practitioner does not make determinations as to whether it applies but may cease to act in a matter if he or she believes their advice is to be used for an illegal or improper purpose. As regards the proposed AML/CTF legislation, the legal practitioner cannot be asked to make determinations as to whether client legal privilege will or will not apply to communications and report accordingly, to do so could result in the legal practitioner being subject to disciplinary proceedings if they made a wrong judgment and reported a matter that was later determined to be privileged. If the AML/CTF legislation does require legal practitioners to make such determinations then provision will need to be incorporated into the relevant legislation to protect legal practitioners when they, in good faith, report or refuse to report a matter. But such a requirement would change fundamentally the nature of legal professional privilege.

Recommendation 3

Should the Australian Government decide to extend to AML/CTF regime to legal practitioners and require the reporting of confidential information, that a true exclusion for information which comes to the legal practitioner in privileged circumstances be provided that builds and preserves the partial protection already afforded under section 242 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).

¹⁴² *AG (NT) v Kearney* [1985] HCA 60; (1985) 158 CLR 500

Question 11

What impact would AML/CTF compliance costs have on access to legal services within the community?

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

151. In December 2016 and January 2017 Queensland Law Society conducted a survey of law firms to assess likely implementation costs of an AML/CTF regime akin to the existing Australian scheme being extended to legal practitioners.¹⁴³ The survey approached the imposition of a scheme by considering the impact of each of its component parts on a law firm, with special consideration of different sizes and locations. Firms reported whether they undertook transactions of the following kind and the approximate number undertaken in any year:

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

152. At the time of writing preliminary data from the survey was available and it is intended to provide supplementary analysis when the survey reaches fuller maturity.

153. The dynamics of law firms is significantly affected by the size of their operations both in terms of the number of transactions engaged in and the types of matters undertaken. For this reason, compliance costs are presented for three broad categories of law firms:

- Larger firms (comprising 19 or more solicitors);
- Medium sized firms (comprising 6 to 19 solicitors); and
- Small firms (comprising sole practitioner firms and firms up to 5 solicitors).

154. Headline results indicate that set up and annual compliance costs for the AML/CTF regime for legal practices are:

- For larger firms around \$748,000 million per year;
- For medium sized firms around \$523,000 per year; and
- For smaller firms around \$119,000 per year.

¹⁴³ The findings of the Queensland Law Society survey are interim results and are being finalised. These figures of the interim results do not factor in AUSTRAC registration costs, registration fees or industry contribution levy.

155. Given that there are approximately 10,000 law firms in Australia and that around 5% would be classified as larger firms and 15% as medium firms on our definitions, the approximate national cost on a linear extrapolation would be:

- \$374 million for larger firms;
- \$784.5 million for medium sized firms;
- \$835 million for smaller firms; and
- \$1.99 billion for all firms nationally.

156. The 2016 IbisWorld Industry Report for the legal sector cites that the revenue of the legal services industry nationally is \$23.1 billion and total profit is \$3.3 billion. It seems disproportionate that the potential national cost of set up and compliance should amount to about 10% of the entire revenue of the legal profession.

157. While early figures, the QLS survey showing the annual cost of AML/CTF compliance for the legal profession at around \$2 billion will prove to be a significant burden on the Australian economy. On the IbisWorld numbers it will not be possible for these costs to be absorbed by the legal profession and legal costs will have to rise.

158. This will have a negative impact on access to justice and particularly in the case of smaller and regional practices may see those places lose their local law firms. In many cases the gross revenue of small firms is between \$300,000 and \$600,000 a year and an additional compliance burden of around \$120,000 is not sustainable for communities which cannot support significant and sustained rises in legal fees. As is the experience in the United Kingdom, the closure of smaller and regional firms will not only have a deleterious effect on access to justice but will also remove from smaller communities an integral and important pillar in local community infrastructure.

Larger firms

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

<u>Measure to the extent prescribed under AML/CTF regime</u>	<u>Survey average cost</u>	<u>Total</u>
Implement client due diligence for every client of the firm, on-going client re-identification and verification using reliable, independent source documents, data or information	\$80,000 annually	\$80,000
Identify the beneficial owner in a transaction or in the case of legal person arrangements take reasonable measures to understand the ownership and control structure	\$50.00 per transaction or up to \$275,000.00 annually	\$ 355,000
Obtain information on the purpose and intended nature of each client matter	\$50.00 per transaction or up to \$275,000.00 annually	\$630,000

Implement a risk management system to determine whether a client is a politically exposed person, obtaining senior management approval for establishing a business relationship with such a client, take reasonable steps to establish source of wealth of the person and source of funds. Conducting enhanced ongoing monitoring of the business relationship.	\$17,100 annually	\$647,100
Conduct risk ratings of clients to determine whether a client is a higher risk of being involved in money laundering	\$21,250.00 annually	\$668,350
Implement ongoing AML/CTF financing programmes including: Risk-rating clients Development of internal policies, procedures and controls including compliance management arrangements, employee screening and on-going training, audit function and testing of the programmes.	\$80,000 annually	\$748,350

Medium sized firms

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

<u>Measure</u>	<u>Survey average cost</u>	<u>Total</u>
Implement client due diligence for every client of the firm, on-going client re-identification and verification using reliable, independent source documents, data or information	\$100,000 annually	\$100,000
Identify the beneficial owner in a transaction or in the case of legal person arrangements take reasonable measures to understand the ownership and control structure	\$122.33 per transaction or up to \$148,875.60 annually	\$248,875.60
Obtain information on the purpose and intended nature of each client matter	\$123.66 per transaction or up to \$150,494.22 annually	\$399,369.82

Implement a risk management system to determine whether a client is a politically exposed person, obtaining senior management approval for establishing a business relationship with such a client, take reasonable steps to establish source of wealth of the person and source of funds. Conducting enhanced ongoing monitoring of the business relationship.	\$35,000 annually	\$434,369.82
Conduct risk ratings of clients to determine whether a client is a higher risk of being involved in money laundering	\$18928.65 annually	\$453,298.47
Implement ongoing AML/CTF financing programmes including: Risk-rating clients Development of internal policies, procedures and controls including compliance management arrangements, employee screening and on-going training, audit function and testing of the programmes.	\$70,000 annually	\$523,298.47

Smaller firms

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

<u>Measure</u>	<u>Survey average cost</u>	<u>Total</u>
Implement client due diligence for every client of the firm, on-going client re-identification and verification using reliable, independent source documents, data or information	\$30,000 annually	\$30,000
Identify the beneficial owner in a transaction or in the case of legal person arrangements take reasonable measures to understand the ownership and control structure	\$65.53 per transaction or up to \$14,803.00 annually	\$44,803.00
Obtain information on the purpose and intended nature of each client matter	\$76.80 per transaction or up to \$16,588.80 annually	\$61,391.8

Implement a risk management system to determine whether a client is a politically exposed person, obtaining senior management approval for establishing a business relationship with such a client, take reasonable steps to establish source of wealth of the person and source of funds. Conducting enhanced ongoing monitoring of the business relationship.	\$7,687.59 annually	\$69,079.39
Conduct risk ratings of clients to determine whether a client is a higher risk of being involved in money laundering	\$9,218.78 annually	\$78,298.17
Implement ongoing AML/CTF financing programmes including: Risk-rating clients Development of internal policies, procedures and controls including compliance management arrangements, employee screening and on-going training, audit function and testing of the programmes.	\$41,000 annually	\$119,298.17

Question 12

What additional administrative structures will legal practitioners need to put in place to comply with the requirements of the AML/CTF regime?

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

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

Enrolment

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

164. An agent on behalf of a principal can complete the enrolment process, provided a *current* written agreement or written authority authorises the agent to enrol on the entity's behalf. The *reporting entity* is required to keep an original/certified copy of

the agency agreement for the duration of the term of agreement or authority and be able to produce it upon request.

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

166. A reporting entity:

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

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

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

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

Registration

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

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

Identification

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

172. A *reporting entity* must be reasonably satisfied:

- an individual customer is who he/she claims to be;
- a non-individual customer exists and their beneficial ownership details are known.

173. The CDD requirements include:

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

Record keeping

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

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

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

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

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

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

AML/CTF programs

179. AML/CTF programs are said to be risk based and relate to the size and nature of each business, the designated services offered and its ML/TF risk profile. However, in practice the requirements of the AML/CTF are highly prescriptive and detailed with

little scope for a true 'risk-based' approach. Each *reporting entity* is expected to develop and document an AML/CTF program tailored to its business needs and proportionate to the level of ML/TF risk it faces. All AML/CTF programs (standard, joint and special) must include Part B.

180. Part A of an AML/CTF program is aimed at identifying, managing and reducing ML and TF risk faced by a *reporting entity* including:

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

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

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

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

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

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

- foreign jurisdictions in which the reporting entity deals (eg customers that live or are incorporated in a foreign country).

184. An AML/CTF program must:

- provide for the collection of certain minimum KYC information;
- provide for the collection of certain minimum information about beneficial owners of customers;
- include certain requirements in relation to customers who are 'politically exposed persons' (PEPs), or who have beneficial owners that are PEPs;
- include appropriate risk-based systems and controls to determine whether further customer information should be collected;
- provide for the verification of customer information;
- include appropriate risk-based systems and controls to determine whether further customer information collected from the customer should be verified; and
- provide for the collection of information about the agent of a customer and include appropriate risk-based systems and controls to determine whether to verify information about the agent.

Question 13

How would regulating the legal profession for AML/CTF purposes impact on the delivery of services to clients (particularly in the context of urgent legal matters that require immediate advice)?

Should the performance of urgent barrister's work have to wait for CDD to be completed?

185. It is not unusual for a plaintiff or defendant to need the services of a legal professional urgently. A plaintiff may need to act immediately to preserve a claim or an asset; a defendant may need to act immediately to resist an urgent or interlocutory claim; a person seeking advice may have to make an important decision before a time limit expires.

186. If barristers are required to undertake their own CDD separate to that required of a solicitor, we recommend that the Act provide for exemption of barristers to undertake CDD in circumstances where their services are required urgently. To require CDD by the barrister or by the instructing solicitor before the barrister is permitted to act in such cases would significantly impair access to justice. The countervailing benefit is that urgent proceedings, defence or advice could not be deployed for the benefit of a miscreant. The effect of a strict rule precluding the provision of legal services, even in an urgent case, without prior CDD would impair access to justice for a large number of litigants and clients and potentially deny them the effective exercise of their legal rights. If there were an urgency-based exception, any benefit to miscreants would only be temporary because the solicitor concerned would still have to complete CDD before continuing with the balance of the case.

Question 14

What other aspects of the legal profession would be impacted by AML/CTF obligations?

Ethical Issues

187. Obligations pursuant to the extension of the AML/CTF regime are incompatible with the ethical duties of lawyers and the necessary role lawyers fulfil within Australia's system of justice.

- Lawyers are subject to duties of confidentiality and loyalty to their clients which are inconsistent with the requirement that reporting entities must secretly report suspicions about their clients to law enforcement.
- Lawyers fulfil a unique function in Australia's legal system. In serving the interests of their clients, lawyers are often required to uphold the rule of law and challenge executive power, which necessitates that lawyers remain independent from executive control or direction. At the same time, lawyers are officers of the Court who owe a paramount duty to promote the due administration of justice, an obligation that prevails to the extent of inconsistency with any other duty.

Practical Issues

The legal profession is already comprehensively regulated.

- Every aspect of legal practice is the subject of comprehensive regulatory oversight (legal services commissioners or counterpart) that ensures lawyers comply with their enforceable legal and professional obligations.
- The self-contained legislative regulatory scheme that regulates legal practitioners is supplemented by a robust ethical framework that is founded upon common law principles articulated in rules of professional conduct. These obligations include a general responsibility to avoid involvement in unlawful or criminal activities.
- The existing regulatory scheme operates well and is a key point of difference between the legal profession and any other Designated Non Financial Businesses and Professions ('DNFBPs').
- As officers of the Court with special privileges and responsibilities to the administration of justice, the courts, and clients, the Supreme Court retains inherent power of control over the admission and discipline of legal practitioners.
- Lawyers distinctively (from other DNFBPs) must counsel clients fearlessly and frankly about legitimate behaviours in any aspect of the law, but may not induce or facilitate clients to act unlawfully or break the law. A lawyer who does so is liable to criminal prosecution (for involvement that is complicit, reckless or negligent) as well as the full force of the legal professional regulatory sanctions (which include cancellation of practising entitlements, strike off, pecuniary penalties, publication of disciplinary sanctions and imprisonment).
- AML/CTF regulatory requirements would add a further unnecessary layer of burdensome costly obligations in circumstances where no cogent evidence is available to support the contention that a regulatory gap exists and needs to be addressed.

- The Australian AML/CTF legislative regime is unstable being in an almost continual state of amendment which impacts on the compliance burden of the regulated community. Since 2014 alone, the Law Council has considered well over fifteen proposed amendments to the AML/CTF Act or AML/CTF Rules.

Integrity and Independence of the Legal Profession

188. The imposition of suspicious matter reporting requirements strikes at the heart of the sanctity of the solicitor/client relationship. The role of the solicitor is to be an independent advisor and advocate for their client.
189. The reason for the existence of a special relationship between solicitor and client is not for the protection of the solicitor or to hide the misdeeds of the criminally minded. The rationale for the maintenance of the independent role of solicitor is the maintenance of the rule of law. The rule of law is undermined if the independence of the principal actors of the third arm of Government, the judiciary and lawyers as officers of the court, do not possess a sufficient degree of integrity and independence.
190. The High Court considered the compromise to judicial integrity and independence of being made the agent of the executive branch of government in the decision of *State of South Australia v. Totani & Anor* [2010] HCA 39. In that decision Chief Justice French said:

"Section 14(1) represents a substantial recruitment of the judicial function of the Magistrates Court to an essentially executive process. It gives the neutral colour of a judicial decision to what will be, for the most part in most cases, the result of executive action. That executive action involves findings about a number of factual matters including the commission of criminal offences. None of those matters is required by the SOCC Act to be disclosed to the Court, nor is the evidence upon which such findings were based. In some cases, the evidence, if properly classified as "criminal intelligence", would not be disclosable. Section 14(1) impairs the decisional independence of the Magistrates Court from the executive in substance and in appearance in areas going to personal liberty and the liability to criminal sanctions which lie at the heart of the judicial function. ...

In the exercise of the function conferred on it by s 14(1), the Magistrates Court loses one of its essential characteristics as a court, namely, the appearance of independence and impartiality. In my opinion, s 14(1) is invalid."

191. In a similar way, solicitors as officers of the court must retain a degree of independence from the executive government. This principle is enshrined in section 3 of the Uniform Law.
192. The obligations of suspicious matter reporting to AUSTRAC incumbent on reporting entities make those entities agents of the executive government. This would be heightened when the reporting entity legal practitioner not being able to reveal the fact of a report being made to the client upon pain of criminal sanction. This strikes directly at the heart of the fiduciary relationship between solicitor and client and undermines the integrity and independence of the legal profession by making the solicitor the agent of the executive government against the interests of the client.

193. It is a well understood professional obligation for solicitors that they must not act for a client and be a party to fraud or illegal activity. The Queensland Law Society survey of December 2016 and January 2017 canvassed this issue and found that 75% of respondents advised they had declined to act for a client or ceased acting for a client due to concern the client's instructions were inconsistent with their legal professional ethical obligations.

194. The fact that lawyers have ceased acting for clients to this extent is not unexpected or remarkable given the high value placed on professional obligations by the profession. It is however cogent evidence that the existing professional structures are working as intended.

The better approach

195. Lawyers' current regulatory requirements include obligations to continually upgrade knowledge and skills. Through raised awareness, information about warning signs and red flag indicators designed to mitigate the evolving threat and continuing professional development (rather than the imposition of yet further statutory obligations), lawyers can be better equipped to fortify their practices with appropriate AML/CTF risk management strategies and responses.

Recommendation 4

Making lawyers less susceptible to inadvertent or unintentional involvement in money laundering or terrorism financing is best realised through raising awareness, education and provision of guidance. Such awareness education and guidance would include AML/CTF specific content in mandatory Continuing Professional Development materials, Legal Practice Management Coursework and legal practice training courses.

Question 15

- i) **Would regulation as a reporting entity under the AML/CTF Act affect the independent referral bar?**

Overview of the role of barristers

196. Each State and Territory in Australia have legal practitioners who are either solicitors or barristers. The independent referral bar comprises those legal practitioners who practise exclusively as barristers and not as solicitors. This excludes barristers who do not practise on their own account but as employees in the capacity of Crown Prosecutors or Public Defenders. The term 'barrister' will be used to refer to a member of the independent referral bar, i.e. a barrister-only practitioner.

197. The work and standing of a barrister in the legal community is unique. To understand the manner in which an extension, if proceeded with by government, of anti-money laundering and counter-terrorism financing (AML/CTF) mechanisms on legal practitioners, will have on barristers, it is important first to understand the barrister's unique position and the nature of their work. It is suggested in this paper that the unique positioning of a barrister in Australia's legal industry is such that to bring them within the AML/CTF regime would provide little added benefit or oversight to AUSTRAC on any potential or actual money laundering or counter-terrorism financing activity. The imposition of AML/CTF mechanisms on barristers would only

act to overburden specialist sole practitioners and risk compromising the effective administration of justice.

The work of a barrister

198. The NSW Bar itself comprises of approximately 2,300 independent barristers. Most belong to a set of Chambers but within their Chambers, each barrister has their own sole practice. Rule 12 of the Barristers' Rules mandates that 'a barrister must be a sole practitioner...'.¹⁴⁴ This ensures that barristers are and continue to be independent. Their independence is vital to our system of justice. It ensures legal representation for everyone without fear or favour.
199. A member of the independent bar is restricted to practising exclusively as a barrister by the terms of his or her practising certificate and/or by the terms of his or her membership of a professional association. The member is also subject to professional discipline, obligations and regulations that are specific to barristers. The precise arrangements differ in some respects between Australian jurisdictions, but the detail of those differences is not presently material.
200. The scope of barristers' work is governed by professional regulations in their home jurisdiction. The *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW and Vic) cl 11 is in the following terms:

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 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.*

201. This is based on the Australian Bar Association's 'Model Rules'.¹⁴⁵ Although there are some differences in admission arrangements each State has maintained an independent bar and all barristers must practice as sole practitioners even in those states that have a 'fused' profession.

¹⁴⁴ Rule 12, Legal Profession Uniform Conduct (Barristers) Rules 2015.

¹⁴⁵ NSW, Victoria, Queensland, Western Australia and South Australia have based their Barrister Rules on the Australian Bar Association's 'Model Rules'. See also Tasmanian Barristers Rules Part 8 and the Northern Territory Barristers' Conduct Rules, clause 74. There is no material difference between them.

202. The majority of barristers' work involves advocacy and chamber work for the purpose of advocacy. Some barristers also advise outside the context of contentious business. Traditionally, barristers obtain work by being briefed by a solicitor either for advice on discrete questions of law or for the purpose of advocacy in litigation and the preparation of matters for litigation. This remains the method by which the overwhelming majority of work is obtained by barristers. Where a barrister is briefed by a solicitor the barrister will have minimal, and in some cases no contact, with the client. The latter is particularly the case where a barrister is retained to provide advice on a discrete question such as the interpretation of a contract provision. In such matters the only information they receive from a solicitor is that which is necessary to answer the legal question that is put to the barrister. A solicitor will prepare a brief for the barrister which contains factual documentary evidence, the solicitor's observations of the facts of the matter that relate to the work the barrister is asked to perform and the specific questions upon which advice is sought. Once the barrister's work is complete on the matter - whether it is advice or litigation - the brief is returned to the instructing solicitor. Barristers do not create files or keep documentation relevant to a matter after their services are complete.

203. Unlike solicitors, barristers do not have trust accounts and do not receive monies from solicitors before work commences. A barrister's fee is payable by a solicitor upon issuance of an invoice for work completed.¹⁴⁶ Should the barrister fail to be paid for his or her services, he or she seeks recovery from the solicitor rather than the client.

204. It follows from what has been said that because barristers do not handle client funds and when briefed by solicitors will not usually have access to sufficient information to form a 'reasonable suspicion' for the purposes of the legislation, there is no necessity for making them a reporting entity under the Act, to do so would only have the effect that compliance costs will be passed onto the client.

The nature of a barrister's work and the Act

205. This section addresses specific provisions in the Act (which it is assumed will be part of any extension of the Act to the legal profession) and outline the manner in which the independent Bar would be affected by regulation as a reporting entity under the Act.

206. This section is necessarily premised on the broader legal profession being listed as providing a 'designated service' to be registered on the Reporting Entities Roll maintained by the AUSTRAC CEO.¹⁴⁷ The independent Bars are opposed to that course of action. However, we have considered below the extent barristers would be affected if the legal profession were regulated under the existing provisions of the Act.

207. The provisions in the Act we have considered include:

- section 36: Ongoing customer due diligence;
- section 41: Reports of suspicious matters;

¹⁴⁶ Legal Profession Uniform Conduct (Barristers) Rules 2015 - Barristers Rule 105(c) states that a barrister may refuse or return a brief to appear before a court if the instructing solicitor does not agree to be responsible for the payment of a barrister's fee.

¹⁴⁷ See section 6: Designated Services and Part 3A - Reporting Entities Roll of the Act.

- section 51B: Reporting entities must enrol; and
- section 123: Offence of tipping off;
- section 242: Preservation of legal professional privilege.

Section 41: Reporting of suspicious matters

208. The scope of barristers' work is governed by professional regulations in their home jurisdiction (see e.g., Rule 11 above). The overwhelming majority of barristers' work involves court work including advocacy and advice. As outlined above, the work of a barrister does not include participating in or implementing a client's transactions or arrangements. A barrister predominantly deals with an instructing solicitor. A barrister's contact with the client is limited and often, when the barrister is merely instructed for advice on a matter, the barrister will not meet the client. It follows that barristers will rarely have the necessary knowledge for the purposes of reporting. There are numerous examples of legal practitioners being asked to provide legal advice and acting bona fide is giving that advice and being unaware that the advice is being used to further some fraud or other unlawful purpose.¹⁴⁸ A barrister is particularly unlikely to discover such an intent if the instructing solicitor is involved in the unlawful purpose.

209. Where a barrister does become involved in negotiating a settlement of litigation or of a dispute in the context of alternative dispute resolution, it does not entail the barrister 'becoming concerned in an arrangement' within the meaning of the Act. This is clear from the reasoning of the England and Wales Court of Appeal in *Bowman v Fels*.¹⁴⁹ It is also clear from that judgment that the ordinary conduct of litigation (leaving aside cases where the lawyer is party to an unlawful scheme, such as fraud, which would constitute professional misconduct of the most serious kind and be punishable accordingly under existing regulations of the profession, apart from other civil and criminal consequences) and related legal professional privilege, include the negotiation of a settlement.¹⁵⁰ Where the disputant parties have participated in arbitration, mediation or some other alternative dispute resolution process not annexed to litigation, the scope of privilege is not materially different.

210. In addition to court work and leaving aside the negotiation of settlements of litigation and similar disputes, referred to above, barristers' work is limited to the giving of legal advice in relation to a proposed transaction. In such circumstances, the provision of that advice would fall within the scope of legal professional privilege, preventing a barrister from reporting the person under section 41 of the Act.¹⁵¹ Moreover, as noted, when giving such advice, the briefing solicitor will provide the barrister with such information as is necessary to provide the advice. If the carve out for legal professional privilege is limited to work carried out in the ordinary course of litigation and is not extended to such advice work then the regulation of barristers and legal practitioners generally may have a negative impact as it may deter people from seeking legal advice. For example, assume a barrister is briefed by a solicitor to advise on the legality of a commercial structure they have devised - but not yet put

¹⁴⁸ See *R v Cox & Railton* (1884) 14 QBD 153.

¹⁴⁹ *Bowman v Fels* [2005] 1 WLR 3083, 3107 - 3110, [70]-[84].

¹⁵⁰ *Bowman v Fels* [2005] 1 WLR 3083, 3114 - 3115, [99] - [102].

¹⁵¹ Legal professional privilege does not extend to cases where the lawyer becomes party to an unlawful scheme, such as fraud. This is already prohibited, and attracts serious penalties. A person who is not deterred by existing sanctions will not be deterred by or comply with an explicit obligation to report, in effect, his or her own wrongdoing.

into action – and which is to form part of their tax planning. The barrister could take the view that the plan would be illegal if put into action and would in that case be the subject of a report. But they may not know whether the client will accept their advice and not implement the scheme. Indeed the client may well have come to them for the sole purpose of determining whether their idea is legal or not and with the intention of not activating it if the barrister advised that it would contravene tax laws. However, unless the particular communications are protected by the carve-out for legal professional privilege,¹⁵² it potentially raises a reporting obligation on the part of the barrister and in turn deter clients from seeking such advice.

211. At present section 41 of the Act stipulates what a reporting entity has to do if it forms a reasonable suspicion that the circumstance presented by an individual falls into one or more of the wide circumstances outlined in ss41(1)(d) to (j). A standard of reasonable suspicion is one that is too low to justify diminishing principles that are crucial to ensuring the independence of the Bar. Principles such as legal professional privilege, confidentiality and duty to the client exist to promote respect for and observance of the law.
212. Section 41 of the Act in addition to the other operative sections that include identification verification¹⁵³ and ongoing customer due diligence¹⁵⁴ act to diminish – actual and perceived – the unique relationship that exists between a barrister, solicitor and client, part of which involves legal professional privilege. For example, the scope of section 41 is wide and it is invoked the moment a person inquires or requests a service from a reporting entity. This includes circumstances where a contract for service has not yet been entered into. It appears that leaving a message on a reporting entity's voicemail or sending an email to a reporting entity inquiring about fees for service would suffice in engaging section 41, if the 'designated service' formed a reasonable suspicion from that contact.
213. Furthermore, barristers' work does not include participating in or implementing a client's transactions or arrangements.¹⁵⁵ In the government's *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* released in April 2016, it noted that the Financial Action Task Force (FATF) required AML/CTF regulation to apply to lawyers, notaries, other independent legal professionals and accountants in so far that they are involved in specified activities which are:
- buying and selling of real estate
 - managing of client money, securities and other assets
 - management of bank, savings or securities accounts
 - organisation of contributions for the creation, operation or management of companies
 - creation, operation or management of legal persons or arrangements, and

¹⁵² As noted, legal professional privilege does not attach to communications where the advice sought from a legal practitioner is to further or facilitate fraud, a crime or unlawful purpose. This applies whether or not the legal practitioner was aware of the purpose for which the advice is sought, see *R v Cox & Railton* (1884) 14 QBD 153; *R v Bell* (1980) 146 CLR 141.

¹⁵³ Section 35 of the Act.

¹⁵⁴ Section 36 of the Act.

¹⁵⁵ While para (f) of the definition of 'Barristers' work' refers to 'preparing' as well as advising on documents, in practice the only documents that a barrister prepares are in the nature of submissions in litigation or their equivalent in alternative dispute resolution.

- buying and selling of business entities.¹⁵⁶
214. While, the above transactions may be arranged and executed by solicitors, notaries or accountants, the list does not cover work that barristers would provide.
215. Given the above, the nature of a barristers work is such that it involves little, if not negligible, risk that they will be used by clients as vessels to advance money laundering and/or counter-terrorism financing conduct. We further note that a barrister is not permitted, knowingly to allow his or her services to be used to advance either of those things; the existing law is strong, and additional regulation for the purpose of catching such cases would have little if any additional effect by way of deterrence or discovery but, if widely expressed, would be likely to impose significant compliance burdens and undermine the purpose of legal professional privilege.

Section 123: Offence of tipping off

216. In addition to section 41, we consider section 123 (the offence of tipping off) also acts to directly conflict with the work and principles by which a practicing barrister must adhere to.
217. Section 123 requires that if a suspicious matter report under section 41 is made then the legal practitioner making that report cannot tip-off their client that they have done so. Such a situation compromises the trust and confidence a client can expect from their legal practitioner.
218. A unique attribute of barrister's work is that unlike solicitors, barristers are not able to select their client. Barristers operate under the cab-rank principle which is codified in Uniform Barristers Rule 17 where it states:

17. A barrister must accept a brief from a solicitor to appear before a court in a field in which the barrister practices or professes to practice if:

(a) the brief is within the barrister's capacity, skill and experience;

(b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client's interests to the best of the barrister's skill and diligence;

(c) The fee offered on the brief is acceptable to the barrister; and

(d) The barrister is not obliged or permitted to refuse the brief under rule 101, 103, 104 or 105.

¹⁵⁶ Attorney-General's Department, *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* (April 2016) at page 28. See also footnote 58. <<https://www.ag.gov.au/Consultations/Documents/StatutoryReviewAnti-MoneyLaunderingAndCounter-TerrorismFinancingActCth200/report-on-the-statutory-review-of-the-anti-money-laundering.pdf>>.

219. The distribution of work at the Bar under the cab-rank rule ensures that within our adversarial system of justice, those in need of a barrister are able to access a barrister. It follows that a barrister must accept a client even if there are aspects of the client's business that would raise a reasonable suspicion for the purposes of the reporting obligations under the Act. At the same time, the imposition of section 123 on barristers may result in a barrister having to refuse to act further for a client as to continue to act would potentially compromise their duty to the client.¹⁵⁷ The application of sections 41 and 123 appears to directly conflict with confidentiality, duty to a client, the cab-rank principle and legal professional privilege.

Incompatibility of AML/CTF regulation with the role of barristers

220. Emphasis was given to the unique position of barristers as specialist sole practitioners often having little contact with a client. Barristers who are briefed by solicitors are only provided with that information which is necessary to provide advice. Unlike solicitors, barristers do not operate trust accounts and do not receive money for work which is yet to be completed.

221. It is submitted that the members of the Bar would not be able to provide AUSTRAC with any greater transparency over potential or actual money-laundering or counter-terrorism financing activity due to their 'arm's length' dealings with clients.¹⁵⁸ Such regulation would hinder the administration of justice and increase costs for the client.

222. It is also submitted that application of sections 41 and 123 of the Act to the independent bar would not only impose significant compliance burdens on barristers but operate to undermine the fundamental values of practice at the Bar. To impose an obligation on barristers to report suspicious matters (under section 41) and to not advise a client that the barrister has reported them to AUSTRAC (section 123) jeopardizes a barrister's obligation under legal professional privilege, confidentiality, the cab-rank principle and duty to a client.

223. To this end, the following recommendation is made:

Recommendation 5

The Australian Government should not extend the obligations under the AML/CTF Act to the independent referral bar as the obligations, particularly those stipulated in sections 41 and 123, are inconsistent with the fundamental values of practice as a barrister and will act to compromise the effective administration of justice.

- ii) **What regulatory model would minimise the impact on the independent referral bar (e.g. reliance on CDD performed by instructing solicitors and /or clerks operate the trust) accounts)?**

If the independent bar is made subject to the AML/CTF regime

224. Minimising the impact on the independent bar, barristers should be exempt from the requirement to conduct ongoing customer due diligence (CDD) and should be able to rely on the due diligence conducted by their instructing solicitor or other

¹⁵⁷ Barristers rules 35 to 38 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*.

¹⁵⁸ In some jurisdictions, barristers are permitted to accept direct briefs.

designated professional. Barristers have limited contact with clients to carry out this task and to require it would result in additional and unnecessary cost and labour which will be passed onto the client. If barristers are unable to rely on a solicitor undertaking CDD this would impede barristers acting at short notice and impair access to justice for a large number of clients.

225. In addition, a requirement for barristers to enrol on the Reporting Entities Roll and to keep records is unnecessarily burdensome and is inconsistent with the manner in which barristers practice. Barristers, unlike solicitors do not keep client files and briefs are returned to solicitors at the end of a matter. All relevant information on barristers is publicly available on all State and Territory Bar Association websites.
226. It is noted there is already provision for reliance in the AML/CTF Act. Under section 38 of the Act a reporting entity is able to rely on an applicable customer identification procedure in limited circumstances such as when it is carried out by a second reporting entity that is a licensed financial advisor or a fellow member of a designated business group. The Department states in its consultation paper that it proposes to extend reliance to legal professionals should they be subject to AML/CTF regulation in the future.¹⁵⁹ The proposal is welcomed and will allow barristers to rely on CDD undertaken by a third party, most likely to be a solicitor.
227. Barristers should be able to rely on CDD by the instructing solicitor or other regulated professional as instructor as it is the latter that would have a direct relationship with the client; the barrister as a referral professional does not. As noted above, the overwhelming majority of work carried out by a barrister is referred to them by a solicitor. In addition, a barrister is only provided information relevant to the extent it enables the provision of accurate advice. The solicitor has principal conduct of the matter. To require a barrister to perform separate CDD would add unnecessary cost and labour to all cases, at the expense of clients generally and would produce little if any benefit.
228. If barristers are not able to rely on the CDD undertaken by a solicitor, it would impair an important efficiency inherent in the divided profession. To require the barrister to verify the identity of the client and to develop an understanding of the client's broader affairs, whether on the basis of the barrister's own investigations or information supplied by the solicitor, would involve wasteful duplication. The cost of doing so would ultimately be borne by clients generally.
229. A second point should be made about the nature of such reliance, should it be extended to legal practitioners. To require a barrister to obtain instructions from the solicitor setting out in full the solicitor's CDD, only for the purpose of reviewing it and deciding whether that CDD is sufficient or gives rise to suspicions, would be equally wasteful. It should be sufficient that the solicitor certify to the barrister that he or she has completed CDD, notify the barrister of any circumstances that, in the solicitor's view, indicates an enhanced money laundering and/or counter-terrorism financing risk, such as the presence of any identified politically exposed persons (PEP), and undertake to notify the barrister if any of those things changes.

¹⁵⁹ Commonwealth Attorney-General's Department, *Enhancing Australia's AML/CTF regime: Phase 1 amendments to the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Industry Consultation Paper)* December 2016 at page 10.

230. Similar observations apply if the instructor is a regulated professional such as an accountant.

231. The Law Council understands that in England there has been a requirement that solicitors must give consent for a barrister to rely on the solicitor's due diligence and that solicitors have been reluctant to grant that consent prompting barristers to carry out CDDs on clients from scratch. The concern for the solicitor is that by providing such information to the barrister and the barrister relying on it, this may result in the solicitor being liable to the barrister if their information is misleading. This risk needs to be addressed in any proposed legislation. We propose that an express provision giving barristers a right to rely on a solicitor's CDD together with an immunity from suit for the barrister in doing so together with express protection given to the solicitor to prevent a barrister bringing an action against a solicitor. Without such a provision there will be unnecessary duplication of work. It would also change the barrister, solicitor and client relationship. In all cases, a barrister will need to get to know the client no matter how small the matter or legal question that is referred to a barrister. This will result in increased costs and a slowing down of the justice system.

232. Further, barristers, being sole practitioners, do not have the staff and infrastructure to undertake CDD or generate reports and do not have the business systems to keep records at the level seemingly required. To impose expensive, new obligations on micro-businesses can only lead to making those businesses uneconomic thereby denying efficient and cost effective access to justice.

233. Accordingly, if the Australian Government decides to extend reporting entity obligations to legal practitioners the following recommendations are suggested:

Recommendation 6

The Australian Government allow provision in the legislation for members of the independent bar to rely on customer due diligence being completed by a solicitor or some other third party who may also be a 'designated service' provider under section 6 of the Act.

Recommendation 7

Should the government extend CDD obligations to legal practitioners that those obligations be relaxed where legal practitioners are engaged at short notice for urgent matters.

Recommendation 8

The Australian Government exempt members of the independent bar from the requirement to be enrolled on the Reporting Entities Roll as long as they are enrolled with their respective State or Territory professional association.

Question 16

What broader impacts could the regulation of AML/CTF legal practitioners have?

234. Under the current approach, legal practitioners may be required to assess and mitigate money laundering and terrorist financing risks and prevent sanctions violations, upon pain of penalties for failing to report- whether or not an actual financial crime occurs.

235. A chilling effect may result from the imposition of fines and penalties, particularly on larger organisations for contraventions of AML/CTF and sanctions laws. These factors, along with others, have led banks and lawyers in the UK and Canada to adopt an understandably conservative and at times defensive position. This has included exiting from provision of services to firms, market segments and countries seen as higher risk, lower profitability and could become the source of costly future fines, monitorships or even prosecutions. Like banks who are engaging in “de-risking” by ceasing to conduct certain types of activities, lawyers may seek to reduce their exposure to risks by exiting areas of higher risk in a wholesale fashion, rather than judging the risks of clients on a case-by-case basis.
236. The cost of AML compliance can be expected to increase the cost of legal services. As mentioned above this will have an effect on users of legal services as law practices will be unable to absorb such substantial increases. This will also have implications for the funding of the legal services assistance sector and the providers of pro bono legal services. As occurred in the UK, law practices that become unprofitable because of ALM regulatory compliance will close. It could be anticipated that regional/rural businesses in Australia, especially smaller organisations, will be affected more than others and many will close.

Recommendation 9

The Australian Government monitor the impact of changes to regulation for an AML/CTF purpose on the legal assistance sector and the providers of pro bono legal services.

Part 7: Model for regulation

Key Points

- The regulation of Australian legal practitioners should not change without clear evidence that justifies the need for such change.
- If changes to the regulation of Australian legal practitioners are made for AML/CTF purposes, such changes should be made through amendments of exiting State and Territory based legal profession regulatory schemes.
- If action is taken to extend the requirements of AML/CTF Act to legal practitioners that client legal privilege and the role of the legal practitioner are preserved.

Introduction and scope of response

237. This part of the Consultation Paper is predicated on an assumption that the current AML/CTF regime could be applied to the legal profession on an "as-is" basis as no other design work is available to inform a model that might address legitimate concerns.

238. Referring to its response to earlier sections of the Consultation Paper, the Law Council's response to this section is made by reference to the:

- (i) context of the regulation in Australia under the AML/CTF Act and how protection for Legal Practitioners is provided in other jurisdictions, mostly the UK;
- (ii) model where no further regulation is introduced;
- (iii) model for regulation through State and Territory based professional regulation, by legislation and practice rules; and
- (iv) model for regulation under the AML/CTF Act and its Rules.

239. This section does not consider:

- (i) The specific directives and international obligations which require the Australian government to respond to the question of money laundering and anti-terrorism finance.
- (ii) The whole of the Australian legislative response to those areas of concern.

7.1 Enrolment and scope of services

Enrolment

Context

240. It is noted that the following legislation already exists to regulate legal practitioners' conduct:

- Financial Transaction Reports Act 1988 (Cth) ("FTR Act") Part II Division 1B section 15A: The FTR Act requires a solicitor, a solicitor corporation, or a partnership of solicitors to report a significant cash transaction. The FTR Act does not require registration of solicitors, and exempts compliance where they are already a reporting entity.
- Anti-Money Laundering and Counter Terrorism Financing Act 2006 (Cth) The AML/CTF Act requires by Part 3A enrolment of providers of services if the scope of services includes a "designated service" regulated by the AML/CTF Act. The AML/CTF Act and Rules require a legal practitioner whose business is also a designated service to register and report. There is a specific protection of legal professional privilege and some remittance businesses.
- The AML/CTF Act already regulates the businesses with which a legal practitioner is most likely to engage on behalf of their clients. Consequently, all but obscure transactions will be captured by existing regulation of other designated businesses. As has already been noted, to extend the regulation to all transactions by legal practitioners for a client will only increase costs for clients, and the community generally, without improving intelligence on the matters the subject of the concerns of the AML/CTF Act. To limit the extension of regulation of legal practitioners to those transactions that are not already captured would limit the costs impact and target intelligence to transactions more likely to be of assistance to enforcement programs. Unfortunately, at present, there is no evidence to identify what the transactions may be or how they may be defined. That information may arise from further studies. In the absence of that information the regulation will not be focussed and likely only to increase compliance costs without any significant corresponding benefit.
- The imposition of compliance costs arising from the UK legislation has been a reason to review the approach to this regulation, according to the "Action Plan for anti-money laundering and counter terrorist finance" report of the Home Office of HM Treasury UK April 2016:

"The [UK] Government wants to find new ways for the public and private sectors to work in partnership in order to increase radically the effectiveness of our collective response to money laundering and terrorist financing, and strip away unnecessary bureaucratic burdens in the process. The private sector collectively spends billions of pounds a year on financial crime compliance, but it is not always an effective first-line of defence against those seeking to engage in money laundering and terrorist finance, despite these efforts."

- Criminal Code 1995 (Cth) Division 400 "money laundering": already regulates legal practitioners who deal with money or other property that is or is at risk of being the proceeds of a crime in certain circumstances. Notably this division contains no safe harbour for conduct equivalent to the safe harbour created in the UK legislation where, in the circumstances described, the legal practitioner discloses to the authorities certain information (in the UK see both s.52(1)(c) of the Drug Trafficking Act 1994 and the Proceeds of Crime Act 2002 Part 7).

No further regulation is required

241. For reasons expressed elsewhere there is no demonstrated need for further regulation and further regulation is only likely to increase costs to consumers and the community and decrease access to reliable independent advice.
242. Legal practitioners are not permitted to facilitate, counsel or procure the commission of a crime, not least because to do so would be contrary to their ethical obligations to the administration of justice. That activity would also already be captured by the Criminal Code, under accessorial liability provisions at Division 11 and the primary offences at Division 400 that address acts of money laundering that result from negligent or reckless participation. There is no evidence to indicate that the additional requirement of enrolment would cause a legal practitioner to refrain from conduct that would also breach professional conduct rules.
243. The number of entities required to register is likely to be large if the scope of the "designated service" is expanded to the breadth of entities who comprise the "solicitor, a solicitor corporation, or a partnership of solicitors" as defined and covered by the FTR Act. Even if enrolment is confined to those that undertake "services" as defined and covered by the AML/CTF Act the number of firms required to register and comply will be significantly larger than the providers of services currently the subject to the AML/CTF Act.
244. The difficulty of registration and the cost of amending registration will be significant and will delay advice or require separate external and suitably enrolled legal practitioners. The speed with which matters move or require a change in the scope of advice sought would also make compliance difficult. Where compliance is difficult then policing and enforcement are also difficult in a practical sense.
245. While at a high level it is easy to identify areas of practice where the risk of money laundering or terrorism financing is low, it is not practical to confine each client's instructions to only those matters. For example, it is often suggested (for good reason) that litigation be exempted, however, it is not realistically possible to exclude from consideration in settling litigation a transaction that would (without the context of litigation) be captured by the AML/CTF Act.
246. There are extremely valuable policy reasons to promote the settlement of litigation without the intervention of judicial or administrative observation. The policies were articulated in the money laundering context in the UK in *Bowman v Fels* [2005] 1 WLR 3083 [2005] *ECWA civ 226* at [99] - [102].

Regulation by amendment to State based Practice Rules

247. State based professional regulation already imposes registration obligations on legal practitioners. The registration obligation depends on the nature of the services provided and, broadly, whether the services are as a solicitor or as a barrister. Even within those categories, however, there are enrolment type obligations in the form of continuing professional development and accreditation to areas of specialised practice.
248. The amendment of State based regulation to accommodate a need for enrolment would be more likely to attract compliance costs, because it would simply add to an existing regime with which Legal Practitioners are familiar already required to comply. The familiarity of that existing regime is likely to improve compliance and by that means assist enforcement and supervision.

Regulation by amendment to the AML/CTF Act and Rules

249. If the AML/CTF Act were amended to require enrolment by legal practitioners, it should not require the detailed application and assessment required for financial institutions or larger organisations to ensure compliance.
250. In short any changes should be bespoke or 'made to measure' for the legal profession to suit the huge variation in the scale of law practices and sophistication of systems operated by legal practitioners from sole practices to multinational enterprises. Overwhelmingly the businesses of legal practitioners are very small. There should be no need, for example, to require information about annual earnings (other than that earnings do not exceed a threshold amount). The purpose for seeking that information in existing regulation is, apparently, to determine whether a reportable entity is required to pay the earnings component of the levy payable under the *Australian Transaction Reports and Analysis Centre Industry Contribution Act 2011* (Cth). The contribution based on annual earnings in that Act is currently nil where earnings are less than \$100,000,000. Few law practices would become liable to a payment to AUSTRAC based on this threshold.
251. The change to introduce enrolment, if introduced, should involve a very brief application verified by acknowledgement from State based professional regulators.
252. The enrolment and deregistration and amendment to enrolment should be short and efficient and not involve a cost or only a nominal or minimal cost.

Scope of services

Context

253. The FTR Act does not specify "*designated services*", it imposes obligations by reference to the definition of "*solicitor*".
254. The AML/CTF Act regulates by Part 2 and 3 obligations to undertake "*client due diligence*" and the reporting of "*suspicious matters*" and "*transactions*" by reference to a context of a request for "*designated*" services.

No further regulation is required

255. The varied nature of services provided by Legal Practitioners for clients and the ease with which the scope of services vary quickly for clients is likely to mean that it will be difficult to establish which clients will require "*designated services*". It will be impractical for a Legal Practitioner to enrol only when a client's instructions expand to matters that would be a "*designated service*" covered by the AML/CTF Act.
256. No further regulation is required as most of the services provided by legal practitioners about which there might be concern in relation to money laundering are already undertaken in the context of regulation affecting counterparties or others involved in the services who are themselves already regulated. If counterparties or their representatives are already regulated (enrolled and reporting), it generates wasted costs to repeat the regulation (enrolment and reporting) by the legal practitioner. Any regulation will need to exempt legal practitioners already acting for a regulated client.
257. Further regulation will duplicate costs, reporting, supervision and enforcement. It will also compromise the constitutional framework and safeguards discussed in earlier sections of this report.
258. In addition the Consultation Paper has not provided any evidence of a need for further regulation or indeed the deficiencies in the current regulatory regimes for legal practitioners warranting the imposition of the AML/CTF model on legal practitioners, with the inevitable additional costs for both legal practitioners and their clients.

Regulation by amendment to State-based Practice Rules

259. State based legislation already imposes significant obligations that differ depending on the nature of the services provided.
260. The clearest examples are the requirement for documents and audits for money held on trust. There are already regulations that address registration to undertake real estate settlement processes, particularly electronic settlements.
261. The imposition of a client due diligence obligation directed to the risks of involvement in transactions could best be addressed in the State based regulations equivalent to *Legal Profession Uniform General Rules 2015* for example at chapter 4 and following or possibly the *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015*.
262. Imposing obligations on legal practitioners in the context of existing regulatory frameworks is more likely to ensure a more consistent approach to compliance. By devolving regulation to State-based institutions the process of investigation and enforcement is clearer and more aligned to industry objectives.
263. 7.2 Customer due diligence (CDD)

Context

- The FTR Act does not require customer due diligence.
- Part 2 of the AML/CTF Act requires customer due diligence and ongoing customer due diligence.
- Imposition of CDD on legal practitioners in the UK has seen the imposition of significant costs on firms for compliance and has been a catalyst for a significant review of the operation of the UK legislation.

No further regulation is required

As mentioned elsewhere, the relevant transactions with which a Legal Practitioner will be asked to assist are likely to be already regulated by another entity captured by the current definition of “*designated service*” particularly where real estate or financing is involved.

Regulation by amendment to State based Practice Rules

264. This submission supports the amendment of State based practice rules to build if necessary on existing obligations to avoid the commission or facilitation of crimes.

265. Any change to obligations should be limited to an appropriate response given the size and range of the business enterprises expected to comply.

266. It would be appropriate to limit the obligation of customer due diligence to equivalent existing due diligence obligations. The *Real Estate and Business Agents and Sales Representatives Code of Conduct 2016 (WA)* at regulation 25 provides:

'25. Client identification verification

An agent or sales representative who receives instructions to offer real estate for sale must –

(a) promptly obtain a copy of the certificate of title for the real estate and refer to that copy for the name of the registered proprietor; and

(b) as soon as practicable after receiving the instructions and before a contract for that sale is executed, make all reasonable efforts to verify –

(i) the identity of each person who claims to be, or to act for, a person who is to sell all or any of the real estate; and

(ii) each person's authority to sell the real estate, or to act for the person selling it."

267. The reference to certificate of title could be amended to identify specific public registers or generally publicly available statutory registers of information.

268. The obligation to verify could be amended to include an obligation to document the verification and articulate the reason for accepting the verification.

7.3 Ongoing customer due diligence (OCDD)

Context

- The FTR Act does not require ongoing customer due diligence.
- The AML/CTF Act requires by Part 2 Division 6 ongoing customer due diligence.

No further regulation is required

269. The ongoing nature of existing compliance obligations operate to ensure that ongoing care is required when acting on behalf of clients. Those ongoing care and ethical obligations are markedly different to the near absence of obligations on providers of "*designated services*" already covered by the AML/CTF Act.
270. Further, the need for ongoing obligations is not established in the Consultation Paper by evidence of non-compliance nor is it established by evidence that ongoing due diligence is likely to discover or avoid illegal behaviour.
271. Where a client undertakes more than one transaction or regularly undertakes transactions (of the type said to give rise to a risk of money laundering), there is likely to be another party involved who will be required to comply with the current AML/CTF Act OCDD obligations. Duplicating the obligations observed by other parties to a transaction will simply increase costs, with no additional benefit.

Regulation by amendment to State based Practice Rules

272. The State based regulation if amended to require CDD records could be amended to identify specific events or dates or other relevant touchstones for reviewing the existing CDD documentation and the veracity of those records.

Regulation by amendment to the AML/CTF Act and Rules

273. This submission notes that, by adopting the *Money Laundering Regulations 2007 (UK)* model, there is imposed in the customer due diligence requirement a need to conduct a further due diligence when the regulated person "*suspects money laundering or terrorist financing*".
274. This submission does not advocate an approach that is more sophisticated (and by definition more costly) than that.
275. Commonly in the existing regulation such events would include the receipt of credible information that questions or discredits previously acquired information on which a due diligence assessment was made or the occurrence of a suspicion that such previously acquired information may be wrong or no longer accurate.
276. Amendment to the AML/CTF Act should ground the need to undertake CDD in circumstances which reasonably indicate a review is required and require only a review that is reasonable in the light of then existing known circumstances.

7.4 Reporting obligations

Context

277. The FTR Act requires by section 15A a report on a "significant cash transaction" defined to mean "a cash transaction involving the transfer of currency of not less than \$10,000 in value".
278. The AML/CTF Act requires by Part 3 reports on suspicious matters and threshold transactions and compliance. The AML/CTF Act preserves by section 242 the law relating to legal professional privilege.
279. By section 123 of the AML/CTF Act the reporting entity must not disclose to someone other than AUSTRAC the existence of circumstances giving rise to a suspicion or the communication of a suspicious matter report. The AML/CTF Act by section 123 (4) and (5) permits disclosure in limited circumstances if the reporting entity is a legal practitioner and the disclosure is for the purposes of dissuading the client from the transaction or to obtain advice. The AML/CTF Act does not, however, exempt the reporting entity from making the report in those circumstances.
280. The UK "Parliament showed itself conscious of the dilemma which these provisions might create for legal advisers, and it picked them out for special protection" according to *Bowman v Fels* [2005] 1 WLR 3083 [2005] ECWA civ 226 at [38] - [39]. In legislation, broadly equivalent to s123 of the AML/CTF Act appearing in Part III of the Drug Trafficking Act 1994 (UK) the UK legislation provides by section 52 (2) that:
281. "Subsection (1) above does not make it an offence for a professional legal adviser to fail to disclose any information or other matter which has come to him in privileged circumstances".
282. It is to be noted that the UK legislation specifically excepts from the protection of privilege information and matters communicated or given with a view to furthering a criminal purpose (s. 52(9) Drug Trafficking Act 1994), reflecting the common law position in Australia with respect to legal professional privilege (*Baker v Campbell* (1983) 153 CLR 52 at 67, 86 and 123).

No further regulation is required

283. Consistent with the position in the UK, the legal profession should not be regulated by the need to disclose suspicions to regulators.
284. The need to make suspicious matter reports would be inconsistent with the role of legal practitioners in Australia, would necessarily breach the confidence of clients and legal professional privilege duties to protect their inquiries and advice from regulatory scrutiny.

Regulation by amendment to State based Practice Rules

285. There are mechanisms for State based legal profession regulators to pursue breaches of ethical codes and practice rules. On occasions, they can access legal professional privileged communications in the context of an investigation. The rules and regulations that permit that enforcement could be amended to permit the investigation of money laundering and terrorism financing activities.

Regulation by amendment to the AML/CTF Act and Rules

286. The AML/CTF Act should be amended to protect legal practitioners in the same manner as they are protected in the UK.
287. If the AML/CTF Act is amended to require reports from legal practitioners, the reports should be modified to remove confidential material or information that is covered by legal professional privilege.
288. That may limit the disclosure to information that is or would otherwise be available on publicly available registers or information already provided to others involved in the transaction.
289. The report should be simple to avoid undue costs of compliance.
290. The provision of the report should operate to protect the Legal Practitioner from further pursuit by the regulatory authorities and pursuit by the client in the manner that the AML/CTF Act protects current reporting entities.
291. The protection for legal practitioners should be express and comprehensive. As soon as there is any recourse against the legal practitioner there would be an immediate conflict of interest for the legal practitioner continuing to act for the client. The protection should extend to making the report inadmissible in any proceedings and evidence of the knowledge of the report inadmissible.

7.5 Internal controls- AML/CTF programs

Context

292. The FTR Act does not require internal controls directed to ensuring compliance.
293. The AML/CTF Act by Part 7 requires the adoption and observance of AML/CTF programs directing to ensuring compliance with AML/-CTF Act matters.
294. The UK has acknowledged that the cost of compliance has caused a need to review the operation of the laws to find efficiencies in compliance. The same review also identified the need to avoid mechanical observance of AML/CTF Act type programs because the "*simple ticking of boxes*" does not assist the detection or deterrence of the activity the subject of the AML/CTF Act.

No further regulation is required

295. The absence of evidence that the failure to have internal controls has caused any breach of the law suggests that no further controls are required.
296. The imposition of regulatory checking programs is not likely to improve compliance or detect or deter the relevant activity.
297. The imposition of externally required checking does not address conscious attention to the risks of behaviour the subject of the AML/CTF Act and the Criminal Code 2005.

298. The conscious attention to the risk of such behaviour is inherently difficult to regulate and difficult to enforce or supervise. Those difficulties are magnified when the industry is overwhelmingly made up of small operations with little sophistication.
299. The difficulties are magnified for the legal industry which addresses broad questions (some of which will be "*designated services*" and some not) for each client and where often there is little similarity between clients or even instructions.
300. At best the regulations can address processes but simply addressing processes does not cause the problem to be identified and for sophisticated clients the problem is easily subverted by apparent compliance with processes.

Regulation by amendment to State based Practice Rules

301. There is scope to improve compliance by education programs or the encouragement of quality practice programs which address risks in an organization (including the risk of money laundering or terrorism finance).
302. The improvement of education on risk management and control in the context of legal practitioners' businesses is significantly more likely to achieve the stated goals of regulation, namely to create, and embed, awareness and understanding of risk of money laundering and terrorism financing by legal practitioners and harden the sector against criminal exploitation, than the imposition of checklists and standardised guides.

Regulation by amendment to the AML/CTF Act and Rules

303. If the AML/CTF Act were amended to require the imposition of internal controls, they should be in the context of current regulation directed to the specific risk assessment of each reporting entity and the response should be directed to appropriate processes to address the apprehended risk.

7.6 Record-keeping

Context

304. The FTR Act does not require specific records to be kept.
305. The AML/CTF Act requires by Part 10 the preservation of relevant records relating to transactions and identification processes.

No further regulation is required

306. There are already several sources of common law and legislative obligations on legal practitioners to retain relevant records of transactions by or for their business as well as for their clients.
307. There is the added difficulty for legal practitioners in the fact that many of the records which they will create or acquire in the process of instructions for a client will be owned by and subject to the direction of the client. If the client owns the relevant records it would breach obligations to the client to refuse to deliver up the records or to retain copies of the records in the face of a contrary instruction from the client.

Regulation by amendment to State based Practice Rules

308. Good record keeping is a matter already addressed by State based regulators, particularly in relation to trust account records and supporting information.
309. If there is a need to preserve specific instructions or records or for these to be copied and kept notwithstanding contrary instructions from the client that should be made clear in the engagement with the client and protected by State regulations.

Regulation by amendment to the AML/CTF Act and Rules

310. If the AML/CTF Act was amended to require records to be kept by legal practitioners, there should be a clear delineation of the types of records to be kept and how they are differentiated from the records the subject of the ownership and control of clients.
311. The AML/CTF Act should include protection for the legal practitioner keeping records contrary to client instructions.

7.7 Monitoring and supervision

Context

312. The FTR Act does not impose monitoring and supervision of solicitors save to the extent that the failure to report gives rise to enforceable consequences.
313. The AML/CTF Act requires by Part 11 requires secrecy and access to records by regulatory authorities and by Part 12 a power to require production of information and an audit of information held by reporting entities.
314. The AML/CTF Act by section 242 purports to preserve legal professional privilege but it does not expressly indicate that the obligations to deliver documents and have documents audited is to operate in a manner that preserves that privilege. No other mechanism is provided to support the purported preservation of the privilege which belongs to the client.

No further regulation is required

315. Access to customer information in the context of audits and requests to produce information and documents are contrary to the constitutional role of Legal Practitioners.

Regulation by amendment to State based Practice Rules

316. State based regulation could be directed to education on risks (including money laundering and terrorism finance risks) and to the adoption of plans to ameliorate those risks. Monitoring and supervision of the introduction of plans (appropriate to the enterprise) and compliance with the plans (without access to client files and information) could be the subject of amendment at the State level.

Regulation by amendment to the AML/CTF Act and Rules

317. The AML/CTF Act would need:

- (a) preserve expressly the entitlement to legal professional privilege in the context of an audit and notice to produce information.
- (b) provide a mechanism for disputes about the audit or information requests to be the subject of judicial review.
- (c) preserve from prosecution legal practitioners who act in compliance with the AML/CTF Act and provide clients with an opportunity to oppose information being provided or to recover information provided incorrectly.

Recommendation 10

The Australian Government should take no action that changes the regulation of legal practitioners.

Alternatively, if action is to be taken it should be through amendment of regulations in State based legislative schemes done through a proper collaborative design process to provide enforcement and supervision mechanisms consistent with other obligations on legal practitioners.

If action is taken to extend the obligation of reporting entities under the AML/CTF Act to legal practitioners, that client legal privilege and the role of the legal practitioner are preserved to the fullest extent possible and undermined no more than is necessary to combat the perceived risks.