Law Council
OF AUSTRALIA

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

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes 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 its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

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 Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council thanks the Anti-Money Laundering and Counter-Terrorism Financing (**AML/CTF**) Working Group for their assistance preparing the Response to Paper 2; the Digital Services Committee of the Business Law Section for their contribution to the Response to Paper 4; and the Financial Services Committee of the Business Law Section for preparing the Responses to Papers 4 and 5.

Response to Paper 2

1. The Law Council welcomes the opportunity to comment on the proposals set out in the Reforming Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime, and in particular, to the proposals in *Paper 2: Further Information for Professional Service Providers* (**Paper 2**). We welcome the commitment of the Attorney-General's Department (**AGD**) to risk-based and outcomes-based AML/CTF legislation.

Key points

2. Because of their unique position and demographics in Australian society, the application of AML/CTF legislation to legal practitioners must be tailored to Australian circumstances.

3. The legislation needs to be proportionate to the real risk, targeted, and carefully drafted.

4. Existing statutory obligations and requirements imposed on legal practitioners operate to mitigate risk such that residual risk in the legal sector is generally low.

5. The 2023 national legal profession vulnerabilities analysis indicated the need for heightened awareness of inadvertent exposure to financial crime.

6. The Law Council has moved to address this need by producing comprehensive Guidance Notes for the profession with input from its constituent bodies. The constituent bodies are now moving to roll out education programs for their state-based constituents.

7. The scope of services that give rise to AML/CTF obligations must be carefully considered.

8. Many areas of legal practice have negligible or no risk.

9. To avoid advisory work which has no nexus to a transaction being covered by the legislation, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**the AML/CTF Act**), there needs to be an express statutory provision for legal practitioners stating that advice work, for which there is no underlying transaction of which the practitioner has carriage, is not a designated service.

10. To avoid services provided when a transaction does not proceed being covered by the AML/CTF Act, that Act should state that where a legal practitioner has commenced to provide legal services, and later receives instructions to have carriage of a transaction that is a designated service, the requirement to have an AML/CTF program and to apply client due diligence pursuant to it arises only if and when those instructions for the transaction are received.

11. To avoid transactions that are the result of the outcome of judicial, arbitral or tribunal processes being covered, there needs to be an express statutory provision exempting those transactions from the application of the AML/CTF Act.

12. There needs to be a specific exemption for barristers from the operation of the AML/CTF Act.

13. Practices that do not otherwise provide designated services should not become subject to the legislation by reason only of the fact that they operate a trust account.

This can be dealt with by excluding the types of payments made in connection with litigation, legal assistance and advice in respect of potential legal proceedings, and legal advice work where there is no contemplated transaction of which the practice/practitioner will have carriage.

14. Conveyancing is subject to rigorous risk mitigations that operate to mitigate money laundering and terrorism financing risk, especially the rules that bind users of electronic conveyancing platforms. Government has not yet evaluated these mitigations for their AML/CTF effectiveness. There are also other regulatory tools to use without imposing entirely new obligations on small business and sole practitioners. Targeted measures within existing systems would better align with the proposed risk-based approach.

15. Legal practitioners must be exempt from any suspicious matter reporting obligation where that 'suspicion' is based upon information or documents the subject of client legal privilege.

16. Section 242 of the AML/CTF Act ought not be repealed but should be supplemented.

17. The anti-tipping off provisions need to be amended to allow legal practitioners to take instructions from clients in relation to the client's legal privilege.

18. Any AML/CTF Rules ought to be managed and put forward to be promulgated as regulations by AGD.

19. The profession should be allowed a minimum period of 2 years from the time the legislation comes into effect to implement the requirements.

20. Specific proposals are made in relation to each designated service proposed for professional service providers by AGD.

21. To require solicitors to hold significant additional client data is a cyber risk.

Introduction

22. In July 2023, the Law Council commissioned an independent vulnerabilities analysis of the legal profession, the VAR.[1] We are pleased to say that the behaviours and attitudes of the profession toward integrity, risk aversion and to fulfilling statutory and professional obligations should give the Government confidence in the profession.[2]

23. The VAR identified residual vulnerabilities including the need for further education for the profession. However, the VAR does not provide support for the profession to be characterised as a high-risk profession.[3]

[1] Russ and Associates, *Vulnerabilities Analysis: Money Laundering and Terrorism Financing – The Australian Legal Profession* (28 September 2023) (**VAR**).
[2] VAR at [52]-[54].
[3] AGD, *Modernising Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime – Consultation Paper on Reforms to Simplify and Modernise the Regime and Address Risks in Certain Professions* (April 2023) (**AGD Consultation Paper, April 2023**) p 3.

24. In response to the VAR, the Law Council has worked to produce comprehensive guidance[4] for the legal profession to heighten awareness as to mitigating and managing specific money-laundering (**ML**) and terrorism financing (**TF**) risk.[5]

25. The Financial Action Task Force (**FATF**) encourages a risk-based approach that is based on a combination of factors including (primarily) the level of ML/TF risk, as well as a consideration of the size and nature of the practices to be further regulated and the extent of legally binding controls already in place (which may mitigate risk). According to FATF, scarce resources are to be concentrated in the higher-risk areas and resulting obligations should be proportionate to the nature of the practice.

26. The resources to be deployed in this area are private sector resources. The burden of any new obligations should take into account both the unique and critical role of lawyers in Australian society in upholding the rule of law, the administration of justice and service to community, as well as the unique demographics of the profession in this country. It must be borne in mind that the profession is overwhelmingly comprised of small and micro-practices based outside the major CBDs. Failure to appropriately recognise these matters risks replicating some of the adverse consequences which occurred in New Zealand when legislation designed for banks but imposed on the legal profession caused some law firms to stop providing newly regulated services; some New Zealand practices closed their doors entirely as a result of the unsustainable cost of compliance.

27. Access to justice and the small-practice character of the Australian legal sector are at stake and the foreshadowed legislation must be proportionate to the real risk, targeted, and carefully drafted.

28. While the Law Council welcomes the development of outcomes-based legislation, there are key issues, including exemptions and clear definitions, which must be resolved and need to appear in the primary legislation. In turn, the subordinate legislation must not be prescriptive and must be disallowable. To avoid conflicts of interest, it should be contained in regulations and not rules made by the proposed regulator.

29. The Law Council intends to convene Pathways Workshops together with AGD, the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) and occupational groups and professions who have a role in a given transaction, to better identify potential areas of duplication of obligations. Such duplication can then be eliminated through the regulatory design process with meaningful inputs from the regulated community.

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[4] Law Council of Australia (2024) *National Legal Profession Anti-Money Laundering and Counter-Terrorism Financing Guidance*, available at https://lawcouncil.au/resources/policies-and-guidelines/national-legal-profession-anti-money-laundering---counter-terrorism-financing-guidance .

[5] The guidance is based on the findings of the VAR and on international material including cases drawn from court judgments and typologies published by the Financial Action Task Force and the Australian Transaction Reports and Analysis Centre. The guidance is now being used by the constituent bodies of the Law Council, particularly state and territory law societies, to develop training sessions and form part of regular communications to members. This outreach is intended to alert practitioners to the specific characteristics of ML/TF risks, and prompt practitioners to assess their existing risk management systems and to augment mitigation strategies within the current regulatory framework for the profession, including practitioners' existing professional obligations. An example is the Law Institute of Victoria's 'Follow the Money' seminar series: 'Follow the Money: Financial Crime, AML and Risk'.

Continued Relevance of Submissions

30. The Law Council has recently made two written submissions that continue to be relevant to the present second-phase consultation by AGD, namely submissions to:

- the Senate Legal and Constitutional Affairs References Committee inquiry, *The adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing regime* (2021–2022), dated 15 September 2021 (**LCA submission to the Senate Inquiry**);[6] and
- the AGD phase one consultation, *Modernising Australia's anti-money laundering and counter-terrorism financing regime* dated 27 June 2023 (**LCA phase one submission**).[7]

Updated Information Relevant to Economic Impact

31. The gross revenue data for small firms supplied in the LCA submission to the Senate Inquiry[8] has now been reviewed based on current figures. The Law Council is unable to publish the figures in this public submission, but may separately share them with AGD on a confidential basis. The updated income figures demonstrate the extent to which the overwhelming majority of solicitors in private practice in Australia would not be able to sustain compliance costs beyond the bare minimum required. This updated data is relevant to the application of the risk-based approach insofar as that approach requires compliance to be sustainable, especially for smaller entities.

Further Information for Professional Service Providers

Timelines, Implementation and Rule-Making

32. Certainty as to the timelines for the legislation coming into force is a key concern for the profession. Last year the Law Council sought assurance that there would be an implementation grace period before which the obligations for legal practitioners would come into force.[9] We consider that this must be **a minimum of two years** from the legislation commencing. This is based on a number of considerations including that:

- The vast majority of the affected practices will be very small or micro-practices.[10] There is already significant change taking place within the profession. The proper implementation of AML/CTF changes will require significant lead time (a minimum of two years) for professional bodies to be

[6] Submission 30 available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AUSTRAC.
[7] Available at https://lawcouncil.au/resources/submissions/modernising-australia-s-anti-money-laundering-and-counter-terrorism-financing-regime.
[8] At [129].
[9] In the LCA phase one submission, the Law Council described practitioners' keen desire for reassurance as to when obligations are likely to come into force. This anxiety has only grown since that submission was made in July 2023. Practitioners need to know that there will be adequate time to prepare and comply once there is certainty as to the precise nature of the obligations.
[10] The Law Council is not estimating the number of practices that will become reporting entities because the definitions of the proposed designated services have not yet been settled. However, in terms of the national profile of the profession as a whole, as at 30 June 2023 there were 97,497 practising solicitors: Legal Services Council, Annual Report (2023), p 27. 84% of private law practices in October 2022 were sole practitioner or 1-principal firms and a further 9% were law practices with 2–4 principals (altogether 93% of all private law practices in Australia): Urbis, *2022 National Profile of Solicitors: Final Report* (26 April 2023) pp 6, 29.

able to actively and effectively support law practices, and of course for law firms themselves, in developing the necessary controls.

- Time will be needed for a body of expertise (and services) to grow in this new field to enable genuine compliance.
- Legal practices will be required to reevaluate and potentially substantially redesign their business and technology systems, as well as their compliance systems, which will take time.
- Reforms currently underway to improve Australia's Digital ID System have the potential to vastly improve the efficiency of the client identification and verification processes. However, private accredited digital ID providers will not be able to enter the market under the new law until November 2026 (even though it appears that the peer-to-peer service provided by myGovID may be available to consumers from November 2024).

33. While we are pleased to see indications that practitioners will be afforded a period of assisted compliance, it is also important for AGD to publish its commitment to, and planned timeline for, phased or staged implementation once the 'grace' period expires.

34. More immediately, the design and drafting of the regulations and amendments to the draft bill will be the most complex and time-consuming part of the second tranche reform package. The Government's timetable must recognise and allow for the size of this task.

35. As to these supporting statutory instruments, the Law Council considers it vital that these take the form of regulations under the enabling legislation which are developed and managed by AGD (and not, as proposed, in amended, or new, rules made by the CEO of AUSTRAC). It is critical that the regulations are legislative instruments under section 10 of the *Legislation Act 2003* (Cth) and subject to disallowance by Parliament. In our view, it is not appropriate for the conduct-regulator, AUSTRAC, to be responsible for determining the scope of the regulatory regime. This should be the responsibility of AGD. There is, otherwise, a risk of conflicts arising between the role of regulator and the role of policy-maker.

36. This approach is consistent with the financial services regulatory model administered by the Treasury where significant exemptions and the scope of the regulatory scheme is, appropriately, set out in regulations. It also consistent with the work undertaken by the Australian Law Reform Commission in reviewing the *Corporations Act 2001* (Cth) to achieve better adherence to fundamental legislative principles.

37. We understand AGD's wish to place clear limits on the time for reporting entities to transition pre-commencement clients to the regime. The period must reflect the compliance burden of the transition, particularly upon sole practitioners. Some law practices manage large numbers of clients, including in the area of conveyancing. We consider a five-year outer limit to be appropriate.[11] We note that the pre-commencement transition is intended to take place on a risk-sensitive basis,[12] but

[11] See the Response to AGD, *Reforming Australia's anti-money laundering and counter-terrorism financing regime: Consultation Paper 5: Broader Reforms to Simplify, Clarify and Modernise the Regime* (May 2024) (**Paper 5**) by the Financial Services Committee, section (h).

[12] See first paragraph of AGD, Paper 2, p 26: '…extend the requirement for a customer risk rating to all pre-commencement customers to inform a risk-based transition into the regime. The Act would then require a **reporting entity to collect and verify identity information about any pre-commencement customer who is rated as medium or high risk**. Identity information that has previously been collected and verified by a reporting entity could be used for this purpose, where appropriate.' (Emphasis added).

rather than applying to medium and high-risk classes, we consider that the risk rating should be narrowed to a manageable level whereby high-risk clients are identified and the obligation to complete due diligence within the transition period applies to those clients and not those in lower categories of risk.

38. While all of these timeframes are under consideration, the Law Council is, as noted above, actively taking steps to raise awareness of ML/TF risk and to equip the profession with tools to mitigate and manage this risk.

A Framework for a Risk-Based Approach

AML/CTF Measures Must be Tailored to Australian Circumstances

39. The Law Council notes that a risk-based approach is the method by which countries and sectors should develop and apply measures to mitigate and manage ML/TF risk. The risk-based approach means that each country should design and implement an AML/CTF solution that fits **its own circumstances**. FATF recognises that:[13]

> *… Countries have diverse legal, administrative and operational frameworks and different financial systems, and so cannot all take identical measures to counter these threats. The FATF Recommendations, therefore, set an international standard, which countries should implement through measures adapted to their particular circumstances.*
>
> *…*
>
> *… Countries should first identify, assess and understand the risks of money laundering and terrorist finance that they face, and then adopt appropriate measures to mitigate the risk. The risk-based approach allows countries, within the framework of the FATF requirements, to adopt a more flexible set of measures, in order to target their resources more effectively and apply preventive measures that are commensurate to the nature of risks, in order to focus their efforts in the most effective way.*

The Unique Position of Lawyers in Australia

40. The risk-based approach applies not only to countries but to regulated sectors.[14]

41. Lawyers' special role in upholding the rule of law is a critical element in the fight against corruption, and organised crime. They have always had a special responsibility to enquire into, advise, counsel against, and not facilitate any unlawful or improper purpose a client might have (inadvertently or otherwise) in mind. This role means that, overlaid with the risk-based approach, it is appropriate to apply special provisions to lawyers recognising that their existing professional obligations are a risk-mitigation factor. FATF also accords recognition to the unique role of lawyers globally.[15]

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[13] FATF (2012–2023) *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (FATF, Paris) pp 7, 8 ('Introduction').
[14] See FATF (2019), *Guidance for a Risk-Based Approach for Legal Professionals* (FATF, Paris) at [4].
[15] FATF (2012–2023) *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (FATF, Paris) see Interpretive Note to Recommendation 23.

42. In relation our own legal profession, the Hon. Marilyn Warren AC (former Chief Justice of Victoria) has stated:[16]

> *The foundation of a lawyer's ethical obligation is the paramount duty owed to the court. The reasons for this are long-standing. It is the courts who enforce rights and protect the citizen against the state, who enforce the law on behalf of the state and who resolve disputes between citizens, and between citizens and the state.* ***It is the lawyers, through the duty owed to the court, who form the legal profession and who underpin the third arm of government, the judiciary.*** *Without the lawyers to bring the cases before the courts, who would protect the citizen? Who would enforce the law?* ***It is this inherent characteristic of the duty to the court that distinguishes the legal profession from all other professions and trades.***
>
> (emphasis added)

The Unique Demographics of Lawyers in Australia

43. Australia's small-business sectors across the economy are to be prized and maintained. In the legal profession, 93% of firms in private practice are 1–4 partner firms. Almost half of those firms are sole practitioners.[17] Most are located in the suburbs and in regional areas, and their incomes are not, on average, high. In regional and suburban communities in particular, legal practitioners regularly provide pro bono and low-cost legal services to members of their communities and frequently struggle to make a reasonable income due to overheads, including regulatory costs.

44. The high incidence of small and micro-practices throughout Australia is an advantage because it facilitates access to legal services even while increased costs of living places additional pressure on families. The pronounced dominance of tiny law practices across our vast continent is now a feature that is unique to Australia.

45. To date, we have successfully withstood pressures that have transformed the demographics of legal sectors in other countries. The United Kingdom, for example, saw its demographic profile disrupted by small firms' restricted access to insurance, limiting their viability and seeing many exit the market. In New Zealand, many experienced sole practitioners and small practices closed doors altogether, and some elected to refrain from providing designated services, specifically to avoid the high costs of AML/CTF compliance. The prospect of having to undertake prescriptive client due diligence, maintain specific categories of records, establish and maintain a compliance program, report to the financial intelligence unit and be audited for AML/CTF compliance, were a tipping point for many.[18]

Existing Statutory Mitigations of Risk to which Lawyers in Australia are Subject

46. The role of the lawyer as officer of the court and the fiduciary character of the practitioner-client relationship underpin state and territory statutory regimes that strongly mitigate ML/TF risk. Features of these regimes are listed in Appendix 1.

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[16] The Hon. Marilyn Warren AC Chief Justice of Victoria on the Occasion of Joint Law Societies Ethics Forum Melbourne (20 May 2010) at [3] (emphasis added).
[17] Urbis, *2022 National Profile of Solicitors: Final Report* (26 April 2023) p 31.
[18] Law Council of Australia, Responses to Questions on Notice to the Senate Legal and Constitutional Affairs References Committee Inquiry, *The adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing regime* (2021–2022), pp 5–6 (Document 21).

47. These are described in the VAR as 'significant existing mitigating factors reducing the ML/TF risk currently present in relation to the Profession.'[19]

The Specific Risk Profile of Lawyers in Australia

48. The VAR points to stratification as a defining national characteristic of the legal sector in Australia, as summarised here:

Small and micro law practices

(a) The ML/TF environment[20] is one of servicing rural, regional, and remote communities.

(b) Apart from conveyancing and buying and selling businesses (often involving the use of trust accounts), clients of legal practitioners are negligible users of most other proposed designated services.

(c) The client base is well-known and some elements of AML/CTF controls are in place. The most effective control at present is the client/practitioner relationship,[21] and practitioners' risk-aversion.[22] New clients and calls for provision of services not previously encountered are recognised red flags.[23]

Large law practices

(d) The ML/TF environment is one of servicing commercial, or high net wealth, clients.

(e) Clients are recipients of a range of proposed designated services.

(f) Large law practices typically already have the range of client due diligence and other AML/CTF measures in place to very high standards.

Specialist and medium-sized law practices

(g) The ML/TF environment is one of servicing clients in city, urban or large population centres.

(h) These practices are a mixture of specialist legal services providers (e.g., family law, personal injuries litigation) as well as providers of proposed designated services.

(i) As for small practices as described in [48(c)], above.[24]

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[19] VAR, Executive Summary, p 11, para (r); also [53], [163]–[169] and Appendix 1 (p 57).
[20] The 'ML/TF environment' refers to the contexts in which the given firms operate (as relevant to AML/CTF considerations).
[21] The client/practitioner relationship is governed by a duty upon the practitioner to give effect only to lawful, proper and competent instructions. See LCA submission to the Senate Inquiry at [13]–[15], [22] and [71]–[76] for other features of this relationship.
[22] The VAR characterises practitioners 'in their representation of clients and conduct of their practices' as 'risk aware, and risk averse' and finds this to be 'a significant "real world" factor leading practitioners to avoid exposure to risk, including ML/TF risk': Executive Summary, p 12, subparagraph (r)(x).
[23] VAR at [169(a)].
[24] The VAR describes this subsector or type of practice (see [15(b) and (c)] and p 25) and conducted interviews across all subsectors but interviewed a relatively greater number of sole practitioners and members of small law practices stating that this was because they are vastly more numerous, and their practice areas are diverse: at [16] ('Methodology').

49. When legal professions alongside other 'designated non-financial businesses and professions' are described internationally as high-risk,[25] this description is almost always a reference to a risk rating that has been made **before** local vulnerabilities and mitigations are taken into account in the risk assessment.

50. However, in Australia, when the residual risks associated with the proposed designated services are analysed in the context of the ML/TF environments in which the variously sized practices operate, what emerges is that of a generally **low-risk sector.** This may surprise some AML/CTF practitioners and consultants, and perhaps even some representatives of the media, but that will be because the focus is usually on inherent risk, not actual vulnerabilities and *mitigated* risk.

51. The reason legal sectors are often described in terms of inherent risk, not *mitigated* risk, is because the literature is international and aspires to have universal application, and mitigations are local (domestic) matters. Yet it is mitigated risk that is the most meaningful. There are very few empirical studies in this field[26] (a fact that scholars have noted and have critiqued for some time), but to assess actual (residual) risk requires empirical work to be done. The VAR is one such study and to our knowledge, for a profession to have commissioned such work, without being specifically AML/CTF-regulated and required by law to do so, is a world-first. For the purposes of domestic policy-making, and to apply the risk-based approach, an appreciation of this distinction is critical.[27]

52. This is not to say that the Law Council believes that nothing further should be done because only low residual risk attaches to the profession; on the contrary, the Law Council and its constituent bodies are addressing those residual risks, including through the development of professional guidance, as set out above.

Additional Measures Must be Targeted and Proportionate

53. AGD has been clear that there will be Commonwealth legislation that will operate alongside the current complex of rules of professional conduct, the common law, and the inherent jurisdiction of state and territory courts to control officers of the court. The Law Council is in favour of this legislation being outcomes-based, to give expression not only to the autonomous operation of the profession, but also the state and territory regulatory schemes already in place and its myriad present obligations under state and territory law. Specifically, outcomes-based (non-prescriptive) legislation should give autonomy to legal practitioners and regulatory bodies in the states and territories to augment and develop their existing practices to meet national AML/CTF outcomes.

54. However, it is absolutely critical that the regulatory burden and associated cost impact of AML/CTF reform on Australia's legal practices, and particularly our small and medium-sized practices, is proportionate to the relevant risks and recognises

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[25] AGD Consultation Paper, April 2023, p 20. See, however, International Bar Association, *Statement in Defence of the Principle of Lawyer-Client Confidentiality* (January 2022) available at https://www.ibanet.org/document?id=/IBA-Statement-in-Defence-of-the-Principle-of-Lawyer-Client-Confidentiality

[26] Katie Benson (2021) *Lawyers and the Proceeds of Crime: The Facilitation of Money Laundering and its Control*, Routledge, p 4 (and works cited). Notable exceptions include Katie Benson's work and research by Dr David Chaikin; see also Dr Ilaria Zavoli and Dr Colin King (2021) 'The Challenges of Implementing Anti-Money Laundering Regulation: An Empirical Analysis,' *Modern Law Review* 84(4): 740–771.

[27] To this end, we note that the National Threat Assessment due to be published on 9 July 2024 is unlikely to take account of existing risk mitigations within the legal sector (or any other DNFBP sector), and its findings will need to be read with the distinction between 'inherent' and 'mitigated' risk borne in mind.

the significant extent to which legally binding obligations already operate to mitigate those risks.

Specific Areas of Practice Where ML/TF Risk is Not Appreciable or Nil—Solicitors

55. The work undertaken by solicitors is vast and varied. Their work includes important practice areas that are often worlds away from financial transactions.

56. Solicitors act for separated parents to negotiate how and when they will spend future time with their children. Criminal defence lawyers act for clients being prosecuted or fined. Suburban solicitors draft simple and complex wills and advise on estate planning and succession. Solicitors represent victims of catastrophic accidents in their pursuit of fair compensation and help local residents enforce and test planning laws.

57. Solicitors own, manage, and work in many different types of practices that are not targets for money laundering or terrorism financing, simply because the types of services they provide do not give rise to relevant typologies. Family law, personal injuries, employment law, criminal law, planning and environment law, media law, and general litigation practices should not be brought within the regime because they do not face any, or any significant, ML/TF risk. Specific considerations related to these practices are outlined in Appendix 2. There should be express statutory exclusions that will have the effect that these practitioners will not be covered by the regime.

58. Further, none of these practices ought to be brought within the regime for the sole reason that they also operate a trust account, as discussed below.

59. We set out below the mechanisms by which the Law Council considers these outcomes may be achieved.

'Transactions', Advice and Preparatory Work—An Appropriate Limiting Provision is Needed for Legal Practitioners

60. The Law Council has a fundamental concern that the concept of the ***transaction being carried out for the client*** is unclear when it is transposed from a banking sector setting to a legal sector setting. Unless this issue is resolved in the draft legislation, it will create problems at the implementation stage. If an appropriate exemption is not granted, each of the practice types described in Appendix 2 will be unnecessarily brought within the scope of the regime. The exemption should explicitly cover legal advice where there is no underlying transaction of which the practitioner has carriage and make particular provision for when preparatory work develops into such a transaction. Proposed wording is supplied in paragraph [67] below.

61. It is a **transaction** that is fundamental to ML/TF risk. Existing AML/CTF obligations to mitigate and manage risk have evolved with the transaction as the focal point.

62. Transaction monitoring is an example of one such obligation.[28] It is obvious from the way that transaction monitoring works, and from many other AML/CTF concepts,

[28] Transaction monitoring is an obligation that was designed for, and is well suited to, banks. It means placing money flows under observation and triangulating data points in relation to those money flows to try to detect unusual behaviour (for example, repeat customers, one-off customers, the same customer shifting bank

that it was banks that were first to be regulated for ML/TF risk. It is banks' business models and relationships with customers that remains the basis for the obligations. For banks, *customer accounts* are key and the *transaction* is the very reason for which the customer seeks out the bank. Banks have clarity around whether or not someone is a customer; customers either hold an account with a bank, or the account is closed. Transaction monitoring by banks is useful by virtue of the transaction flow; the enormous amount of transactions may be analysed to detect patterns and anomalies.

63. Unlike banks, lawyers' clients seek them out for legal advice and representation, not for transactions. That advice or representation might directly relate to a relevant transaction—a transaction that has gone wrong, for example, or has fallen through, or is a feature of a commercial relationship which has broken down. But the subject matter can just as often be non-transactional—who owns a given asset, for example, or when and under what conditions a separated parent may visit their child. Except when provided pro bono, these services are paid for, and payment of professional fees and associated disbursements generate a 'transaction'. The receipt and payment of fees and disbursements do not carry any appreciable ML/TF risk and, as recognised by AGD,[29] these are not the types of transactions to which AML/CTF standards are directed. This is why where trust accounts are used to accept payments of professional fees and make associated disbursements where the work is advisory or relates to representation in disputes, these 'transactions' will not be a designated service.[30]

64. With some exceptions, because the transaction is not the key to the client relationship, advice and representative services will begin and will proceed without it being necessarily contemplated that the practitioners is going to assist with actually carrying out a relevant transaction. Perhaps based on legal advice, or on receipt of initial legal services, the client may, or may not, instruct the practitioner to proceed with a transaction. An example of where they may not provide such instructions is where a practitioner undertakes due diligence on a potential counterparty. The due diligence may result in the client refraining from entering into a relationship with the counterparty instead of proceeding.

65. As presently drafted, it is not clear in what circumstances the words 'preparing for'[31] in relation to a transaction would result in AML/CTF obligations applying at all. On one view, to draw on the counterparty example above, the practitioner has prepared for a transaction, but the transaction is only notional, and never actually occurs.[32] In the alternative scenario in which the client elects to proceed, there is a transaction

accounts, customers shifting between jurisdictions, using unusual jurisdictions, depositing small amounts in large volumes, or making deposits of very large amounts).

[29] Paper 2, p 9 (exception of payments for professional fees).

[30] Legal services that are commonly provided where a transaction is at the heart of the service are the purchase of real estate, and the purchase of a business. As pointed out by the New South Wales Bar Association in its submission, transactions can also arise upon the settlement of legal proceedings where, for example, transfers of value are made after the parties' rights in relation to them (or associated matters) have been resolved. These transactions should be clearly exempted from the operation of the regime, consistent with the exclusion of litigation. In relation to solicitors, while Paper 2 refers to exempting 'representing a client in legal proceedings' (p 7) clarification that the following activities are exempt from the regime is still required: conduct of civil litigation, family law litigation, occupational discipline litigation, administrative appeals, criminal litigation and other quasi-judicial litigious processes, such as patent and trade mark appeals, and tribunal processes.

[31] As referred to in FATF Recommendation 22(d) and Paper 2, pp 8, 11 and 12.

[32] As noted in paragraph [61] above, it is a transaction that is fundamental to ML/TF risk. Paper 2 confirms that AGD does not intend to subject 'pure' advisory work to AML/CTF obligations (p 7). As set out in the LCA phase one submission, there is a strong public interest in avoiding certain foreseeable adverse consequences of clients failing to obtain legal advice in relation to complex transactions: see [168].

but at the point in time at which the practitioner undertakes the work that would be preparatory to it, the practitioner does not know that the transaction will go ahead; that is to say, *it is only in hindsight that the work becomes preparatory*. It may be that AGD considers that there is some work (that is, that there are some tasks) that are inherently preparatory to a transaction. However, that interpretation would run counter to the risk-based approach in its application to legal practitioners. If it is only in hindsight that the practitioner knows that the work constitutes preparatory work, it is untenable and unworkable to hold the practitioner accountable for the application of measures that they cannot at the relevant time know are required. It is also too remote from the flow of funds—that is, the transaction—that is at the heart of ML/TF risk.

66. The solution is not to break down into tasks work that can be (or is even typically) preparatory to, or which may be associated with, a transaction. This is the approach taken in the consultation papers and it has caused consternation. It is confusing, and probably quite misleading, as it does not align with ML/TF risk.

67. Instead, the solution Law Council proposes is to include an **express statutory provision for legal practitioners** stating that:

    (a) advice work where there is no underlying transaction of which the practitioner has carriage is not a designated service;[33] and

    (b) where a legal practitioner has commenced to provide legal services and subsequently receives instructions to have carriage of a transaction that is a designated service otherwise than on an occasional basis, the requirement to have an AML/CTF program and to apply client due diligence pursuant to it (and to that client) arises only upon receipt of those latter instructions.

68. In relation to subparagraph (b) above, we recognise that if a practice does not have an AML/CTF program in place (because it does not usually undertake transactional work of the nature sought by the client), the time, commitment, and cost involved in developing an AML/CTF program will be a factor that the practice is likely to take into account in deciding whether to accept the instructions, or refer the client to another practitioner.

69. Given that ML/TF risks can attach to transactions, guidance provided by professional bodies should emphasise that if practitioners provide legal services that involve a transaction on a one-off or initial basis, practitioners should apply the full range of client due diligence measures that are appropriate to the client circumstances and the features of the transaction, alert to ML/TF risk. Under state and territory regulatory regimes and the common law, practitioners are already subject to professional obligations to know their client,[34] to deliver legal services competently and diligently,[35] and to only follow the client's lawful and proper instructions.[36]

[33] Due to the low or non-existent ML/TF risk.
[34] See solicitors' common law obligations described in *Guidance Note No 3 – What Are My Professional Obligations?* (p 3) in Law Council of Australia (2024) *National Legal Profession Anti-Money Laundering and Counter-Terrorism Financing Guidance*, available at https://lawcouncil.au/resources/policies-and-guidelines/national-legal-profession-anti-money-laundering---counter-terrorism-financing-guidance .
[35] Rule 4 of the Australian Solicitors' Conduct Rules (**ASCR**).
[36] Rule 8 ASCR.

70. There are other areas where the Law Council considers that there should be specific exemptions. These relate to carve-outs for transactions that are a result of a court order/settlement of proceedings and certain matters relating to trust accounts. These are discussed below.

Specific Exemptions Required for the Legal Profession—Transactions the Result of a Court Order

71. We note that the activity of 'representing a client in legal proceedings' is not proposed to be a designated service.[37] However, it should be made clear in an explicit statutory exemption that this extends to transactions that are a result of a court, arbitral, or tribunal order. Transactions that are given effect because a court, arbitrator, or tribunal has ordered parties to a dispute to take certain steps do not pose a ML/TF risk. We have seen no evidence whatsoever that sham litigation is a known typology in Australia and court, arbitral, and tribunal supervision in this country militates against it. These transactions should be excluded from the application of the AML/CTF Act.

72. Further detail is supplied in Appendix 3.

73. Further clarification is also needed to account for the way that legal instructions typically develop. While a client may seek legal advice in connection with a matter that could involve legal proceedings, commencement of proceedings is often the last resort. To be workable, the exception for legal proceedings should include legal assistance or legal advice in respect of potential legal proceedings.

Specific Exemptions Required for the Legal Profession—Trust Accounts

74. Legal practitioners typically conduct far fewer transactions than other reporting entities such as banks or other financial institutions. However even so, client monies and other payments are made through a solicitor's trust account. Solicitors' trust accounts are highly regulated and subject to strict oversight with 'significant uniformity across Australia.'[38] These accounts are only held with Approved Deposit Institutions (**ADIs**) authorised by legal profession regulatory authorities. These ADIs have their own AML/CTF programs in place.

75. The stringent, legally binding rules that govern solicitors' trust accounts have been described at length in both the LCA submission to the Senate Inquiry[39] and the LCA phase one submission.[40] The VAR finds that 'trust accounts are highly regulated and are typically monitored on an ongoing basis'[41] noting that '[c]riminal consequences may be applied for serious breach in relation to the handling of trust money.'[42] Solicitors' trusts accounts are 'commonly used' not only to facilitate commercial and conveyancing transactions, but for 'holding funds on account of fees and disbursements.'[43]

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[37] AGD, *Reforming Australia's anti-money laundering and counter-terrorism financing regime: Consultation Paper 2: Further information for professional service providers* (May 2024) (**Paper 2**) p 7.
[38] GE Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co: 2021, 7th ed) at [9.05].
[39] At [11]–[12].
[40] At [81]–[85].
[41] VAR at [56].
[42] VAR at [163(c)].
[43] VAR at [56].

76. In light of the strict controls in place governing trust accounts and their common usage, it is vital that any proposed amended legislation should contain additional statutory exemptions in relation to the use of trust accounts in addition to the statutory exemption for advice work for legal practitioners. The effect of the trust account exemption should be to exclude law practices that operate trust accounts where the practice, but for proposed designated service 3, would not be a reporting entity under the AML/CTF Act because the practice does not provide any other designated service.

77. The means proposed by AGD to give effect to such an exemption is to comprehensively list the kinds of payments made by such practices in the course of their services as exempted payments in a regulation made under the legislation, so that the trust accounts operated by these types of practices do not fall within the ambit of the legislation and the practices themselves do not become subject to the regime.

78. Such an exemption is only logical because, with very few exceptions, these firms do not carry out transactions for their clients. The exemption is also consistent with the risk-based approach in that it takes account of actual ML/TF risk, as well being proportionate to the size and nature of the practices.

79. We refer to our submissions in paragraphs [122]–[127] below in relation to proposed designated service 3. In addition, the exemption must apply to barristers' trust money accounts, which are very limited in use[44] but fulfill the important function of supplying security for money paid in advance for legal costs, for services provided by barristers. As stated previously, because of the statutory restrictions on the nature of the work that a barrister is permitted to undertake, this money will always be a payment (in advance) for the provision of legal advice, or legal representation in litigation. As such, the ML/TF risk is nil or negligible and the exemption of these accounts (or payments made into and from these accounts) is a corollary of the exemption that is sought for barristers.

Specific Areas of Practice Where ML/TF Risk is Not Appreciable or Nil—Barristers

80. For convenience, we set out in Appendix 4 what we said in the LCA phase one submission.[45]

81. The professional limitations on barristers' scope of practice, which precludes them from providing services that carry ML/TF risk, warrants recognition, clearly stated, that barristers' work—that class of work to which they are restricted by their practising certificates—does not overlap with designated services. This aligns with a genuine application of the risk-based approach.

82. Based on their research, including an analysis of barristers' rules of professional conduct, a comparative analysis of the role of barristers in New Zealand and Australia and meetings held with members and representatives of the Australian Bar, the authors of the VAR concluded that there is 'little to no AML/CTF risk

[44] For example, statistics provided by the New South Wales Bar Association in their submission to AGD dated 8 June 2023 indicated that 1.5% of barristers in NSW had notified that they maintain trust money accounts in accordance with the *Legal Profession Uniform Law Application Regulation 2015* (NSW). It should be noted that these accounts are known by different names in other jurisdictions. They are a very limited feature of the Bars of the states and territories where they are regulated under the Uniform Law or relevant legal profession statute for the same general purpose as just described.
[45] LCA phase one submission, pp 29–31. See also p 5 [7], p 21 [7] and p 25 [26.1].

associated with the activities of practitioners performing only the activities of barristers.'[46] Consistently with the application of a risk-based approach and the VAR finding, and noting the statement in Paper 2 that work undertaken by barristers would not be captured,[47] we welcome the recognition that AGD does not intend the work of barristers to be regulated as designated services under an amended AML/CTF Act.[48] This is also consistent with AGD's stated intention not to include within the scope of the regime:

- pure advisory work where there is no underlying transaction; or
- representing a client in a legal proceeding.

83. However, the descriptions of the proposed designated services in the present consultation documents are expressed in a way that may be understood as encompassing advisory work by a barrister that relates to a proposed or contemplated transaction, the actual preparation and implementation of which will be done by the client or another professional person engaged by the client.[49] We note that these matters have been raised with you by the New South Wales Bar Association in its submissions dated 3 June 2024 and 8 June 2023. We share those concerns.

84. Specific and troubling examples of definitional uncertainty include:

- whether advice in respect of documents that bring about the settlement of legal proceedings, including the drafting of proposed terms of settlement, would fall within proposed designated services 1, 2 4 or 5 where settlement of the proceedings involves aspects of the transactions described by those proposed designated services; and
- whether a barrister's advice in a non-litigious matter on some aspect of a proposed or contemplated transaction, or a barrister's review of proposed transaction documents, might be thought to fall within descriptions proposed designated services 2, 4 or 5, although—as a result of the limitations on barristers' work—the barrister does not have the professional carriage or implementation of the transaction. A factual scenario (as provided to you by the New South Wales Bar Association) may be where counsel is briefed to advise on the operation of a specific proposed clause in a transaction document in large commercial matters in the course of negotiations as to the terms of those documents, but is otherwise uninvolved with the mechanics of the transaction as a whole. Similarly, a barrister may be briefed to review or propose a legal structure or to draft certain provisions of a proposed instrument, drawing on the barrister's specific skill to ensure that the intended legal effect will be achieved.

85. The caution published in Paper 2 that 'businesses that provide 'designated services' in the course of carrying on a business would be regulated under the regime regardless of how they brand their business or identify themselves'[50] compounds the uncertainty by its generality.

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[46] VAR at [23] and see analysis at [20]-[23].
[47] AGD, *Reforming Australia's anti-money laundering and counter-terrorism financing regime: Consultation Paper 1: Further information for real estate professionals* (May 2024) (**Paper 1**); Paper 2**,** p 7.
[48] Paper 2, p 7.
[49] See our submissions in [60]–[69] and [128]–[131].
[50] p 7.

86. It would undermine the application of the risk-based approach if barristers, with whom no or negligible ML/TF risk is associated, are put in a position as a matter of professional prudence of having to analyse the terms of the designated services under the AML/CTF Act against the risk that some of their work may be technically captured. This could mean, for example, that barristers are reluctant to participate in facilitating settlement proceedings, to the detriment of their clients.

87. The definitions of the proposed designated services have not yet been settled. However, based on what appears to be a speedy recent consultation timetable and legislation development timetable, and based on experience in New Zealand and, over a longer period, in the United Kingdom, we are concerned that issues of interpretation will cause costly confusion and have the potential to endure for lengthy periods before they are resolved, with avoidable adverse consequences in the meantime for barristers and their clients.

88. We acknowledge that the chief design feature of the AML/CTF Act is an activities-based regulatory structure; that is, if one undertakes an activity on more than an occasional basis that amounts to a designated service, one is thereby brought within the ambit of the Act.

89. During our roundtable discussions, AGD indicated in a preliminary manner that, as a matter of drafting or structure, the AML/CTF Act's focus on activities precludes barristers from being subject to an exemption as a category or class. A kind of neutrality is sought to be preserved within the statute as between 'entities' and sectors.

90. While this is an unobjectionable starting point, it does not hold true at present.[51] For example, the entities 'financial institution' and 'qualified accountant,' the term 'trustee' and other offices and entities are specifically defined under the AML/CTF Act.[52] Special provision is made for entities such as building societies, insurers, trustees, providers of a pension, holders of an Australian financial services licence, and more, as providers of designated services in s 6 of the Act where they are described as providing services 'in the capacity of…'. Other formulations already in use within the Act include where particular entities are described as providing a designated service in the course of carrying on a particular business/activity (such as a gambling business). Any of these formulations could be readily adapted to clearly exclude legal practitioners practising exclusively as, or in the manner of, barristers from the scope of the given designated service. The Law Council supports the submission of the New South Wales Bar Association that appropriate ways to give effect to the exemption may include exclusion from the proposed designated services pursuant to s 247, or in the way in which some exemptions in the AML/CTF Rules will be transposed into the Act as outlined on p 31 of Paper 5, or in the manner proposed for prescribed disbursements in relation to proposed designated service 3.[53]

91. If barristers are not excluded explicitly from the operation of the AML/CTF Act, the statutory descriptions or definitions of proposed designated services 1, 2, 3 and 5, for example, would need to exclude the provision of legal advice by a practitioner who is not responsible for the general preparation or the implementation of the

[51] The submissions of the New South Wales Bar Association describe the unique role of barristers and the manner in which they serve the public interest in the representation of clients in legal proceedings, including the facilitation of dispute settlements, and by providing legal advice.
[52] Section 5.
[53] Submission of the New South Wales Bar Association to AGD dated 3 June 2024 at [9].

transaction, or would need to be expressed in such a way as clearly to have that effect.

Issues Specific to Real Estate

92. Criminals have in the past used real estate as an asset for the storage of value. There is evidence that this was the case in Australia and that criminals used real estate in Australia to enrich or reward themselves, and/or to launder money. More recently, however, electronic conveyancing offered by commercial providers and subject to legally binding client identification and verification standards developed by the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**) have come to dominate the practice of the sale and purchase of real estate in every state and territory except Tasmania and the Northern Territory.[54] According to one electronic conveyancing provider, PEXA, Australia is unique in the world in that (at least in relation to its own platform) the electronic exchange plays a critical role in almost 90% of all property transactions undertaken across the country.[55] As such, the 'subscribers' who use the platform are subject to the ARNECC regulatory customer ID and verification requirements.

93. The trend to achieving this state of affairs is relatively recent. What effect, if any, has it had on inhibiting the ability of criminals to use illicit funds in Australia to store value in real estate? Is it too early to know? Has the work been done to establish whether electronic conveyancing is already making a significant difference? Would this tool be the appropriate tool, with necessary augmentation, that could push criminals out of real estate without imposing a whole separate raft of obligations (see paragraph [95], below) on agents, conveyancers, accountants and solicitors?

94. The questions that follow are how well are current regulatory tools working to mitigate risk associated with real estate? What is the baseline against which improvements in the future will be measured? What constitutes improvement?

95. The policy response currently under consultation is to add buying and selling real estate to the list of designated services in s 6 of the AML/CTF Act. This would mean that all businesses and professionals who prepare for or carry out real estate transactions are obliged to: screen employees; train staff; appoint an officer to be responsible for AML/CTF compliance; develop a mitigation and management program based on a risk assessment (of their sector and of their business or practice and its clientele); delineate across a range of circumstances the extent of information that they will be requiring their customers or clients to supply to prove the legitimacy of their corporate or other type of legal structure where they are not individuals; verify the identity of their owners, partners or beneficiaries; delineate when and how they will seek proof of their customer or clients' sources of wealth and particular funds; and to register with AUSTRAC and report to AUSTRAC any matters of suspicion.

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[54] Electronic conveyancing was established by adoption of the Electronic Conveyancing National Law. As PEXA has advised in its submission to AGD dated 13 June 2024, electronic conveyancing is likely to be activated in Tasmania in the 2025 financial year and in the Northern Territory in 2026. In both jurisdictions, robust Verification of Identity standards have been implemented paper-based transactions ahead of commencement. These commenced in March 2024. In Tasmania, these were Directions issued by the Recorder of Titles under the *Land Titles Act 1980* (Tas) and in the Territory, they are Registrar-General's Verification of Identity Guidelines made under the *Land Title Act 2000* (NT). The standards align with the ARNECC Model Participation Rules requirements for electronic conveyancing and require practitioners to take reasonable steps to verify identity.

[55] PEXA, Investor Presentation Commentary, 23 February 2023 at https://www.pexa-group.com/staticly-media/2024/02/PEXA-Group-H1-FY24-Investor-Presentation-Commentary-sm-1708654167.pdf

96. These obligations are extensive and in some cases will require large numbers of small and micro-practices to develop and adopt new processes. But regardless of the potential regulatory burden, the fundamental question raised by the proposed policy response is: to what degree is it likely to be effective, and what alternatives are available? Indeed, how is effectiveness being measured?

97. It cannot simply be that the FATF Standards will be legislated and implemented. The Standards pre-date electronic conveyancing by many years. The Standards are designed to be implemented subject to a risk-based approach and should be (within certain limits stated by FATF) tailored to each jurisdiction's existing regulatory environment and specific national and sector threat profiles. This is the task for Australia in the important area of real estate.

98. We expressed in the LCA phase one submission as 'a matter of grave concern that recent figures show real estate to constitute 57% of assets confiscated as proceeds of crime in Australia.' The Law Council noted that 'it would be of enormous assistance to the profession to know which of these transactions, if any, involved legal practitioners and under what circumstances' and the Law Council asked whether this figure pre-dates the introduction of e-conveyancing.[56] Analysing the significance of confiscation of assets statistics is complex, not least because there can be a considerable time lag between the acquisition of the asset by the criminal and its confiscation by the state. The effectiveness of the regulatory regime needs to be measured at the time the criminal acquires the property. It is not straightforward to extrapolate findings to evaluate the effectiveness of the present regulatory regime without taking this lag into account as well as other potentially complicating factors. Instead, the figures and cases must be broken down and case-by-case analyses undertaken.

99. Another area that does not appear to have been evaluated for AML/CTF effectiveness in the formulation of policy to prevent the criminal misuse of real estate is the gatekeeping role of the Foreign Investment Review Board. Of course, the sale of narcotics to Australian consumers generates illicit funds *within* the country that needs to be 'washed', and here the transactions are presumably domestic or outward-bound. Yet concern has also been expressed about funds from off-shore being routed through Australia to launder money[57] including through real estate.

100. Yet how are these concerning, off-shore funds first passing unnoticed through banks? After all, if a dubious foreign entity is the purchaser or sits behind an intermediary, there are avenues presently available for banks to detect and report their suspicions. Further, foreign entities and foreign individuals must obtain the approval of the Foreign Investment Review Board before they can acquire apparently legitimate Australian real estate. Much concern has been expressed in the media about foreign funds inflating property prices in Australia. Yet such purchases are subject to Foreign Investment Review Board approval. How effective, or ineffective, is this approvals process? How effective could it be, to detect and deter criminals?

101. These are all existing regulatory tools that could potentially be leveraged without imposing entirely new obligations on small business and sole practitioners, but which do not appear to have been explored and subjected to any, or any robust, or publicly available, evaluation for their AML/CTF effectiveness. Yet in the VAR, it was

[56] At [89].
[57] For example, by a panel presenter for the Australian Federal Police (Assistant Commissioner Eastern Command) 'Crime Washing Ashore: New Developments in Organised Crime', ACAMS Australasian Assembly, Hilton Sydney (17 June 2024).

found that in the jurisdictions in which it is used (currently all bar the Northern Territory and Tasmania), electronic conveyancing and associated verification of identity requirements pursuant to ARNECC Participation Rules are a significant mitigating factor reducing ML/TF risk.[58] While the VAR found that residual vulnerabilities do exist, these were held to be associated with paper transactions and cheques, and transactions that fall outside of the electronic conveyancing system (such as in Queensland where self-represented buyers and sellers do not have access to electronic conveyancing).[59] Source of funds and source of wealth enquiries do not form part of the electronic conveyancing system, and such enquiries are not necessarily made routinely by legal practitioners. Targeted measures where higher risk situations warranted it could, however, be provided for within existing systems that operate to facilitate the buying and selling of real estate.

102. AGD has indicated that to show compliance with the Act, businesses and professionals will be permitted to leverage their existing obligations; that is, they may rely on their existing protocols, practices and professional obligations, as well as profession or sector-wide features that mitigate ML/TF risk. This commitment to ensuring existing obligations can be leveraged is consistent with the application of a risk-based approach and it is a welcome commitment. However, for practices that are exclusively conveyancing practices to be required to adopt costly obligations, the effectiveness of current levers (such as the interventions of banks, the effect of e-conveyancing and the Foreign Investment Review Board approvals process) should be carefully evaluated.

103. Nevertheless, if AGD rejects exempting legal practitioners from proposed designated service 1, we make the submissions below in relation to it.

The proposed designated services

Proposed designated service 1

> *Preparing for or carrying out transactions on behalf of a person, to buy, sell or transfer real property, in the course of carrying on a business. The customer is the person.*

104. The Law Council opposes the proposed inclusion of 'transfer' in addition to the activities of buying and selling (real property) on the basis that its inclusion runs counter to the risk-based approach. We note that the receipt of property from a deceased estate would not require exclusion if the language of FATF Recommendation 22(d) was strictly adopted. The FATF language suggests that a transfer (without consideration) is not intended to be a regulated activity. We are not persuaded that ML/TF risk attaches to transfers without consideration to any degree that is sufficient to warrant its inclusion for the profession as a trigger for new AML/CTF obligations.

105. As presently drafted, transfers between litigants would be caught under this proposed designated service including, in family law proceedings, transfers of matrimonial property made pursuant to consent orders and other court orders. Should the current language remain, transfers between litigant parties should be exempted. We note a concern was stated by AUSTRAC at a roundtable regarding sham litigation, however no evidence has been presented to us that sham litigation is a prevalent ML typology in Australia and we are not aware of any such evidence. In contrast, transfers in family law proceedings and other litigation are routine (and

[58] VAR, Executive summary (r)(vii), and at [79(f)], [152].
[59] VAR at [79(f)], [126], [152].

litigation is not sought to be captured under this regime).[60] The reasons for this latter exclusion have long been settled at a global level in acknowledgment of the special role of the courts and tribunals in democratic systems and the importance of access to justice as a cornerstone of the rule of law. To reintroduce tasks associated with litigation including transfers of property made in connection with legal proceedings would undermine the sound basis for excluding litigation, without justification based on risk.

106. As we have pointed out to AGD, the words 'It is intended to trigger AML/CTF obligations for businesses that do the following for a client:'[61] have caused extreme concern. The words in the consultation paper were widely interpreted to mean that, on their own, the listed tasks could trigger the obligation to enrol as a reporting entity. The words were read to mean that undertaking a land titles search could amount to providing a designated service. For instance, preparing a contract (of any kind) on its face could be held to amount to providing a designated service. The same applies in relation to undertaking a zoning permit search on its own. This would of course lead to manifestly absurd results.

107. We understand from our discussions during our roundtable that there is no intention for the listed tasks to themselves trigger obligations under the AML/CTF Act. The obligation-trigger is to be the proposed designated service.

108. To avoid future confusion, a provision based on the reg 24AB(1)(e) ancillary services exemption of the *Anti-Money Laundering and Countering the Financing of Terrorism (Exemptions) Regulations 2011* (NZ) (**NZ AML/CFT (Exemptions) Regulations**) should be adopted in the legislation. It should be clearly stated that any relevant service that is wholly ancillary to the provision of a designated service provided by a designated non-financial business or profession is exempt from the operation of the AML/CTF Act. Further, if a list such as that which appears in Paper 2 on p 8 is to be used by AGD for illustrative purposes as part of future consultation documents or in explanatory memoranda, we suggest preceding it with an explicit statement referring to the ancillary services exemption and explaining that the tasks are not independent triggers but may be components of an entity's overall service offering when *preparing for or carrying out transactions for their client to buy or sell real property*.

109. We also agree with the ML/TF risk assessment in relation to (and welcome the exclusion of):

- the receipt of property from a deceased estate;
- services related to residential tenancies;
- services related to property management; and
- services related to leasing of commercial real estate.

110. In relation to deceased estates, the removal of the word 'transfer' as urged above would be consistent with this exclusion.

111. We note that residential tenancies and commercial leases are to be excluded. For clarity (and because there would not appear to be any appreciable adverse ML/TF consequences)[62] leasing itself should simply be excluded.

[60] Paper 2, p 7 and see [71] of this submission.
[61] Paper 2, p 8.
[62] A (short-term) holiday caravan park lease, for example, might not be either a residential tenancy or a commercial lease but poses no appreciable ML/TF risk.

112. Licences should also be excluded along with leases. Leases and licences are kindred property rights with licences only less commonly issued. They tend to be used for less significant assets where, for example, a lease would not necessarily be the appropriate legal vehicle to achieve a client's aims. Rights over a car space are an example of a proper subject of a licence. On balance, we consider that if any risk attaches to leasing (which we do not consider to be the case), still less does it attach to the grant of a licence and any exemption for leases should be extended to licences.

113. In addition, and on the same risk-sensitive basis, services related to grants of easements, covenants, profit a prendre, and exclusive use by-laws should be excluded.

114. Additional, appropriate risk-based exemptions are transactions already enumerated in the LCA phase one submission. These include where the purchase is fully funded by a licensed financial institution or settlement funds are solely coming from within the Australian banking system, and for transactions where the incoming proprietor:

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

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

    (c) is a listed domestic company.

115. The exemptions above are consistent with the exemptions in the NZ AML/CFT (Exemptions) Regulations. New Zealand has recently concluded a statutory review of its primary AML/CFT statute and is working hard to tailor its provisions (especially for newly regulated sectors) to apply a genuinely risk-based approach. Other exemptions of the NZ AML/CFT (Exemptions) Regulations, and particularly reg 24AB and reg 24AD, should be adopted at a minimum. More generally, the lessons from New Zealand's calibrated exemptions (which followed upon and sought to remediate the effects of rushed, blanket legislation) should be carefully understood and applied.

116. Finally, we refer to our observations in paragraph [65] above. The regime should not apply to an entity when a transaction does not proceed. In particular, it should be clarified that advice given to a client who is intending to attend an auction (which could be urgently required) does not constitute preparing for a transaction and so does not fall within this proposed designated service. This is because while the client is preparing to bid the preparation *for the transaction* will crystallise only once the bid is successful (and will not so crystallise where the client is unsuccessful). Once it crystallises, the practitioners' due diligence obligations will commence. The provision proposed in paragraph [67] would cover this scenario.

Proposed designated service 2

> *Preparing for or carrying out transactions on behalf of a person, to buy, sell or transfer legal entities in the course of carrying on a business. The customer is the person.*

117. The VAR found that the transactions contemplated in proposed designated service 2 typically involve a financial institution and/or the use of a solicitor's trust account.[63] As such, this proposed designated service represents a significantly mitigated activity. In the LCA phase one submission[64] the Law Council proposed that the definition be modified so that the sale of an individual business for threshold consideration of less than $20,000 does not amount to a designated service. The manner in which the service is defined would need to be adjusted to reflect the difference between a business and the legal entity that operates it. However, without the introduction of a monetary threshold, the small end of the market will be made subject to the full suite of AML/CTF obligations at a disproportionately high cost. As with the other exemptions sought in accordance with a risk-based approach, the threshold exemption must be clearly articulated in the statute as part of the definition of the service itself. This mechanism aligns with the current policy intention to move many existing exemptions from the AML/CTF Rules to the AML/CTF Act. It would also provide appropriately strong legislative support for the risk-based approach.

118. AGD's proposed drafting, set out for reference above, departs from the FATF Recommendation in two respects. The Law Council has no principled objection to departing from the words of the FATF Standards provided the reasons are clear and sound. The two differences are: the replacement of business entities (in the FATF Standards) with legal entities; and the addition of 'transfer', where FATF specifies only buying and selling. We understand from helpful clarifications made during roundtable discussions that the term legal entities has been proposed as a replacement for companies (in proposed designated service 4) in order to encompass trusts, partnerships and other legal entities (to which a similar ML/TF risk may attach for the purposes of that activity). AUSTRAC personnel have explained that 'person' is defined in the AML/CTF Act to include an individual. In order to exclude individuals but still capture other legal persons, the term 'legal entity' has been introduced. We assume that the same rationale applies equally to the substitution of the term in this proposed designated service.

119. The net result of these changes however in the context of proposed designated service 2, is that while the FATF Recommendation contemplates mitigation of the risk of a *commercial* activity, the inclusion of 'transfer' together with 'legal entity' could mean that a wide range of entities transferred for no consideration would appear to bring a solicitor within the regime. For example, a legal entity could be transferred pursuant to the settlement of legal proceedings or in administration of an estate. As the VAR noted, buying and selling business entities was a 'commonly reported activity' including where the practice type involved estate administration.[65] A legal practitioner who acts for the client to ensure a transaction is lawful and takes effect in order to settle legal proceedings or in the administration of an estate faces

[63] The VAR found that buying and selling business entities is 'a commonly reported activity for law practices of all sizes and in all 8 jurisdictions where the practice type involved a general practitioner, a commercial specialty or estate administration. Transactions often involved use of solicitors' trust accounts' at [99]–[100]; and banks at [60].
[64] At [61].
[65] VAR at [99].

no measurable ML/TF risk. The activity should not be a designated service in these contexts.

120. If the FATF Standard is to be transposed into legislation, we suggest reversion to the wording used in the Standard and, at a minimum, the omission of 'transfer'. We note further that the examples provided on p 9 of Paper 2 read on their own could capture advisory work as distinct from acting in a manner which assist with actually giving effect to a transfer (for example, valuations 'prior to a transfer'). We refer to and reiterate the suggestion in paragraph [67] as to how to deal with work that may (or may not be) preparatory to a transaction, for legal practitioners.

121. If 'transfer' is not removed, clear statutory exemptions are warranted on a risk-based approach, to ensure that transfers undertaken in connection with legal proceedings, in estate planning, and in the administration of an estate are not captured.

Proposed designated service 3

Receiving, holding and controlling or disbursing

- *money (other than sums paid as fees for professional services)*
- *accounts*
- *securities or securities accounts*
- *digital assets (including private keys), or*
- *property*

on behalf another person, in the course of carrying on a business, but excluding:

- *pre-payment for good and services provided by the business*
- *property management activity, and*
- *prescribed disbursements.*

The customer is the person.

122. We noted in the LCA phase one submission that the prefatory phrase on p 22 of the 2023 Consultation Paper, 'lawyers when they prepare or carry out transactions for clients …' implied the need for an underlying transaction separate from a trust account inflow and payment. In that submission, we sought clarification that the mere fact of maintaining a trust account would not bring a law practice into the scope of the AML/CTF Act if it did not otherwise provide any designated service.[66]

123. That clarity appears to have been provided, as the proposed designated service makes no reference to the need for a separate transaction. Instead, AGD is seeking to give effect to the position set out above by listing the payments (currently termed 'prescribed disbursements') that are made into and out of trust accounts of firms whose ML/TF exposure is nil or effectively nil, because they are not transactional lawyers. This would include employment law firms, personal injuries and other litigation firms, boutique planning and environment practices, estate planning and administration practices and media law firms.[67]

[66] At [47].
[67] Many general practices and sole practitioners provide services across a range of practice areas so that references to these practice areas above should also be taken to be a reference to a part of a law practice.

124. So that it has the intended effect, we strongly support the incorporation of the list of prescribed disbursements in a regulation and urge AGD to ensure that the list is comprehensive. In addition:

(a) Payment for goods and services provided by the business should not be limited to pre-payment. Professional fees may be paid on the conclusion of work and upon issue of an invoice.[68] While payment in arrears in this way does not require that a trust account is used, practices do commonly use the trust account rather than the general account for this purpose, which is entirely appropriate. The proposed exclusion, accordingly (for legal practitioners), should refer to payment in place of pre-payment.[69] 'Prescribed payments' may be a simple alternative. The bullet-point list of entities on p 11 of Paper 2 could be preceded by 'payments to and from' rather than simply 'to'. This would correctly capture licensed insurers, for example, from whom payments are *received* upon resolution of personal injuries proceedings (not disbursed to).

(b) The phrasing of the exclusion should make clear that it applies even when it is not necessarily the client (or 'customer') making the payment. It is common for law firms to receive money from third parties, including insurers, in satisfaction of a liability to the client (for example, a costs order in litigation) and to then use that money to pay the firm's existing or future professional fees and/or disbursements in accordance with the instructions of the client. AML/CTF obligations should not be triggered in these circumstances.

(c) The proposed inclusion of payments that are wholly ancillary to a service that is not a (proposed) designated service is sensible and proportionate except for the proposed criterion whereby the exempted service-provider payer (or payee) must carry out business in Australia. If this limitation were retained, overseas experts, consultants and suppliers of outsourced services from other countries would be excluded apparently without any justification based on the level of ML/TF risk. The condition is unnecessarily limiting and does not reflect the global nature of practice, especially that of larger law firms in Australia whose practices are often international and whose AML/CTF mitigation controls are strong.[70] We seek that the geographical limitation be removed.

(d) Other payments to be included are:

- escrow service payments;
- mediation costs (including to a third-party mediator);
- arbitration costs;
- costs for consultants to set up and run paperless hearings;

[68] We are aware that false invoicing exists in other contexts as a money-laundering typology. We do not, however, consider this to be a real risk in the context of the legal profession. False invoicing assumes a witting accomplice and a practice that is designed to hoodwink a lawyer (or other target) whereas it is the lawyer who issues the invoice in the legal profession.

[69] The term 'prescribed disbursements' will need to be reconsidered because in order to give effect to the intended outcome, payments made into as well as out of (disbursed from) a trust account will need to be excluded.

[70] VAR, Executive Summary at paragraph (r)(ix) finding that '[i]n very large law practices, sophisticated client due diligence and approval processes have been established and are applied, up to the levels of CDD required by European countries, as part of a global standardisation of policies, processes and controls to identify and manage financial and compliance risk, to manage conflicts of interest, assist with business strategy and to manage reputational risk'.

- class action fees, such as fees to issue notices to class members;
- witness and expert fees and associated outlays (including where greater than $1,000);
- payments from litigation funders;
- money held in connection with a dispute, pending settlement of the dispute;
- all other payments made in connection with, including preparatory to, the institution, carriage or resolution of legal proceedings;
- money held as a deposit under a contract for the sale of land or option agreement;
- charges for title searches and other property and legal entity search fees;
- other payments to local councils (for example, application fees for town planning/development applications);
- money held in connection with a final payment in a sale of business;[71]
- amounts retained in relation to a contractual warranty; and
- payments made by and to reporting entities under the AML/CTF Act.

125. The Law Council will continue to work on providing listed payments in the coming fortnight in consultation with constituent bodies, but notes that given the consequences that will flow from the inadvertent omission of a category of payment, reference should in any case be made to payments by category along the lines of 'money held in connection with' or 'payments made in connection with', to limit the risk of unintended consequences.

126. The VAR found that legal practitioners appear to hold client assets only 'in very limited circumstances, typically in connection with the administration of estates, or as a special arrangement for a long-standing client, for a limited period of time'.[72] We note, as to managing client 'valuables' as a class of assets, legal practitioners are reluctant to and generally avoid holding cash or valuables[73] and comply with reporting requirements in relation to cash. However, estate planning and the administration of estates is a core practice area for many small and medium-sized practices, with little to no ML/TF risk posed by these services.[74]

127. In the same way that 'property management activity' is to be defined and excluded, estate planning and administration should also be excluded (for the reasons set out above and in paragraphs [119] and [123] above) as follows:

    - on behalf another person, in the course of carrying on a business, but excluding:
        - pre-payment for good and services provided by the business;
        - <u>payment for services provided by a law practice;</u>
        - property management activity;
        - <u>estate planning and administration undertaken by a law practice; and</u>
        - prescribed disbursements.

[71] For example, a final stock valuation.
[72] VAR, Executive Summary at (i), see detail at [82].
[73] VAR, see [82] for details.
[74] 'Deceased estates offer limited scope for ML/TF typologies due to the necessity of a death having occurred': VAR, Executive Summary, subparagraph (g)(iii) (p 9 n 34) and see [96].

Proposed designated service 4

> *Preparing for, or carrying out, or organising transactions for contributions for the creation, operation or management of legal entities, on behalf of a person in the course of carrying out a business. The customer is the person.*

128. In the LCA phase one submission,[75] we highlighted the risk of inadvertently capturing the following activities which would be highly disproportionate to the ML/TF risks they pose:

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

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

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

    (d) holding company meetings;

    (e) auditing accounts and financial reporting;

    (f) taxation advice;

    (g) reporting and compliance obligations; and

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

129. Paper 2 notes that 'the determining factor of this proposed designated service is whether the reporting entity has control over the flow of client money, accounts, securities or security accounts, other assets or property.'[76] This is reassuring, but this clarification needs to be given statutory force to create an environment of certainty.

130. As was the case for proposed designated services 1 and 2, many readers of the consultation papers have expressed concern lest the tasks mentioned on p 12 of Paper 2 (for example, to assist clients by advising on loans) should independently constitute the provision of this designated service (without the practitioner having carriage of the transaction). We reiterate submissions made in paragraphs [60]–[69] above as to the need to ensure a direct link to the transaction, by excluding advice work and clarifying that, where a legal practitioner has commenced to provide legal services and subsequently receives instructions to have carriage of a transaction that is a designated service (otherwise than on an occasional basis), the requirement to have an AML/CTF program and to apply client due diligence pursuant to it arises only upon receipt of those latter instructions.

131. If the practitioner does have instructions to give effect to the transaction, and the transaction is not in cash, a risk-based measure that could appropriately allocate the regulatory burden would be to introduce to this proposed designated service a monetary threshold of $5,000 for the value of the transaction. Such a threshold would deal with circumstances for the profession where not only would the ML/TF risk be low, but the legal fees received by the practice for these smaller transactions would be minimal. For the cost of undertaking the AML/CTF due diligence on the

[75] At [56].
[76] p 10.

transaction to exceed the fees earned would be to risk creating an access to justice deficit and adversely affecting communities that may already be underserviced.

Proposed designated service 5

> *Formation, creation, operation or management of a legal entity (excluding a testamentary trust), on behalf of a person, in the course of carrying out a business. The customer is the person.*

132. We note and welcome the exclusion of testamentary trusts on the grounds of low or nil ML/TF risk.

133. In the context of a slightly different formulation of this designated service, the LCA phase one submission[77] highlighted the risk that this proposed designated service may inadvertently capture:

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

    (b) holding meetings of members;

    (c) auditing accounts and financial reporting;

    (d) providing taxation advice;

    (e) reporting and compliance obligations; and

    (f) changing trustees.

134. Unfortunately, this uncertainty has not been dispelled. In fact, further confusion has arisen as a result of the commentary that now accompanies the formulation of the service. For example, the references to 'drafting' and 'reviewing' in the first and second example points on p 12 of Paper 2 are so wide as to potentially capture pure advisory work performed by solicitors or barristers. Together with the uncertainty in relation to the activities listed above, this only underscores the need for a clearly stated statutory exemption for advisory work performed by legal practitioners. The word 'preparing for' should also be omitted from the relevant designated services. Attention to this matter is now urgently required as we note that the designated service has been redrafted following last year's consultation without addressing these concerns.

Proposed designated service 6

> *Acting as, or arranging for a third person to act as*
>
> - *a director or secretary of a company,*
> - *a power of attorney for a legal entity,*
> - *a partner of a partnership,*
> - *a trustee of an express trust, or performing the equivalent function for another form of legal entity, but excluding the executor or administrator of a deceased estate, or*
> - *a similar position in relation to other legal entities*
>
> *on behalf of another person in the course of carrying out a business. The customer is the person.*

[77] At [57].

135. We explained our concern in the LCA phase one submission that the phrase 'arranging for a third person to act' might capture drafting or reviewing of documentation in connection with this designated service, such as the drafting of a power of attorney or a document appointing someone as director or secretary. We sought further clarification as to the breadth of this proposed designated service to ensure that documents that solicitors draft and review daily are not inadvertently caught.

136. We reiterate this request for clarification and an appropriately drafted statutory exclusion for any ancillary work.

Proposed designated service 8

> *Providing a registered office address, principal place of business address, correspondence address or administrative address for a:*
>
> - *company*
> - *partnership, or*
> - *any other legal entity*
> - *on behalf of another person, in the course of carrying out a business.*

137. As to this proposed designated service, we raise the following question (noting that this is an activity infrequently undertaken by practitioners for their clients):[78] if a law practice were to permit its address to be used as the business address, correspondence address or administrative address for a family company or the trustee company of a family trust associated with one of the solicitors who owns or is employed in the law practice—not for reward, but reflecting the association of that person with the address—would that law practice be held to be providing this designated service? Would a barrister's chambers, in similar circumstances, be brought within the regime? While we assume that this type of private use of an address is not intended to be caught, clarification on this point is sought.

Other Issues Raised by the Proposed Preventative Measures

Data Collection and Retention

138. Depending on the detail of the rules and how prescriptive they are in the result, the tranche two package of reforms may require law practices to obtain and retain client data on a potentially significant scale. The retention of personal information such as identification documents is a serious data security concern for the profession, particularly in light of the growing prevalence of cyber-crime and the risk of data breaches.

139. As mentioned in paragraph [34] above, accredited private providers may not be permitted to enter the Digital ID market until November 2026. Given the sheer volume of data legal practitioners may be required to retain as part of their new obligations, consideration might be given to a process where such documents are only retained in the case of high-risk clients (as suitably defined). A complementary (or alternative) provision might be to relieve firms from the obligation to retain verification of identity documents.[79] Instead, the AML/CTF Act could stipulate that a document could be signed by a practitioner, or the firm could otherwise attest to the fact that the identity was verified, on a particular date, for a particular transaction. This would be consistent with the philosophy behind the new Digital ID laws and the

[78] VAR at [97].
[79] The retention of documents can generate a risk of cyber-attack.

sharing of information only on a selective basis rather than generating new repositories of data.

140. Clarity and consistency are important if records of client identity must be retained. Seven years corresponds rule 14.2 of the ASCR and is consistent with obligations to retain records under the electronic conveyancing framework.[80]

Enrolment with AUSTRAC

141. Legal practitioners who become providers of designated services under the reforms will need assistance to understand and navigate the requirements for AUSTRAC enrolment. The introduction of another regulator into an already complex regulatory framework will particularly affect smaller firms with fewer resources available to manage the change.

Education and Guidance Specifically Targeted to the Needs of the Legal Profession

142. Many small- to medium-sized firms will have to make nuanced decisions as to what constitutes their 'senior management' and the qualities and resources an AML/CTF Compliance Officer will need to effectively carry out their role. It will be imperative that AUSTRAC and AGD produce detailed, legal profession-specific compliance guidance, education, and templates to assist legal professionals—and especially, sole practitioners and small- to medium-sized firms—to meet their obligations. Continuing professional development will also need to be delivered to the profession well in advance of the regime being extended to the profession. Particular focus areas will include support for firms to develop appropriate risk assessment protocols and understand triggers for re-assessment of risk while the client relationship is on foot. Risk-ratings can be indicative rather than extensive in certain contexts. For example, a client incorporated in a jurisdiction where significant sanctions are imposed would be a high risk but it would be helpful to better understand in advance the degree to which AUSTRAC will issue guidance around risk parameters, or how legal practices should assess these and other risks in a manner that is deemed compliant.

143. Considerations particular to the legal profession will include making allowance for the fact that practitioners sometimes need to commence work or give preliminary advice prior to the matter being formally opened. There should be guidance provided to the profession on how to manage compliance including timing of client due diligence while still conducting an effective and competitive legal business.

AML/CTF Programs

AML/CTF Programs—Further Consultation is Required

144. AML/CTF Programs may be the key mechanism by which practitioners will demonstrate compliance with the outcomes stated in the amended AML/CTF Act. It will be critical to dedicate time and separate consultation to the potential content of such programs.

AML/CTF Programs—KYC

145. Based on the consultation papers and our roundtable discussions, we anticipate that Know Your Client (**KYC**) processes will be a feature of individual AML/CTF programs. We understand that reporting entities will be required set out in their

[80] ARNECC Model Participation Rules 'Guidance Note – Retention of Evidence,' p 2 https://www.arnecc.gov.au/wp-content/uploads/2021/08/mpr-guidance-note-5-retention-of-evidence.pdf

programs how they intend to respond to the risks that their particular practices face. We understand that the features of such programs will be flexibility and an ability to give expression to existing mitigating factors in place, and to the practice's own risk appetite. Paper 2 has, however, alluded to a potential pitfall by singling out as an example the ARNECC Model Participation Rules Verification of Identity Standard as a way to meet one's client due diligence outcome. It may be that this is simply illustrative of one possible method envisaged by AGD to meet KYC outcomes. However, we point out that solicitors (for example, in New South Wales) undertaking a conveyancing matter may choose to satisfy the verification obligations under Rule 6.5.2 of the NSW Participation Rules[81] by taking 'reasonable steps' to identify the client, rather than applying the Verification of Identity Standard. The criteria for what constitutes a compliant program must be sufficiently flexible to allow means other than the ARNECC Verification of Identity Standard to satisfy AML/CTF requirements, if the solicitor so chooses in accordance with robust practices. In this example, it is important to also note that the Verification of Identity Standard has limitations, including that the verification must be conducted face-to-face and cannot be conducted over an audio-visual link. The Verification of Identity Standard for electronic conveyancing also requires the solicitor to retain copies of the client identification documents. The AML/CTF customer due diligence requirements (whether set out in a regulation, rules or in compliance guides to AML/CTF Programs) need to be cognisant of these and similar limitations and ensure that an overly prescriptive approach is avoided.[82]

146. It will also be necessary to ensure a solicitor is able to use the services of a reputable third-party such as Australia Post or MyGovID, to satisfy verification of identity requirements and other client due diligence obligations under the AML/CTF regime.

AML/CTF Programs—Cross-Border Consistency

147. We note that Paper 2 states that all members of business groups remain responsible for fulfilling their own obligations,[83] but suggest that the legislation should ensure that firms operating AML/CTF-compliant operations in jurisdictions outside of Australia should be able to use those same processes to be compliant under the Australian regime. Having a different approach for the same legal firm in every jurisdiction would create an additional and unnecessary administrative burden.

Confidentiality, Client Legal Privilege, Suspicious Matter Reporting and Tipping Off

148. Recognising that the Law Council and AGD have been engaged in discussions in relation to client confidentiality and client legal privilege during the phase two consultation period, we refer to paragraphs [95]–[173] of the LCA phase one submission and rely on those detailed submissions without reproducing them here.

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[81] NSW Participation Rules for Electronic Conveyancing, Version 7 https://www.registrargeneral.nsw.gov.au/__data/assets/pdf_file/0003/1286751/NSW-Participation-Rules-Version-7.pdf.

[82] While we appreciate the importance of client identity verification, we note that, occasionally, clients have difficulties in producing sufficient identity documentation or being able to present this documentation in person to a solicitor, particularly in rural or regional areas. This may pose a problem, particularly for small law practices in those areas.

[83] Paper 2, p 17.

149. The cornerstone of our concern arises from the fiduciary nature of the relationship between the legal practitioner and their client. To require the practitioner to report on their client and not to tell the client, but to continue to act for them, as proposed, is an untenable disruption to the fiduciary relationship. To protect the lawyer-client relationship, and to address this issue, the Law Council submits as set out below.

150. Legal practitioners should not be required to disclose confidential or privileged information.[84] To avoid any doubt, an express statutory protection should be introduced to the following effect:

> *Legal practitioners and law practices are exempt from obligations under this Act to provide information or documents which are the subject of client legal privilege, or which are confidential to a client and acquired by the legal practitioner or law practice during the client's engagement.*

151. AUSTRAC must not be permitted to collect confidential information from legal practices or share such information with other agencies.

152. Legal practitioners should be exempt from the suspicious matter reporting obligation.[85]

153. In the alternative, and for consistency with AGD's assurance that the AML/CTF Act will not abrogate client legal privilege,[86] if a suspicious matter reporting obligation is to be introduced for legal practitioners, the Act must expressly state that it does not apply where client legal privilege applies. While the exemption set out in paragraph [150] above would have this effect, if it is not adopted, an exemption with specific reference to the suspicious matter reporting obligation to state that it does not apply where the suspicion arises from information or communications that are subject to client legal privilege, is necessary. In these circumstances, a practitioner's normal professional obligations with respect to declining or ceasing to act would apply. An exemption from s 123 of the AML/CTF Act is also required so that practitioners can fully comply with their professional obligations (for example, terminating the retainer) without risking committing the offence of tipping off.

154. In addition to the point in paragraph [153] above, if a suspicious matter reporting obligation is to apply at all, it is necessary for an obligation to be specially drafted to take account of the existing professional obligations that apply to legal practitioners. In particular, it should be drafted so that:

    (a) the degree of concern that currently triggers (permissive) provisions for reporting information under state and territory professional obligations is mirrored by the definition of the suspicious matter reporting obligation trigger. A mere suspicion on reasonable grounds is too low a threshold to be workable for legal practitioners. This is because legal practitioners have a very important duty to counsel their client to dissuade them from pursuing a course of conduct that is likely to be unlawful, and this duty is inconsistent with the obligation to report on a mere suspicion on reasonable grounds (and continue to act, if only in the attempt to dissuade the client and seek lawful instructions);

[84] LCA phase one submission at [154]–[169].
[85] LCA phase one submission at [95]–[173].
[86] Paper 2, p 23.

(b) in contrast to the threshold provisions in s 41(1) of the AML/CTF, which are broadly drafted, the obligation would need to be drafted so that it could not apply merely to contact made by a person before engagement as a client (for example, where a person emails a legal practitioner 'cold' in a spamming fashion which raises suspicion); and

(c) if the obligation to report is to be mandatory, if would be inappropriate for it to be a civil penalty provision.

155. Section 242 should not be repealed. It should be retained and supplemented by the express provision sought in paragraph [150] above and also with specific protections that reference ss 148, 167 and 170 (or their equivalents) as set out in the LCA phase one submission.[87]

156. AGD's proposed definitional approach that would 'simultaneously allow the concept of LPP under the regime to develop alongside common law without being constrained by its treatment under the Act' assumes the 'development' of client legal privilege 'under the regime' (that is, parallel to) or 'alongside' the common law.[88] On reflection, the Law Council considers that it is necessary to entirely eliminate any risk of a new concept of client legal privilege emerging that diverges from the common law and state, territory and Commonwealth Evidence Acts. The Act should not seek to define client legal privilege.

157. A provision to the effect of s 77 of the *Anti-Money Laundering and Countering Financing of Terrorism Act* 2009 (NZ) should be introduced:

> **Section 77 Protection for reporting entities, officers etc, acting in compliance with this Act**
>
> 77 No reporting entity, or person who is, or has been, an officer, an employee, or a member of the governing body of the reporting entity, or person appointed under section 56(3) is criminally or civilly liable for any action taken in order to comply with this Act or regulations if the action—
>
> (a) was taken in good faith; and
>
> (b) was reasonable in the circumstances.

158. The Law Council does not consider that there is any need for a mechanism to resolve disputes over claims of privilege and in particular, the mechanism outlined on p 22 of Consultation Paper 2 has the potential to place pressure upon legal practitioners to unintentionally waive their client's legal privilege. This has been outlined in detail in the LCA phase one submission. There has been no suggestion that legal practitioners generally make spurious claims of client legal privilege and there is no evidence at all to that effect. Regulators may not always agree with a claim made by a practitioner. But that does not mean either that the claim is spurious or that the practitioner has done anything other than take proper steps to protect their client's interests. The proposed AML/CTF regime is not directed to 'bad actors' in the legal profession but to prevent those who are at risk of being unwittingly exploited from being so misused.

[87] At [135(b)] and [135(d)].
[88] Paper 2, p 21.

159. The LCA phase one submission did raise the prospect of a mechanism (not a general disputes mechanism) to deal with circumstances where the legal practitioner faced with a warrant may inadvertently waive privilege.[89] The mechanism suggested by the Law Council was expressly intended to be limited to searches under warrants and would have these features:

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

    (b) a legal practitioner would be given a reasonable opportunity to review the seized material and obtain client instructions in order to determine whether to make a claim of legal professional privilege;

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

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

160. In contrast, the mechanism that has been proposed in the consultation paper is mandatory, extends beyond the circumstances of compulsion under warrant, pre-empts a court's determination, and may itself place pressure on a practitioner to waive their client's privilege. It is also inconsistent with other government agencies' approaches to client legal privilege. The Law Council is participating in a whole of government review of the management of claims of client legal privilege led by Treasury and AGD. Any disputes mechanism, should one be required, should be limited to AUSTRAC's exercise of its audit and investigation functions and be consistent with the whole-of-government review.

161. As mentioned above, an exemption from s 123 is required for legal practitioners. The terms of s 123 are so wide as to include circumstances where a person has not filed a suspicious matter report but is required to do so. It does not matter why they didn't file a report (it could be as a result of an error made in good faith). In turn, the conduct that constitutes tipping off under s 123 could include conduct from which the person (who should have been the subject of the report) could reasonably infer that a report was required. It is not clear, but there is a risk, that practitioners who advised their client (in accordance with their duty) that their proposed (or previous) conduct is unlawful in order to counsel them to take lawful action, could, in so doing, commit the offence of tipping off. Legal practitioners are officers of the court and the ability to freely communicate with their client in relation to the lawfulness of their client's conduct is fundamental to their role. The terms of s 123 are inconsistent with the ability of legal practitioners to discharge their professional responsibilities, and with the important role that legal practitioners play in upholding the administration of justice.

Response to Paper 5 – As to Impacts upon the Legal Profession

Defining the Business Relationship

162. We note the observations made by the Financial Services Committee in paragraph (g) of its submission. For legal practitioners, the definition requires more clarity as the 'element of duration' is typically associated with an engagement for legal service. Accordingly, this does not provide much guidance—yet the concepts have

[89] LCA phase one submission at [144].

important consequences for when obligations arise and potentially the level of due diligence required.

163. If the definition is seeking to emphasise a distinction between enduring relationships and one-off transactions or single matter, then this aspect of the definition should be strengthened.

164. Legal practices provide diverse services, particularly in more remote communities and it should be a policy intention that practices should continue to be able to offer a range of services especially in regional communities, sometimes on an occasional basis.

The Requirement for Independent Audit—Avoiding Duplication Where There is Overlap

165. Legal practices are subject to regular audits[90] for compliance with stringent rules that are particular to the legal profession, including the audit of trust accounts. The Consultation Paper foreshadows a requirement for a further audit with a frequency determined by the entity's risk profile (with a potential minimum frequency of every four years).[91] For legal professionals, this should be able to be incorporated in trust account audits at appropriate intervals.

'Keep Open Notices' Should Not Be Capable of Being Issued to Legal Practices

166. Paper 2 proposes that an eligible law enforcement agency could issue a 'keep open notice' without requiring approval from AUSTRAC in circumstances where a senior delegate within the relevant agency reasonably believes that maintaining the provision of a designated service to the client would assist the investigation of a serious offence.

167. It is totally inappropriate to issue a 'keep open notice' to a legal practitioner, an officer of the court. We note AUSTRAC's observations made during our roundtable meeting to clarify the fact that keep open notices offer permission rather than imposing an obligation. This is not a distinction that matters in these circumstances because the invitation would act to place pressure on the practitioner to continue to represent the client in circumstances where the lawfulness of the client's conduct is being questioned. The ethical decisions facing a practitioner in these circumstances are exacerbated, relative to other potential reporting entities, by their strict duty to maintain client confidentiality and not to waive the legal privilege of the client. This dilemma plays out in circumstances where the client's legal privilege potentially remains in place given that the threshold of suspicion has, conceivably, not been exceeded.

168. Keep open notices should not be able to be issued to a legal practice.

[90] See Appendix 1, paragraph (c); VAR, Executive Summary at paragraph (e) and see [105]ff.
[91] Paper 5, p 11.

Response to Paper 4

169. This part of the submission is in response to the questions posed in Paper 4. It has been prepared by the following Committees of the Business Law Section of the Law Council of Australia:

- Digital Commerce Committee (responses to questions b., c. and d. only); and
- Financial Services Committee (responses to all questions).

170. The Digital Commerce Committee focuses on commercial and government/regulatory transactions with business and consumers using digital and related technologies and platforms including digital marketing, procurement, supply and service delivery, contracting, authentication, signing and consents and monitors associated emerging legal issues.

171. The Financial Services Committee monitors developments in the laws and regulations governing providers of financial services including banks and other financial institutions, wealth management advisers, fund managers, payment service providers and other intermediaries in the financial system.

172. Each of the Committees monitors developments in Australian anti-money laundering laws impacting their respective industries.

173. A reference in this document to the "Law Council" reflects the views of the Financial Services Committee or both of the above Committees, as relevant.

Expanding the range of regulated digital currency related services

a.	**Do you consider that the current term and associated definition of 'digital currency' is appropriate? What alternative terms outside of 'digital asset' might be considered, and why?**

174. The Law Council considers that the current definition of "digital currency" in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the **AML/CTF Act**) is not fit for purpose and ought to be changed because the current definition:

(a) does not accommodate the requirement of being capable of being used "for payment or investment purposes" in accordance with the Financial Action Task Force (**FATF**) definition of "virtual asset"; and

(b) is too narrow because the attribute of being "interchangeable with money" may not capture all types of digital assets that ought to be captured by the definition.

175. The Law Council agrees that the term "digital asset" would be more appropriate than "digital currency".

176. The Law Council recognises that policy drivers of certain aspects of AML/CTF regulation and financial services regulation will not necessarily be the same in every instance. However, the close connection between AML/CTF regulation and financial services regulation more generally is specifically recognised in paragraph 4 of the Interpretive Note to Recommendation 15 of the FATF Recommendations (New Technologies). The Law Council submits that it would be desirable for key definitions utilised in AML/CTF regulation to mirror the definitions proposed to be

used in financial services regulation, to the fullest extent that this is consistent with the policy underlying AML/CTF regulation. In particular, when defining "digital asset" for AML/CTF purposes, it would be helpful to have regard to the work being done by Treasury and the federal government generally on the definition of "digital asset" for the purposes of regulating digital asset platforms under the *Corporations Act 2001* (Cth) (the **Corporations Act**).

177. In line with the comments made above, the Law Council recommends that "digital assets" for AML/CTF purposes be defined as digital representations of value which:

    (a) are treated as financial products under the Corporations Act; or

    (b) represent non-financial entitlements (e.g., to tangible and intangible collectibles) which are "financialised" by being available via a digital asset facility that engages in activities, and create risks that mirror those of existing financial services, as described in Treasury's October 2023 Proposal Paper on Regulating Digital Asset Platforms[92].

178. If ultimately, contrary to the Law Council's recommendation above, the respective definitions of "digital asset" for AML/CTF purposes and the Corporations Act are not aligned, then the Law Council considers that it may be more appropriate to use a distinct term (such as "virtual assets", in line with the FATF expectation) to avoid confusion which could arise if the term "digital assets" was used for both Corporations Act and AML/CTF purposes yet had a different meaning in each respective context.

b. How should the scope of NFTs subject to AML/CTF regulation be clarified?

179. The Law Council notes that NFTs can record entitlements to anything.

180. The Law Council believes it is important to ensure that AML/CTF regulation extends only to those NFTs which operate as a means of payment or are an investment instrument. In essence this would involve applying a test as to whether the NFT:

    (a) functions as if it were money; or

    (b) is characterised as a financial product.

181. The Law Council further notes that, if the FATF Recommendation 15 definition ("a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes") were to be adopted for this purpose, then most NFTs would not be subject to AML/CTF regulation, as unique digital assets are not primarily used for payment or investment. It is important, however, to note that payment used to acquire/dispose NFTs will be covered.

182. If the above FATF definition is not adopted, then the Law Council submits that care should be taken to avoid regulatory duplication (e.g., NFTs representing real-world assets, where the payment for those assets is already covered) and imposing regulatory constraints on functional use (e.g., NFTs for 'back end' applications such as supply chain management platforms).

[92] See https://treasury.gov.au/consultation/c2023-427004

c. Are there any services that may be covered by the term 'making arrangements for the exchange…' that should not be regulated for AML/CTF purposes?

183. The Law Council notes that there is a proposed amendment to the existing designated service under item 50A of table 1 of section 6 of the AML/CTF Act. The proposed change is that the existing designated service would be expanded to include "making arrangements ….".

184. Paper 4 states that "making arrangements …" is intended to capture "the participation in, and provision of, financial services related to an issuer's offer and sale of a digital asset".

185. The Law Council does not believe that there is sufficient clarity in Paper 4 as to the scope of additional activities which are intended to be regulated. In particular, "making arrangements for the exchange" is very broad. The Law Council notes that, based on the definition of "arrangements" in section 5 of the AML/CTF Act, "making arrangements" would appear to cover "a scheme, plan, proposal, action, course of action or course of conduct to enable a customer to receive a designated service".

186. The Law Council is concerned that the lack of clarity and unnecessary breadth could have unintentional consequences, including regulating activities which were not intended to be within scope.

187. For example, while Paper 4 suggests that the change is in respect of the "issuer's" offer and sale, by including this in item 50A, the proposed amendment appears to have the consequence of regulating the arranging of secondary sales of digital assets, whereas the FATF expectation only covers the issuer's offer and issuance (and would be covered in the proposed new designated service described below).

188. The Law Council therefore recommends that the wording be revised to ensure that only those activities which are intended to be regulated fall within the scope of the item 50A designated service.

d. Is the proposed language around custody of digital assets or private keys clear?

189. In the current AML/CTF Act the concept of a custodial or depository service includes, but is not limited to, custody of financial products under the Corporations Act, and it excludes those custody services which are excluded from being a custodial or depository service under the Corporations Act.

190. To the extent that, in the future, a digital asset constitutes a financial product for the purposes of the Corporations Act, then the Law Council considers that a custodial service for the digital asset should be subject to the AML/CTF Act. If, in the future, there is a new custody arrangement for digital assets proposed to be regulated as a financial product in the Treasury consultation mentioned in the response to question a. above, then the Law Council submits that the definition in the AML/CTF Act should also capture that custody arrangement.

191. If a private key were property (which is doubtful) then it would also be captured by the existing definition of custodial or depository service in the AML/CTF Act. It is unclear that an intangible key is property and so, if custody of the key is intended to be a designated service, then it will be necessary to revise the definition of "custodial or depository service" in the AML/CTF Act to achieve this.

192. Further, the Law Council submits that the clarity in the drafting with respect to custody should be improved to ensure that:

(a) arrangements under which a customer is merely provided with the technological means to take custody of their own digital assets are excluded; and

(b) it takes into account situations where multiple actors may have an influence on the application of private keys to change the state of a blockchain, for example where a private key is "sharded" or a "multisig" arrangement is in place.

e. Does limiting proposed designated service 4 to businesses 'participating' in an issuer's offer or sale of a digital asset clarify the scope of included services?

193. It is proposed that designated service 4 would cover any service which is defined as a designated service in Table 1 of subsection 6(2) of the AML/CTF Act where the service is provided in the course of carrying on a digital asset business participating in the offer or sale.

194. The Law Council considers that:

(a) the designated service should not be defined by reference to any other designated service in Table 1, because these may be difficult to apply to digital assets and such difficulty could cause confusion—rather, the relevant designated service should cover specified activities relating to digital assets); and

(b) referring to a digital asset business *participating* in an offer or sale exacerbates this issue by failing to identify particular activities.

Streamlining value transfer regulation

f. Are there any services currently provided by financial institutions that fall outside the definition of 'electronic funds transfer instruction', but would be captured by the 'value transfer' concept?

195. The Law Council notes that, at present, a service that did not involve a transfer of "money" would fall outside the current definition of an "electronic funds transfer instruction". The current scope of the term "money" is unclear, but the Law Council considers that it is likely to be limited to something that is generally accepted as being used to discharge a debt or as a mechanism for payment. Even if a financial institution currently provides a means to transfer digital assets, the Law Council considers that it is unlikely to be a transfer of "money" except (arguably) for a small number of digital assets, such as Bitcoin or Ethereum, which may be accepted for payment of a debt.

196. The Law Council notes that, on one view, any asset that has a market value and is capable of transfer could, if transferred, involve a "transfer of value". It will therefore be important to specify which asset classes are excluded for this purpose.

197. The Law Council further notes that, as things currently stand, a service that did not involve a transfer of money "controlled" by the payer would fall outside the current definition of an "electronic funds transfer instruction". The Law Council considers that it is likely that, in the case of a direction by a borrower for disbursement of a loan or for payment from an account for which the ordering institution is not

contractually obliged to accept instructions for payment, money is not "controlled" by the payer. There does not appear to be any similar limitation in the proposed concept of a "transfer of value".

g.	**Is the terminology of ordering, intermediary and beneficiary institutions clear for businesses working in the remittance and digital asset service provider sectors?**

198. The Law Council considers that the terms "ordering", "intermediary" and "beneficiary" institutions may not be clear for businesses working in the remittance and digital asset service provider sectors, but these are simply roles which need some form of definition.

199. The Law Council submits that, in the proposed new regime, whilst retaining the term "intermediary institution" for want of a better term, it might be clearer to replace the other terms as follows:

    (a) replace "ordering institution" with "payer's institution"; and

    (b) replace "beneficiary institution" with "recipient's institution".

h.	**Is the introduction of a limited designated service with appropriate exemptions the simplest way to clarify the transaction monitoring and risk mitigation and management expectations for intermediary institutions?**

200. The Law Council considers that, if an intermediary institution is expected to:

    (a) enrol with the Australian Transaction Reports and Analysis Centre (**AUSTRAC**);

    (b) adopt and apply an AML/CTF Program;

    (c) conduct transaction monitoring; and

    (d) report suspicious matters,

201. then the introduction of a limited designated service with appropriate exemptions is the most obvious feasible way to implement the obligations that the intermediary institution is expected to perform.

Updates to the travel rule

i.	**What flexibility should be permitted to address the sunrise issue or where a financial institution or digital asset service provider has doubts about an overseas counterparty's implementation of adequate data security and privacy protections? What risk mitigation measures should be required?**

202. The Law Council considers that it is appropriate to require digital asset service providers to take a risk-based approach to determining whether to make value available to the payee for incoming transfers lacking travel rule information.

203. The Law Council submits that it would be helpful for AUSTRAC to:

(a) establish a materiality threshold for transfers in this category; and

(b) publish guidance, presumably based on FATF ratings, which would flag particular jurisdictions of concern, to guide digital asset service providers in making their risk-based determinations.

j.	**Do you consider that the existing exemptions for the travel rule are appropriately balanced?**

204. The Law Council considers that the travel rule will need to be uniquely crafted to be fit for purpose in relation to transfers of digital assets. The balance of existing exemptions for the travel rule for payments seem unlikely to be relevant to digital assets.

k.	**Are there challenges for financial institutions reporting cross-border transfers of digital assets, including stablecoins, on behalf of customers?**

205. The Law Council believes that institutions involved in cross border transfers of digital assets may struggle to report the information presently required for IFTIs because transfers to, say, a payee may require no more than a wallet identifier. In such circumstances:

(a) the identity of the payee may be difficult to ascertain; and

(b) it may not even be possible to tell that the payee is outside Australia.

l.	**Should the travel rule apply when transferring value incidental to a foreign exchange or gambling service?**

206. The Law Council considers that, having regard to the nature of gambling services and the risks associated with them, the travel rule should apply to a transfer of value incidental to a gambling service.

Reforms to IFTI reports

m.	**What is the anticipated regulatory impact for smaller financial institutions and remittance providers in giving them primary responsibility to report IFTIs sent or received by their customers? Could this impact be offset by continuing to allow intermediary institutions to submit IFTI reports on behalf of smaller reporting entities, but with requirements for appropriate safeguards to ensure the accuracy and completeness of reports?**

207. In the view of the Law Council, if a smaller financial institution has primary responsibility to submit IFTIs, the impact on the smaller financial institution can be offset by continuing to allow intermediary institutions to submit IFTI reports on behalf of smaller reporting entities. The Law Council considers that it would be reasonable to apply requirements for appropriate safeguards to ensure the accuracy and completeness of reports.

n. What should be the 'trigger' for reporting IFTIs? At what point is a reporting entity reasonably certain that the value transfer message will not be cancelled or refused and the value transferred?

208. The Law Council considers that, the payer's institution has taken steps to carry out a value transfer, and the value transfer is not cancelled or refused within a specified period, the IFTI reporting obligation should arise. The Law Council believes it would be helpful for both AUSTRAC and for industry if there was a straightforward mechanism provided within the IFTI lodgement platform to enable the party lodging the IFTI report to update its report at a later point if there was any subsequent change to any part of the information relating to it (e.g., corrected recipient account details).

o. What information should be required to be reported in a unified IFTI reporting template, covering both IFTI-Es and IFTI-DRAs?

209. The Law Council considers that a unified IFTI reporting template should have functionality to enable a lodging party to correct any information that is received about an IFTI after a report of the IFTI has been lodged.

p. Are there challenges with digital asset service providers reporting IFTIs to AUSTRAC as proposed?

210. The Law Council envisages that there will be some challenges with the proposal for digital asset service providers to report ITFIs to AUSTRAC because:

(a) necessarily the reports will refer to a number of digital assets rather than to monetary value;

(b) where the designated service is accepting an instruction to transfer digital assets, the beneficiary institution in another jurisdiction may not be regulated, and therefore it may be difficult for the digital asset service provider to assess and verify the beneficiary institution; and

(c) where the designated service is receiving a transfer of digital assets, the ordering institution in another jurisdiction may not be regulated and similarly it may be difficult for the digital asset service provider to assess and verify the ordering institution.

q. Would the proposed amendments to the BNI definition in the Act reduce the volume of reportable BNIs and regulatory impost on business?

211. The Law Council considers that the proposed amendments to the definition of BNI (bearer negotiable instrument) are helpful.

212. It would also be helpful to clarify that where there is an issue or transfer of rights to notes or bonds that are recorded only on an electronic register maintained in Australia by the issuer and:

(a) there is no physical instrument that is capable of delivery which evidences the rights; and

(b) rights could be transferred to a person offshore by the giving of instructions to the issuer by a subscriber or holder,

then there is no cross-border movement of a BNI.

Response to Paper 5

213. This part of the submission is in response to questions posed in Paper 5. It has been prepared by the Financial Services Committee within the Law Council's Business Law Section (the **Committee**) and reflects the views of the Committee.

AML/CTF programs

a.	**Under the outlined proposal, a business group head would ensure that the AML/CTF program applies to all branches and subsidiaries. Responsibility for some obligations (such as certain customer due diligence requirements) could also be delegated to an entity within the group where appropriate. For example, a franchisor could take responsibility for overseeing the implementation of transaction monitoring in line with a group-wide risk assessment. Would this proposal assist in alleviating some of the initial costs for smaller entities?**

214. The Committee generally supports the proposal to replace the concept of designated business group (**DBG**) with a concept that better reflects the various types of business structures in the financial services industry and submits that:

(a) simplifying the business group concept will facilitate greater information sharing between members of the business group and allow for appropriate group-wide risk management and sharing of AML/CTF obligations;

(b) the definition of "business group" will need to be carefully drafted to ensure that it is not confused with the well-established definition of "related entities'" in the *Corporations Act 2001* (Cth) or similar concepts;

(c) to the extent that the concept of franchisees is included in the definition of "business group", it should be made clear that this is only for the purposes of allowing for information and resource sharing between entities that support the purpose of the AML/CTF legislation; and

(d) liability under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (the **AML/CTF Act**)] and the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (Cth) (the **AML/CTF Rules**) must only attach to reporting entities and must not be extended (deliberately or otherwise) to non-reporting entities in the business group, even if they are privy to suspicious matter reporting information or provide AML/CTF risk management related support.

b.	**The streamlined AML/CTF program requirement outlined provides that the board or equivalent senior management of a reporting entity should ensure the entity's AML/CTF program is effectively identifying and mitigating risk. To what extent would this streamlined approach to oversight allow for a more flexible approach to changes in circumstance?**

215. The Committee generally supports the proposal to streamline the AML/CTF program requirements and clarify the respective roles of the board, senior management and AML/CTF compliance officer.

216. With respect to the proposed clarification of the requirement to conduct a risk assessment, the Committee recommends that the requirement closely reflect the judgment of Perram J in *CEO of AUSTRAC v TAB Limited (No 3)* [2017] FCA 1296

as this is already a well-established industry practice. While having clarity on the role of a risk assessment and internal controls will benefit smaller reporting entities, having regard to the diverse and complex range of activities carried out by reporting entities, the Committee submits that care should be taken to ensure that the AML/CTF Act maintains a principles-based approach and avoid imposing overly prescriptive requirements.

c. Many modern business groups use structures that differ from the traditional parent- subsidiary company arrangement. What forms and structures of groups should be captured by the group-wide AML/CTF program framework?

217. The Committee notes that the Statutory Review of the AML/CTF Act conducted by the Attorney General's Department in 2016 found that the DBG structure does not align with how businesses structure themselves, particularly in relation to offshore operations, but retained a focus on corporate groups. The Consultation Paper proposes a broader concept, which would automatically extend to all related entities in a corporate group or other structure, including franchise arrangements. The heads of such business groups would be required to provide for:

    (a) the sharing of customer due diligence and other information between group members; and

    (b) arrangements whereby one member of the group may fulfill AML/CTF obligations on behalf of other members of the group.

218. The Committee supports the proposal to replace the current DBG concept with a concept of this nature. While this consultation question focuses on form and structure as the means to define the scope of a "business group", the Committee notes that the tools and techniques that may be used to structure business ventures are almost unlimited. The Committee submits that the "group" concept should be delineated using the concept of control rather than, or as an alternative to, ownership. For example, the current definition of "beneficial ownership", which relies on the concepts of ownership and control in tandem.

219. While this approach would mean the "group" concept is potentially very wide, the concept is enabling and would lead to a net reduction in the compliance impact on grouped enterprises by allowing for the AML/CTF Program implemented by the group to be designed to meet the needs of its members.

220. The Committee further notes that, if this proposed reform was implemented, the calculation of the AUSTRAC industry contribution levy ought to be revisited. The Committee considers that the current methodology under the *Australian Transaction Reports and Analysis Centre Industry Contribution Act 2011* (Cth) (the **Industry Contribution Act**) does not sufficiently reflect the extent to which a leviable entity engages in the provision of designated services. Under the current arrangements, leviable entities with a large revenue base, of which only a small fraction may in fact derived from designated services, are required to make a financial contribution to the funding of AUSTRAC's operations which is significant, yet may be disproportionate to the designated services they provide (which may be limited in their scope and nature). This proposed reform, in extending the reach of a corporate group for this purpose, would serve to exacerbate this concern. Therefore, the Committee submits that the Industry Contribution Act should be amended to narrow the definition of "earnings" in the AUSTRAC annual determination to only cover earnings which are derived from the provision of designated services.

221. The Committee has made a related point in its response to question g. below, which notes circumstances in which the regime can apply to an entity which may only ever provide a designated service on a single occasion.

Customer due diligence

d. To what extent do the proposed core obligations clarify the AML/CTF CDD framework?

222. The Committee's response to previous consultation relating to the existing customer due diligence (**CDD**) framework supported the shift from prescriptive requirements set out in the AML/CTF Rules to a risk-based approach to these obligations. The proposals acknowledge that this remains a focus for the proposed reforms, however it remains unclear whether this has been sufficiently achieved.

223. The Committee notes that the proposed "standard CDD" process still appears to rely heavily on underlying rules, so to the extent that a reporting entity is unable to apply the simplified CDD process, it appears to the Committee the "standard CDD" process may not be materially less prescriptive than it is in the current framework. The Committee submits that a principled approach should be taken both when drafting the rules for the standard CDD process and for determining when a reporting entity may use the simplified CDD process.

224. The Committee notes the proposals which indicate a requirement to consider the risk profile of each individual customer and submits that this will not be appropriate in all circumstances. While provision has been made for consideration of classes of customers, it appears to the Committee to be presented on an exceptions basis. The Committee submits that the requirements should not be overly prescriptive, and that a reporting entity should be allowed to self-determine and justify the risk profiling approach to its body of customers.

e. What circumstances should support consideration of simplified due diligence measures?

225. The Committee submits that:

(a) the factors that a reporting entity is required to consider when determining which CDD approach to adopt for a customer or customer type should be principles based rather than prescriptive;

(b) the principles-based approach should not be limited to the required identification requirements;

(c) a reporting entity's risk assessment and adoption of appropriate risk-based measures should include determining the relevant risk level and corresponding identification requirements that suit its business;

(d) a reporting entity should be required to justify its initial and ongoing assessment by factors they consider relevant to its business; and

(e) industry groups should be encouraged to assist reporting entities by establishing factors and circumstances that support a simplified approach.

f. What guidance should AUSTRAC produce to assist reporting entities to meet the expectations of an outcomes-focused approach to CDD?

226. The Committee submits that AUSTRAC guidance should encourage reporting entities and industry groups to develop factors and risk frameworks that meet their risk profile. This will enable reporting entities to adopt measures appropriate for their industry in line with their peers.

227. While the Committee also supports the inclusion of safe harbour provisions, it should be noted that this can lead to reporting entities adopting these standards as their default (and prescriptive) position. The Committee considers that it would be preferable for industry groups to develop appropriate standards using a risk-based approach, allowing reporting entities to adopt an approach that corresponds with their risk profile.

g. When do you think should be considered the conclusion of a 'business relationship'?

228. The Committee notes that the concept of a "business" is an important element of a number of designated services. For example, making a loan is a designated service when the loan is made "in the course of carrying on a loans business". The concept of carrying on a business has a well-established meaning under the general law, generally incorporating elements such as those of repetition and continuity.

229. The AML/CTF Act modifies the general law to extend the concept of a business to a "venture or concern in trade or commerce whether or not conducted on a regular, repetitive or continuous basis". While the Explanatory Memorandum to the Act indicates that ancillary activities to the core business would be excluded from the meaning of "carrying on a business" when deciding what business was being "carried on", in AUSTRAC's view, the making of a single loan in trade or commerce will be considered a loans business, and an entity wishing to do so must therefore implement an AML/CTF Program. The Committee notes that this circumstance is common. Many corporate finance business structures involve the incorporation of a special purpose vehicle with the sole purpose of making as few as one large loan for the purposes of a single transaction. These entities do not trade, have no employees and do not carry out any other activities, yet they are treated as carrying on a loans business for the purposes of the AML/CTF Act.

230. See also the Committee's response to question c. above, which notes the potential disconnect between the amount of the industry contribution levy payable and the relative significance of the provision of designated services to a reporting entity's business operations.

231. The consultation paper states that the term "business relationship" is not defined, and proposes the following definition:

> *"a relationship between a reporting entity and a customer involving the provision of a designated service that has, or is expected to have, an element of duration".*

232. The Committee notes that a reporting entity would, on the one hand, be specifically brought into the AML/CTF regime on the basis that it is a "carrying on a business" even though it may only provide a designated service on a single occasion, while at the same time that business would not be subject to CDD requirements if the requisite element of "duration" is lacking. The Committee submits that this could create significant confusion because the scope of a business relationship may or

may not differ from the scope of a business transaction. A company may, for example have a single loan with a particular bank which embodies the bank's relationship with that customer. Transactions will be conducted in relation to the loan, and the loan is itself a transaction. Another company may not have any ongoing banking relationship with a particular bank but nevertheless have a regular practice of exchanging currency or carrying out some other banking transaction.

233. The Committee submits that the meaning of "carrying on a business" and the related concept of a "business relationship" should be consistent throughout the Act. The Committee notes that the Financial Action Task Force recommends looking at the substance of the entity's purpose. The end or conclusion of a business relationship should be defined sufficiently broadly to capture both the end of a formal legal relationship (such as the closure of an account) and the less formal systemic or repetitive practices that are sufficiently frequent and familiar to generate a mutual expectation between the parties to the relationship that the encounters or transactions on which the relationship is founded will continue. In the latter case, a relationship that lacks any formal legal foundation such as a contract could be said to end when the patterns of behaviour on which it is based change (i.e., become less frequent or regular) to the extent they lead one party or the other to reasonably conclude that further encounters or transactions are unlikely (or that any that do occur are motivated by other reasons) and accordingly that the relationship has ended.

h. What timeframe would be suitable for reporting entities to give a risk rating to all pre--commencement customers?

234. The Committee submits that five years would be a reasonable period.

Tipping off offence

i. Are there situations where SMR or section 49 related information may need to be disclosed for legitimate purposes but would still be prevented by the proposed framing of the offence?

235. The Committee generally supports the proposal to reframe the tipping off prohibition to clarify that reporting entities can disclose information for legitimate purposes and for private sharing of information in future. The Committee acknowledges that, on a practical level, it will be essential for a reporting entity to have appropriate controls in place to ensure that information is only shared for legitimate purposes. The Committee submits that it would be useful for the drafting to provide some context and/or examples of what constitutes a "legitimate purpose"—e.g., to mitigate fraud risk.

j. Are there any unintended consequences that could arise due to the proposed changes to the tipping off offence?

236. The Committee notes that the proposed new framing of the tipping off prohibition focuses on the prevention of sharing information that is likely to prejudice an investigation or potential investigation. It appears to the Committee that the relevant reporting entity or entities within the business group would need to have knowledge of a real or potential investigation to ensure that they didn't breach the prohibition. The Committee submits that the circumstances in which a reporting entity or entities within the business group would have knowledge or would reasonably be considered to have such knowledge ought to be clarified in the legislation.

Appendix 1: Existing statutory mitigations of risk, which are the subject of legally binding obligations upon lawyers in Australia

(a) A **nationally consistent statutory regime** that establishes integrated standards[93] for:

  (i) the issue of practising certificates and conditions;

  (ii) legal practice management including trust accounting, fee/costs arrangements;

  (iii) continuing professional development;

  (iv) professional disciplinary rules; and

  (v) regulatory oversight and interventions.

(b) **Strict statutory rules** that tightly control funds moving in and out of **trust accounts**.[94]

(c) **Continual reinforcement of professional obligations** and legal practice rules through initial preadmission training in ethics, trust accounting and practice management, as well as through supervision, ongoing professional training, continuing duties of strict record-keeping and record retention (for 7 years) and subjection to regular audit and sanctions imposed by statutory regulatory bodies and courts, with rule breaches enforced with utmost seriousness (especially trust account rule breaches).[95]

(d) **The Australian Solicitors Conduct Rules and Barristers' Rules**, which have statutory force, and strengthen practitioners' **paramount duty to the administration of justice**. Relevantly to AML/CTF, these rules include obligations to act only where instructions are lawful, to avoid compromises to one's integrity as a practitioner and to consider the true purpose of a client's activities.[96]

(e) Principals' obligations to supervise employed solicitors.[97]

(f) **Disciplinary action** that centres around the concepts of unsatisfactory professional conduct and professional misconduct encapsulating all of the above duties. Sanctions can include conditions on a practitioner's licence to practise, fines and disbarment. The regulator must report to police/state authority if it suspects that a practitioner has committed a serious offence.[98]

[93] LCA submission to the Senate Inquiry at [9], [10].
[94] LCA submission to the Senate Inquiry at [11].
[95] LCA submission to the Senate Inquiry at [12].
[96] LCA submission to the Senate Inquiry at [13]–[15].
[97] LCA submission to the Senate Inquiry at [16]–[20].
[98] LCA submission to the Senate Inquiry at [23].

(g) **Admissions prerequisites** that control entry to the legal profession. All practitioners must pass the **fit and proper** person test and demonstrate that they are of **good fame and character**, the meaning of which extends to the personal qualities of practitioner, beyond direct connection to practice. If a practitioner is no longer a fit and proper person they will be disqualified.[99]

(h) **Legal education at a tertiary level**, followed by **Practical Legal Training** and annual **Continuing Legal Education** (CLE) requirements for qualified professionals. Ethical competence is considered upon admission. Practitioners are required to undertake an hour of annual mandatory CLE in ethics/professional responsibility.[100]

(i) **Professional indemnity insurance** adds a layer of risk management that is tailored to legal practice.[101] Insurers are an important provider of education and training with a particular focus on risk.

(j) **Legal practitioners undertake client due diligence**. The threshold issue before practitioners may act is to ascertain the instructions are proper, lawful, and competently provided. Reasonable measures to ascertain (true) identity are to be taken as soon as practicable before acting.[102] Conveyancing has still tighter verification rules and processes.[103]

(k) Practitioners and legal profession regulators give notice of irregularities. These include:

    (i) rules that are carefully monitored and enforced in connection with trust account transactions;[104]

    (ii) continuous (and annual) disclosure obligations by legal practitioners of matters that bear directly on whether they continue to be a fit and proper person to hold a practising certificate; and

    (iii) cash transactions of $10,000 or more must be reported to AUSTRAC under s 3 of the *Financial Transactions Reports Act 1988* (Cth).[105]

[99] LCA submission to the Senate Inquiry at [30]–[36].
[100] LCA submission to the Senate Inquiry at [37]–[38].
[101] LCA submission to the Senate Inquiry at [39]–[42], [55].
[102] LCA submission to the Senate Inquiry at [43]–[48].
[103] LCA submission to the Senate Inquiry at [49]–[53].
[104] LCA submission to the Senate Inquiry at [65]–[66].
[105] LCA submission to the Senate Inquiry at [67].

Appendix 2: Specific areas of the legal practice of solicitors where ML/TF risk is not appreciable or nil

- **Family law practices** do not pose any, or any appreciable, ML/TF risk. Family lawyers represent parties to matrimonial/family law disputes, often related to the care of children. Property is transferred exclusively in the context of such matrimonial/family law disputes. The manufacture of such a dispute for ML/TF purposes is not an accepted typology. Assets are transferred pursuant to a highly supervised court process including by court order or consent (also requiring court supervision).

- **Personal injuries law practices** do not pose any ML/TF risk. Personal injuries practices provide litigation services and legal advice. Most transactions flowing from the litigation services they provide are subject to court orders. Their advisory work focuses on the rights of a plaintiff or defendant in relation to an injury, the nature of the compensation entitlements that arise at law, and the steps in the litigation process. Payments upon settlement are typically made by licensed insurers who undertake their own rigorous due diligence, including to always verify the identity of the plaintiff. This verification is also undertaken by a legal practice acting on the other side of a dispute. Refunds deducted from compensation payments are paid to hospitals, Medicare, and other licensed and government providers, as well as to the successful plaintiff. Further, courts dedicate significant resources to the close supervision of these claims because, due to their volume, courts are obliged to manage them efficiently. The process is accordingly subject to legally binding, prescriptive case management rules articulated in state and territory civil procedure legislation. Expert witnesses are typically involved at early stages of claims and their evidence is tested in the adversarial process by solicitors and barristers (who are officers of the court and whose paramount duty is to the administration of justice). To manufacture an injury claim to receive a false settlement would be an exceedingly rare ML/TF typology if it is a typology at all and, in Australia, would be quickly detected and eliminated due to the strong controls in place, including the close involvement of lawyers in an adversarial setting and tight court supervision.[106]

- **Employment law practices** do not pose a ML/TF risk. Through litigation and the provision of legal advice, employment law firms assist employers of all types, employees and subcontractors, to resolve a range of disputes. Most transactions (settlements) flowing from the litigation services they provide are subject to court or tribunal orders. The types of disputes handled include claims of discrimination, bullying and harassment, unfair and unlawful dismissal, union rights of entry to work sites, negotiation of enterprise agreements and employment contracts, workplace health and safety issues, and matters related to large and small industrial relations disputes that can include industrial action. These disputes often have a personal, psychological, or psychosocial dimension. Terms of settlement commonly relate to repairing or permanently severing relationships and other (non-financial) terms including alterations to the conditions of employment, or the resolution of wider workplace issues that have given rise to the dispute. Where individual claims are handled and result in financial settlements, these are typically negotiated against the backdrop of court and tribunal procedures and are conducted by skilled lawyers who are, of course, officers of the court. Employment disputes by their nature are difficult to manufacture on any scale due to the often personal/psychological dimensions of the narratives behind these claims, the requirement for evidence, and the scrutiny of such

[106] No or very low ML/TF risk is associated with these practices and the operation of their trust accounts: VAR at [81].

claims by lawyers, tribunal members and judicial officers. Sham, employment-related disputes are not a ML/TF typology in Australia.

- **Criminal law practices** do not pose a ML/TF risk. In the LCA phase one submission, by way of example, the Law Council reported on a shortage of litigation and criminal lawyers in north-western Tasmania.[107] This is far from unique to Tasmania (although there, it is particularly acute), yet criminal defence lawyers are indispensable to the protection of individual rights and freedoms. These are lawyers who often provide their services when individuals are in highly vulnerable states. While abrogations of the rights of accused persons are experienced concretely by individuals, the work of criminal lawyers is also critical to maintaining the broader balance between the power of the state and the individual in society. Criminal lawyers appear in proceedings before magistrates and judges, and negotiate with police prosecutors and departments of public prosecution to represent their clients. They do not handle transactional work. In relation to funds passing from accused persons to lawyers, the Commonwealth has appropriately enacted special statutory protections against prosecution for the receipt of funds in payment of professional fees, due to the social need to ensure legal representation for accused persons.[108]

- **Planning and environment law practices** do not pose a ML/TF risk. These firms are often specialised ('boutique') practices or teams within practices that provide legal advice and conduct litigation. Most transactions flowing from the litigation services they provide are subject to court orders. Planning and environment law practitioners represent clients to ensure compliance with planning laws, including when: seeking or objecting to development approvals; advising on tree-cutting and heritage listings; advising on land contamination, air pollution and other environmental harm; acting in relation to impact assessments, the presence of endangered species, and biodiversity issues; and representing neighbours in disputes over noise and obstructed views. While legal advice in this field can relate indirectly to the value of an asset, legal advice is provided by independent legal practitioners subject to a duty to act only on a client's lawful instruction. Rezonings or approvals for improved use-rights or other potential improvements that can affect asset values are complex statutory processes subject to mandatory community consultation and which involve the active engagement of, and approval, by municipal and state authorities. These practitioners do not carry out transactions for their clients and there is no associated known or appreciable ML/TF risk.

- **Media law practices** do not pose a ML/TF risk. The transactions flowing from the litigation services they provide are often subject to court orders. Media lawyers' work spans: defamation advice and litigation; acting to register patents and trademark (and in relation to associated disputes); advising in relation to intellectual property and copyright matters; advising on contracts for film production; advice in relation to book publishing and associated contracts and disputes; and providing advice in relation to large commercial deals between communications providers. Media lawyers do not carry out transactions for their clients. They are litigation and advice lawyers focused largely on intellectual property with the exception of large media deals. The latter are scrutinised by public authorities because of their implications for market competition, Australian content, and the public interest. There are no ML/TF typologies associated with these legal services.

[107] LCA phase one submission at [22].
[108] See for example *Proceeds of Crimes Act 2002* (Cth), s 330(4)(c) (where property ceases to be proceeds of an offence where it is 'acquired by a person as payment for reasonable legal expenses incurred in connection with an application under this Act or defending a criminal charge').

- **Succession law practices** do not pose a ML/TF risk. Succession lawyers do not typically carry out transactions but instead advise in relation to matters that can result in transactions. However, these are within the context of a death either having occurred, or mortality being planned for, and it is primarily for this reason that the ML/TF risk is, at most, extremely low. Legal services in estate administration include obtaining probate and acting in relation to disputes between potential beneficiaries under a will. Estate planning includes preparing for succession within the context of a functioning enterprise as well as planning for distributions of assets under a will or through trusts or other entities. Again, a death is always in contemplation. The assets must already form part of the client's asset pool, and the lawyer is obliged to closely examine the intentions of the client, the business and personal rationales for the manner in which the assets are structured at the time of receiving instructions, and assess those against the (lawful and proper) objectives the client is seeking to achieve. In any complex estate planning matter, an accountant is typically also advising the client. Sometimes cash is received and obliged to be held by a legal practitioner acting as an executor after the death of a testator, but this has been found to be limited to small 'finds', particularly in regional and rural areas,[109] and are not associated with any ML/TF risk.[110]

- **Litigation practices** do not pose an appreciable ML/TF risk. See Appendix 3.

[109] VAR at [151].
[110] VAR, Executive Summary at (g)(iii); see also [82]–[83].

Appendix 3: Specific exemption—transactions the result of a court order

Litigation practitioners act for plaintiffs and defendants in adversarial processes involving courts and tribunals, arbitrators, mediators, regulators, and the like where special ethical obligations upon the solicitor with conduct of the matter come into play. These include in some circumstances requirements to certify that proceedings have a reasonable basis in fact and law.[111] These requirements underscore the level of highly detailed scrutiny to which every claim is subjected, both in terms of legal analysis and an analysis of the facts. To certify as to the merits of the case, practitioners need to know where there are gaps and other weaknesses in the evidence. The legal practitioner consequently has to scrupulously test potential evidence that the client presents to them or that is provided by an independent witness, often with advice from, and assistance provided by, a barrister. We have seen no evidence whatsoever that sham litigation to achieve an illegal transaction is a known typology in Australia. As well as deceiving the solicitors and any barristers acting for each of the parties to a dispute, sham litigation also needs to deceive a judicial officer making the order for the transaction. Case management and the close involvement by judicial officers in the steps of litigation mean that, in Australia, this is not a realistic method for criminals to launder money.

[111] For example, see Item 4 in Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* (NSW) ('Restrictions on commencing proceedings without reasonable prospects of success'); *Civil Procedure Act 2010* (Vic), s 42 ('Proper basis certification'); and *Civil Law (Wrongs) Act 2002* (ACT), s 188(2) ('Certificate that claim or defence has reasonable prospects of success').

Appendix 4: Barristers' legal practice

As we said in the LCA phase one submission:[112]

35. *The independent bar in each Australian jurisdiction is made up of legal practitioners who practise solely as or in the manner of barristers and whose practising certificates are specific to that manner and form of practice. They provide advocacy and related services in the conduct of litigation and alternative dispute resolution; some also provide legal advice; but significantly, they do not represent their clients other than in litigation or alternative dispute resolution, they do not carry out transactions for their clients, they do not set up legal entities or provide company or trust services, and they do not administer or manage their clients' entities, money or investments.*[113]

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[112] LCA phase one submission, pp 29–31. See also pp 5 [7], 21 [7] and 25 [26.1]. Footnotes in the following quotation are renumbered for continuity with the present text.

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

'11 Work of a barrister

Barristers' work consists of:

(a) appearing as an advocate,
(b) preparing to appear as an advocate,
(c) negotiating for a client with an opponent to compromise a case,
(d) representing a client in or conducting a mediation or arbitration or other method of alternative dispute resolution,
(e) giving legal advice,
(f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs,
(g) carrying out work properly incidental to the kinds of work referred to in (a)–(f), and
(h) such other work as is from time to time commonly carried out by barristers.

…

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

(a) act as a person's general agent or attorney in that person's business or dealings with others,
(b) conduct correspondence in the barrister's name on behalf of any person otherwise than with the opponent,
(c) place herself or himself at risk of becoming a witness, by investigating facts for the purposes of appearing as an advocate or giving legal advice, otherwise than by:
  (i) conferring with the client, the instructing solicitor, prospective witnesses or experts,
  (ii) examining documents provided by the instructing solicitor or the client, as the case may be, or produced to the court,
  (iii) viewing a place or things by arrangement with the instructing solicitor or the client, or
  (iv) library research,
(d) act as a person's only representative in dealings with any court, otherwise than when actually appearing as an advocate,
(e) be the address for service of any document or accept service of any document,
(f) commence proceedings or file (other than file in court) or serve any process of any court,
(g) conduct the conveyance of any property for any other person,
(h) administer any trust estate or fund for any other person,
(i) obtain probate or letters of administration for any other person,
(j) incorporate companies or provide shelf companies for any other person,
(k) prepare or lodge returns for any other person, unless the barrister is registered or accredited to do so under the applicable taxation legislation, or
(l) hold, invest or disburse any funds for any other person.'

Rule 14 excludes things done 'without fee and as a private person not as a barrister or legal practitioner'.

Rule 15 exempts conduct 'as a private person and not as a barrister or legal practitioner' that would otherwise offend rule 13(a), (h) or (l).

36. The services that have been identified as involving sufficient risk to warrant classification as designated services under tranche 2 all involve transactional work.[114] A legal practitioner who practises solely as or in the manner of a barrister provides litigious and advisory services but does not provide transactional services. This remains a fundamental distinction between lawyers practising solely as or in the manner of barristers and other legal practitioners.

37. Ordinarily, barristers' fees are paid only after performing the work for which they have been retained, often out of funds in the instructing solicitor's trust account. In some but not all jurisdictions, it is possible for a barrister to receive funds for payment of his or her fees in advance of performing that work.[115] If the fees turn out to be less than the amount received, the excess will be repayable. This is the only context in which a barrister may end up paying money back to a client.

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

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

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

[114] AGD Consultation Paper, April 2023, p 22.

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