Law Council
OF AUSTRALIA

8 November 2024

Senator Nita Green
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: LegCon.Sen@aph.gov.au

Dear Senator

Anti-Money Laundering and Counter Terrorism Financing Amendment Bill 2024

The Law Council of Australia thanks the Senate Committee for its invitation to attend the public hearing on the *Anti-Money Laundering and Counter Terrorism Financing Amendment Bill 2024* on 30 October 2024 and to respond to questions on notice.

Unfortunately, given the short time frame within which the Committee must report, and the consequently short notice available to deal with questions, our response is not as thorough as we would want. We seek the Committee's understanding in this regard.

Supplementary submission on Schedule 9

In addition to responding to questions we took on notice, we make further submissions on Schedule 9 to the Bill included in **Attachment 1** to this letter.

Schedule 9 contains an extensive array of compulsory examination powers that we were unable to properly examine due to the very limited time available before the Committee hearing. Since the issues raised are extremely important, we have continued to work through them. We hope the Committee will accept this supplementary submission on that basis. We emphasise that Schedule 9 contains powers that are very concerning, and which we strongly advocate be removed from the Bill pending further public consultation outside the Parliamentary process.

The Lawyer X problem

Senators Scarr and Shoebridge raised concerns about the Bill's effect in creating mandatory reporting obligations, covertly informing while being unable to terminate a retainer, and being precluded from disclosing that to any party, including a court. Those concerns were in response to submissions as to the impossible position lawyers will face resulting from the imposition of obligations repugnant to the legal profession as officers of the courts.

The Committee will have seen the advice from the Victorian Bar dated 6 November 2024 (**Nettle KC Advice**) and the conclusion that there is significant risk that the application of these aspects of the Bill would be unconstitutional. The authors of the opinion are eminent counsel, including former High Court Justice, the Hon. Geoffrey Nettle AC KC.

While the Nettle KC Advice is focussed on barristers, you will note "[t]he risk of constitutional invalidity may also extend to solicitors".[1] Our principal submission raised the role of legal practitioners as fiduciaries and as officers of the court.[2] It appears to us that, insofar as the reasoning set out in the Nettle KC Advice is applicable to barristers as advocates and legal advisors, it would also be applicable to solicitors as advocates and legal advisors, as all legal practitioners (solicitors and barristers) are equally officers of the court.[3]

We have also now seen the advice from the NSW Bar dated 7 November 2024 (**Game SC Advice**) dealing with the *Lawyer X* problem. We also note that the Game SC Advice addressed the issue of delayed disclosure raised by Senator Shoebridge. We agree with the conclusions expressed therein, which reflect the matters raised in our principal submission.

We do note, with particular concern, the conclusion in the Game SC Advice that there is a **real likelihood** that the suspicious matter reporting obligation being imposed on legal practitioners, coupled with the tipping off prohibition, may lead to convictions of accused persons being quashed as being the product of a substantial miscarriage of justice.

It appears to us that there must be a fundamental flaw in the proposed regime if the outcome is either that clients lose representation because their lawyer has complied with a suspicious matter reporting requirement and then ceases to act, or there is ultimately a risk that a prosecution will miscarry because a lawyer has continued to act. It appears to us that, in the drafting of the legislation extending the reporting obligations to legal practitioners, insufficient thought was given to the impact on the criminal justice system.

Comparative experience in the United Kingdom and New Zealand

Senator Scarr expressed an interest in whether the United Kingdom (**UK**) or New Zealand (**NZ**) have had any experiences or judicial consideration on the mandatory reporting requirements or similar concerns outlined in Canada. In the time available we have been unable to conduct an exhaustive case review. Our preliminary view is that in neither the UK nor NZ has there been constitutional or similar challenge on the *validity* of the AML regime. We note that both systems of law do not have the constitutional framework of a federal system such as Australia or Canada. Those cases we have identified to date are concerned with the application of their AML Acts.

We note, and agree with, the submissions made by the NSW Bar in its response to questions on notice to the effect that the UK model is not a preferable approach.

Since the Committee hearing we have located and draw the attention of the Committee to updated evidence of significant compliance costs identified in New Zealand.[4] This includes:

- market research indicating that, on average, businesses spent NZD62,000 per annum managing their financial crime obligations for the financial year ending 31 March 2022";[5] and
- very small businesses (0–5 employees) on average spent NZD25,000, while large businesses spent on average NZD747,000 per annum".[6]

We also note that, in New Zealand, compliance costs have been so onerous that more than 6000 applications for partial or full exemptions under the Act have been made over the last

[1] Memorandum of Advice, 6 November 2024, [3].
[2] Law Council Submission, 16 October 2024, [83]–[96].
[3] Memorandum of Advice, 6 November 2024, [45]
[4] Ministry of Justice, *Report on the review of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009* (July 2022), 83-84
[5] Ibid, 86
[6] Ibid, 87

decade, and the incoming NZ Government is committed to a roll back of the compliance burden.[7] That has been in response to a lengthy report by Business NZ on the regulatory burdens.[8] In short, the regulatory model in NZ has come at a significant cost to the private sector.

Conclusion

We remain considerably concerned about aspects of the Bill relating to:

- Mandatory reporting by legal practitioners across numerous provisions of the Act, including sections 41, 49, 49B, 49C and 167 of the Act;
- the compulsory examination powers in Schedule 9 to the Bill;
- the scope of the tipping off offence
- confidential information being amendable to a notice to produce without judicial oversight;
- client legal privilege being compromised by reporting to AUSTRAC;
- information sharing with law enforcement without judicial oversight; and
- the inclusion of all barristers.

In particular, as a bare minimum, we consider that **all** legal practitioners should be exempted from mandatory suspicious matter reporting, responding to notices to produce, and compulsory examination concerning the affairs of their clients.

If, notwithstanding our submissions, legal practitioners are to become subject to the reporting and other requirements to which we have objected, we set out, in **Attachment 2**, extracts of provisions from the New Zealand regime which we think ought to be included in the legislation, with appropriate amendments to account for domestic law. That would necessarily include a narrowing of the scope of offences within the Act, protections for parties making suspicious matter reports in good faith, a replacement of the notice to produce system with a system of search warrants, and proper judicial determination of privilege claims.

Yours sincerely

James Popple
Chief Executive Officer

[7] https://www.beehive.govt.nz/release/government-overhaul-anti-money-laundering-regime
[8] https://businessnz.org.nz/wp-content/uploads/2024/10/BusinessNZ-Reducing-Compliance-Burden-on-New-Zealand-Small-Businesses-Report.pdf

ATTACHMENT 1

SCHEDULE 9 TO THE BILL

Examination and notice to produce powers

The Law Council's primary submission raises concerns with existing and enhanced notices to produce information under sections 49 and 167 (as amended) in conjunction with new sections 49B and 49C, which authorise the AUSTRAC CEO and certain law enforcement agencies to issue a notice to produce information and/or documents. Failure to comply with the notice is a civil penalty provision. The Law Council's submission highlighted a range of concerns about those provisions, including their broad, imprecise and opaque scope and low thresholds; extension to 'other serious crimes'; and highly problematic extension to legal practitioners. The Law Council's concerns about these coercive powers are augmented by the Victorian Bar's supplementary submission.

We add that section 222 of the Act enables the AUSTRAC CEO to delegate any or all of his or her functions or powers to a member of the staff of AUSTRAC (who may then be required to comply with any directions of the AUSTRAC CEO (s 222(2)). However, no particular level of seniority or qualification is required in this context. The Explanatory Memorandum confirms this delegation power is available with respect to proposed section 49B [797].

Our primary submission also outlined concerns about the new compulsory examination powers to be provided to AUSTRAC under Schedule 9. The Law Council's concerns already raised in this regard include the abrogation of the privilege against self-incrimination in the context of these powers, the linking of the examination powers to strict liability offences with maximum penalty provisions beyond generally accepted Commonwealth standards.

To these we would add the following additional observations.

We underline in this context that Rule of Law principles demand that the use of executive powers should be subject to meaningful parliamentary and judicial oversight. This is particularly so with respect to: powers to use force; to detain; to enter private premises; to seize property; to copy or seize information; to intercept or access telecommunications or stored communications; to compel the attendance or cooperation of a person; or to deport a person. Mechanisms should be in place to safeguard against the misuse or overuse of executive powers.

Like notices to produce, the Bill's new compulsory examination powers are extraordinary coercive powers exercised by the Executive.

Under the Bill, the AUSTRAC CEO may issue a notice requiring attendance for an examination to a person under section 172A, where the CEO believes on reasonable grounds that a person has information "that is relevant to compliance with" the Act, the regulations or the AML Rules, or an offence under the Crimes Act or the Criminal Code that relates to the Act, the regulations or the AML rules. Significant penalties are attached to failure to comply, including maximum penalties of up to two years' imprisonment.

Measures to ensure independent oversight, reporting or accountability over the exercise of these proposed examination powers have not been identified. This contrasts with the oversight conducted by eg, the Commonwealth Ombudsman, of a number of law enforcement agencies with respect to the use of coercive powers (see eg, *Commonwealth Ombudsman, Oversight of the use of covert, intrusive and coercive powers* factsheet, available here).

Concerns with the expansion of AUSTRAC's intelligence gathering powers are exacerbated due to questions as to appropriate oversight. The 2017 Independent Intelligence Review recommended that IGIS's jurisdiction be expanded to include AUSTRAC, noting that multiple agencies, including AUSTRAC, possess intelligence capabilities which allow some activities to be undertaken that can impact significantly on Australian citizens (at 7.19). Further, the 2020 Comprehensive Review of the Legal Framework of the National Intelligence Community considered that there was a strong case for IGIS oversight of AUSTRAC's intelligence activities (at 40.102). While the Intelligence Services Legislation Amendment Bill 2023 (Cth) contained provisions that would extend the jurisdiction of the IGIS to the intelligence functions of AUSTRAC, this legislation has not progressed.

Under proposed Schedule 1, item 5, amendments to section 5 set out that an examiner means the AUSTRAC CEO and includes:

- a delegate of the AUSTRAC CEO; and
- a consultant engaged under subsection 225(1) of the Act to perform services as an examiner.

As noted above, section 222(1) requires no particular level of seniority or qualification to be a delegate of the AUSTRAC CEO. Under existing subsection 225(1), there is also no particular qualification or level of seniority required to be a consultant. Nor does any level of training appear to be required. This is concerning given the Bill's powers to privately examine individuals in circumstances in which their fundamental rights are abrogated, procedural fairness is essential and offences with significant penalties including imprisonment are attached to their non-compliance.

Under proposed section 172F(1), an examinee's lawyer may be present at the examination and may address the examiner / examine the examinee about matters about which the examiner has examined the examinee. However under proposed 172F(2), if, in the examiner's opinion, a person is "trying to obstruct the examination" by exercising rights under s 172(1), the examiner may require the person to stop addressing the examiner, or examining the examinee, as the case requires. A person commits a strict liability offence if they fail to comply with the latter requirement (s 172F(3)). It is concerning that an examiner with no seniority, qualifications or training may determine the extent of a lawyer's involvement—which underpins the right to a fair trial' and constitutes 'obstruction'.

The examiner "may, and must if the examinee so requests, cause a record to be made of statements made at an examination" (s 172G). However, there is no general obligation to keep a record of an examination if it is not requested.

Nor is there an obligation on the AUSTRAC CEO to give a copy of the written record (or part of it) to a person's lawyer. Instead, the AUSTRAC CEO 'may' give a copy of the whole or a part of a written record of an examination made under subsection 172G(1) to a person's lawyer if the lawyer satisfies the AUSTRAC CEO that the person is carrying on, or is contemplating in good faith, a proceeding in respect of a matter to which the examination related.'

Given the above, the Bill's proposed examination powers would appear to fall short of a number of principles outlined by the Administrative Review Council in its 2008 Coercive Information-Gathering Powers of Government Agencies report.

The Law Council recognises that the Bill's powers discussed above are modelled on those in the Australian Securities and Investment Commission Act 2001 (Cth) (see eg, Part 3, Division 2 (Examination of Persons). However, it considers that such powers should not be automatically replicated for other regulatory agencies given their extraordinary nature. Rather, it is essential that any extension of these kinds of coercive powers to new agencies should be justified and carefully scrutinised within the particular context in which they will operate. In the context of the current Bill, this includes the investigatory powers which are available to law enforcement agencies such as police and the safeguards applied in those processes.

The transcript of the Committee hearings for the AML Bill does not disclose Committee questioning into the necessity or justification of these new coercive powers (notice to produce and compulsory examination) powers. LCA's view is that they should not be passed without close Parliamentary scrutiny, noting that these are significant new provisions in a recently-introduced Bill.

This reinforces the Law Council's submission recommendation that these powers should be removed from the Bill, pending further public consultation outside the Parliamentary process.

ATTACHMENT 2

NEW ZEALAND PROVISIONS

Anti-Money Laundering and Countering Financing of Terrorism Act 2009

Suspicious Activity

S39A

suspicious activity means an activity undertaken in circumstances—

(a) in which—

(i) a person conducts or seeks to conduct a transaction through a reporting entity; or

(ii) a reporting entity provides or proposes to provide a service to a person; or

(iii) a person requests a reporting entity to provide a service or makes an inquiry to the reporting entity in relation to a service; and

(b) where the reporting entity has reasonable grounds to suspect that the transaction or proposed transaction, the service or proposed service, or the inquiry, as the case may be, is or may be relevant to—

(i) the investigation or prosecution of any person for a money laundering offence; or

(ii) the enforcement of the Misuse of Drugs Act 1975; or

(iii) the enforcement of the Terrorism Suppression Act 2002; or

(iv) the enforcement of the Proceeds of Crime Act 1991 or the Criminal Proceeds (Recovery) Act 2009; or

(v) the investigation or prosecution of an offence (within the meaning of section 243(1) of the Crimes Act 1961).

Protection for reporting

44 Protection of persons reporting suspicious activities

(1) Subsection (2) applies to a person who—

(a) discloses or supplies any information in any suspicious activity report; or

(b) supplies any information in connection with any suspicious activity report, whether at the time the report is made or afterwards.

(2) No civil, criminal, or disciplinary proceedings lie against a person to whom subsection (1) applies—

(a) in respect of the disclosure or supply, or the manner of the disclosure or supply, by that person of the information referred to in that subsection; or

(b) for any consequences that follow from the disclosure or supply of that information.

(3) If any information is reported under section 43 to any Police employee by any person, no civil, criminal, or disciplinary proceedings lie against that person—

(a) in respect of the disclosure or supply, or the manner of the disclosure or supply, of that information by that person; or

(b) for any consequences that follow from the disclosure or supply of that information.

(4) However, subsections (2) and (3) do not apply—

(a) if the information was disclosed or supplied in bad faith; or

(b) if, in the case of information disclosed or supplied by a lawyer, there were reasonable grounds to believe that the information was a privileged communication but the lawyer disclosed it or supplied it despite the existence of those grounds.

(5) Nothing in this section applies in respect of proceedings for an offence under any of sections 92 to 97.

Search Warrants

117 Search warrant

(1) An enforcement officer may apply for a search warrant in respect of a place.

(2) The application must be made by an enforcement officer in the manner provided in subpart 3 of Part 4 of the Search and Surveillance Act 2012.

(3) An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2012) may issue a search warrant in respect of a place if satisfied that there are reasonable grounds for believing that there is evidential material at that place.

(4) The provisions of subparts 1, 3, 4, and 9 of Part 4 of the Search and Surveillance Act 2012 apply.

Determination of Privilege

159A Procedure for testing assertions that document privileged

(1) If any person refuses to disclose any information or document on the grounds that it is a privileged communication and that section 132(4), 133(5), or 143(3) applies, the Commissioner, an AML/CFT supervisor, or that person may apply to a District Court Judge for an order determining whether or not the claim of privilege is valid.

(2) For the purposes of determining that application, the District Court Judge may require the information or document to be produced to the District Court Judge.