30 April 2014

Law Council
OF AUSTRALIA

Legislative Review and Mutual Evaluation
Criminal Law and Law Enforcement Branch
Attorney- General's Department
4 National Circuit
BARTON ACT 2600

By email: amlreview@ag.gov.au

Dear Sir/Madam

Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Regime

I attach for your reference the submission of the Law Council of Australia that responds to the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Regime.

Please do not hesitate contact Ms Carole Caple, Senior Lawyer on 02 6246 3737 or carole.caple@lawcouncil.asn.au if you require further information.

Yours sincerely

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Law Council
OF AUSTRALIA

Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Regime in Australia

Commonwealth Attorney-General's Department and AUSTRAC

30 April 2014

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Executive Summary

1. The Law Council of Australia (Law Council) welcomes the opportunity to respond to the Attorney-General's Department and AUSTRAC on the Statutory Review into the operation of the AML/CTF Regime ('Review').

2. The Law Council strongly opposes financial criminality and acknowledges the Government's efforts to combat money laundering and the financing of terrorism.

3. The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) *(*AML/CTF Act) contains the legislative prompt[1] for the Review. The Law Council agrees that it is timely to evaluate the performance in Australia of the AML/CTF regime.[2]

4. The Issues Paper[3] to the Review refers to the Tranche 2 proposed extension of the AML/CTF regime to *designated non-financial businesses and professions*[4] (DNFBPs). The Financial Action Task Force ('FATF') has bundled the legal profession in with a diverse group of non-fiduciary service providers in referring to DFNBPs.

5. The Terms of Reference to the Review are stated in very broad terms. However, in this submission the Law Council will focus primarily on the proposed extension of Tranche 2 to the legal profession.

6. The Law Council has maintained a strident and steadfast opposition to the proposed extension of the AML/CTF regime to the legal profession in Australia. This view is a matter of record and rests on the following understandings, which form the Law Council's key submissions:

   - **The imposition on legal practitioners of certain obligations pursuant to an extension of the AML/CTF regime is fundamentally incompatible with the necessary role contemplated for legal practitioners within the system of justice.** The legal profession fulfils a unique and significant function conferred as a result of Australia's western legal tradition and her democratic institutions. In serving the interests of their clients, legal practitioners are often required to uphold the *rule of law* and challenge executive power, which necessitates that the legal profession remains independent from executive control or direction. At the same time, legal practitioners are officers of the Court that owe a paramount duty to promote the due administration of justice, an obligation that prevails to the extent of inconsistency with any other duty;

   - **The cost and burden of additional further regulation are undesirable and unjustifiable.** Every aspect of legal practice is the subject of comprehensive independent regulatory oversight that ensures legal practitioners comply with their enforceable legal and professional obligations. These obligations include

[1] *Anti- Money Laundering and Counter- Terrorism Act 2006* (Cth) at Section 251.

[2] Australian Transaction Reports and Analysis Centre and Attorney- General Department, Review of Australia's AML/CTF Framework, Terms of Reference, December 2013 states that the *Anti- Money Laundering and Counter- Terrorism Act 2006, the Anti- Money Laundering and Counter- Terrorism Regulations 2008 and the* Anti- Money Laundering and Counter- Terrorism Rules *are collectively referred to as* the AML/CTF regime.

[3] The Issues Paper is entitled *Review of the AML/CTF Regime* and forms part of the package of documents which also includes the Terms of Reference and Guiding Principles for the Review released in December 2013.

[4] D*esignated non- financial businesses and professions* or DNFBPs-was developed by the FATF and refers to industry sector groups such as accountants, real estate agents, trust and company service providers, high value dealers and lawyers.

a general responsibility to avoid involvement in unlawful or criminal activities. Legal profession regulation in Australia is based on a co-regulatory model involving the courts, the legal profession and Government. The legal profession is regulated by way of a self-contained comprehensive legislative scheme. The legislation is supplemented by a robust ethical framework, founded upon common law principles that are articulated in rules of professional conduct. The courts exercise an inherent power of control over admission to, and discipline of, legal practitioners. Governments, at times in partnership with professional associations, exercise regulatory control under the legislation;

- **Unlike DFNBPs, the legal profession is subject to an extensive existing regulatory system and core professional obligations not to break or facilitate breaching of the law.** The existing regulatory scheme operates well and is a key point of difference between the legal profession and other DFNBPs. As officers of the court with special privileges (such as client legal privilege) and special responsibilities to the administration of justice, the courts, clients and the profession as a whole, the role of lawyers is unique. Lawyers distinctively must counsel clients fearlessly and frankly about legitimate behaviours in any aspect of the law, but may not induce clients to breach the law or to facilitate breaching the law. A lawyer who does so is liable to criminal prosecution as well as the full force of the legal professional regulatory sanctions. These obligations and requirements mirror the heart of the policy intent of the AML/CTF scheme. The imposition of an additional regulatory structure is not warranted or necessary, given the broad equivalence of the existing regulatory sub-structure with Australia's FATF obligations;

- **Making legal practitioners less susceptible to inadvertent or unintentional involvement in money laundering or terrorism financing activities is best realised through the effect of the current regulatory scheme and raising awareness and providing guidance to legal practitioners**. The current regulatory arrangements include obligations to continually upgrade knowledge and skills. Through education and continuing professional development (rather than the imposition of yet further statutory obligations), legal practitioners can better fortify their practices with appropriate AML/CTF risk management strategies designed to mitigate the evolving threat.

7. Were the scope of the AML/CTF regime extended to capture the legal profession, the Law Council would be very concerned for the damage to the system of justice in Australia as a result of the following:

   - strain on the principle of client legal privilege;
   - erosion of client confidentiality and the independence of the profession, particularly as a result of suspicious matter reporting requirements, which effectively compel legal practitioners to form a reportable suspicion about their clients, the legitimacy of their funds and contemplated transactions;
   - imposition of an onerous additional regulatory burden (as a matter of principle as well as practice), in circumstances where the legal profession is already heavily regulated particularly with regard to flows of client funds through law practice bank accounts;
   - increased compliance burden and lost time impacting on productivity and the ability to compete in the global market particularly with law practices (such as those of the USA and Canada) where lawyers have much reduced client on-boarding arrangements – causing significant disincentive for international clients and impacting on global competitiveness;

- additional regulatory compliance costs, including the regulatory cost recovery levy, which has inevitable consequences for the cost of operating a legal practice and would almost certainly have a flow-on effect on the cost of legal services, potentially making access to legal services even less affordable to the Australian community.

8. FATF describes DNFBPs as "gatekeepers" because the nature of the services that such businesses provide could be exploited by criminals and terrorism financiers as the conduit by which to gain access to the legitimate financial system. The AML/CTF regime regulates professionals and businesses that are deemed "gatekeepers" by compelling them to undertake requirements to 'know your client', transaction monitoring, due diligence and reporting obligations as a means of preventing (or at least minimising the risk of) certain financial and non-financial services industries being used to facilitate the movement of money and property for money laundering or terrorism financing. The underlying justification for the theory that lawyers can act as gatekeeper to the financial system is premised on the assumption that lawyers have a capacity to monitor and control, or at least to influence the conduct of their clients and prospective clients in order to deter wrongdoing.

9. In 2009 the Law Council published and adopted the *Anti-Money Laundering Guide for Legal Practitioners* ('Guide') taking into consideration the FATF's information materials and guidelines (including the 2008 *Guidance for Legal Professionals on Implementing a Risk Based Approach)*.

10. The Guide (updated to take in changes relevant to the legal profession after the FATF 2012 revision of the Recommendations) serves as a resource to lawyers in the development of their practice's own voluntary risk based response. The Guide also urges lawyers to conduct risks assessments by reference to 'identified' money laundering and terrorist financing factors such as the nature of the legal work involved, where the business is being conducted and other matters.

11. In June 2011 the Law Council endorsed and published the *Australian Solicitors Conduct Rules* ('Rules') and in August 2013 it released the accompanying Commentary to the Rules. The Rules do not require a lawyer to undertake a gatekeeper role as such, nor would they be consistent with engaging in the reporting aspect that such a role would entail. However the intermeshing principles articulated by the Rules conflate to create and impel professional obligations and responses on legal practitioners and law practices that ensure their internal management systems, practices and controls safeguard against being unwittingly used to further an unlawful purpose. It is axiomatic that a lawyer may not counsel or procure clients to do anything illegal.

12. Like all citizens, lawyers are subject to the same legal prohibitions against themselves committing or assisting in the commission of acts of fraud, money laundering or terrorism financing. The Rules complement these prohibitions by ensuring that legal practitioners cannot escape responsibility by avoiding enquiry. Lawyers observing their professional obligations must be satisfied that based on the facts available, he/she can perform the requested services without aiding fraudulent or criminal conduct.

13. The Law Council agrees that education of lawyers regarding money laundering and terrorist financing risks (particularly as those risks evolve) is an important ongoing goal. It is the Law Council's view that it is the combination of continuing professional development obligations and the effect of the unique regulatory scheme applying to the legal profession that combine to provide the most balanced approach for ensuring lawyers are already appropriately oversighted for the purposes of meeting the FATF requirements, while respecting the special role lawyers play in the judicial

system. The Law Council has assessed the current regulatory sub-structure and is of the view that it allows law practices to manage their practices in a way that meets the aspirations of the FATF Recommendations.

14. It is the Law Council's submission that taken together, the legal profession regulatory scheme and practical guidance for practitioners in Australia achieve functional equivalence with the risk management objectives (other than suspicious matter reporting) of the AML/CTF regime and obviate the need to extend the regime to lawyers.

15. The Law Council looks forward to further assisting with the Review and would be pleased to engage in the face to face consultations scheduled later in the Review process.

Introduction

16. The Law Council is the peak national body representing the Australian legal profession through its membership which comprises all of the state and territory law societies, bar associations and the Large Law Firm Pty Ltd (as profiled at Attachment A).

17. In providing this submission, the Law Council acknowledges the Australian Government's leadership and efforts to give effect to Australia's commitment pursuant to international obligations, to combat money laundering and terrorism financing.

18. Section 251 of the of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ('AML/CTF Act') requires the operation of the AML/CTF regime to be reviewed seven years after the commencement of that section (12 December 2006).

19. The Law Council welcomes the opportunity to provide the Attorney-General's Department (and AUSTRAC) with this response on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Regime. The Review is set to coincide with the FATF led mutual evaluation of Australia's AML/CTF regime in 2014. The Statutory Review of the AML/CTF regime is expected to take into consideration the findings of the FATF mutual evaluation. The Minister will be furnished with a report of the Review in 2015 prior to a report on the Review being tabled in Parliament.

20. Australia will be one of the first countries to be evaluated against the FATF's 2013 Methodology which introduces the requirement of effectiveness. Assessments will essentially proceed in three steps as follows:

    - Country self assessment;
    - Desk review of the technical compliance by an external assessor body; and
    - Assessment of outcome effectiveness by external assessor.

21. The Minister has described transaction information obtained under the AML/CTF laws as vital for following the money trail to serious and organised crime groups that profit from illegal activities. He said the Review provides an opportunity to consult businesses and identify possible enhancements and simplifications to make these laws even more effective.[5]

22. The Law Council notes the breadth of the Review's Terms of Reference, the accompanying Guiding Principles and the Issues Paper released by the Attorney General Department and AUSTRAC in December 2013. The Law Council also notes the contemporaneous release of AUSTRAC's Typologies and Case Studies Report 2013.

23. Australia's AML/CTF regime comprises the AML/CTF Act, AML/CTF Regulations and AML/CTF Rules. However the Issues Paper excludes from the Review the operation of the *Financial Transactions Reporting Act 1988* (Cth) and *Financial Transaction Reports Regulations 1990*, which also form part of the AML/CTF regime.

24. The Issues Paper makes clear that the Review's primary aim is to obtain feedback on the AML/CTF regime so as to enhance compliance with international standards.

[5] On 4 December 2013, the Federal Minister for Justice, the Hon Michael Keenan MP, announced that the Attorney-General's Department is responsible for the review of the AML/CTF regime: http://www.ministerjustice.gov.au/Mediareleases/Pages/2013/Fourth%20Quarter/4December2013-ReviewOfAntiMoneyLaunderingLawsAnnounced.aspx

The Law Council is concerned that the Review must not be narrow in its assessment of compliance with the FATF's Recommendations. The Review must be focussed on assessing how effectively the AML/CTF regime has addressed money laundering, terrorism financing and serious organised crime. Assessing the performance of the AML/CTF regime will require considering whether the standards and methodologies it has relied upon have achieved the expected outputs and desired outcomes, particularly as the extension of the scope of the AML/CTF regime is being proposed.

25. It is disappointing that potential enhancements to Customer Due Diligence ('CDD') measures pursuant to the AML/CTF Regime are the subject of a separate consultation process that was launched in May 2013. Accordingly, the topic of CDD, while it rightly comes within the scope of the Review, is not substantively considered by the Issues Paper. Further, the Law Council also notes, that the AUSTRAC Supervisory Levy has been expressly excluded from the present Review of the AML/CTF Regime.

26. From a policy perspective, the Law Council contends that the Review of the AML/CTF regime should also be taken as an opportunity to ensure the law's policy settings still serve Australia's interests, that the regime is economically efficient and effective and that the AML/CTF regime takes a balancing regard against unnecessary intrusion and any disproportionate infliction of harm.

27. The Law Council acknowledges and agrees with the Submission of the Financial Services Committee of its Business Law Section.

28. In this submission the Law Council does not respond to every consultation question, focussing instead on issues raised that are of direct importance and relevance to the legal profession.

Background

29. The Law Council has undertaken significant advocacy in relation to Tranche 1, making its preliminary submission in March 2003. Further submissions to the Attorney-General's Department followed in May 2006 regarding the exposure draft bill and in August 2006 on the Revised Anti-Money Laundering and Counter-Terrorism Financing Exposure Draft Bill. In November 2006 the Law Council provided submissions to the Senate Legal and Constitutional Affairs Committee in response to its inquiry into the draft legislation, following that draft legislation's introduction on 1 November 2006 into Parliament.

30. Since the commencement of the AML/CTF Act, the Law Council has provided numerous further submissions about the AML/CTF regime. It has also cultivated and maintained ongoing constructive and productive dialogues with AUSTRAC, the Attorney-General's Department and the Australian Institute of Criminology.

31. The Law Council's early submissions addressed the possible application of the AML regime to legal practitioners, particularly practitioners who provide specified *designated services*, including remittance services and custodial and depository services. The essence of the Law Council's advocacy recommended that the legislation be amended or that an exemption be granted; so that the legislation did not extend to the services provided by legal practitioners in the ordinary course of legal practice as such services might otherwise inadvertently come within the regulatory regime.

32. Pursuant to the AML/CTF Rules, AUSTRAC granted two exemptions, the first of which commenced in August 2008. This Rule exempted lawyers from obligations arising from the provision of a *designated remittance arrangement.* While the wording of the Rule was adjusted in December 2011, the Rule remains in place.

33. In November 2009, a second Rule issued, releasing lawyers from compliance with obligations arising from the provision of custodial, depository or deposit box services.

34. In February 2009 the Law Council published the *Anti-Money Laundering Guide for Legal Practitioners,* which was developed as a joint initiative between the Queensland Law Society, the Law Council's AML Working Group and with assistance of the Law Society of England and Wales.

35. The Guide encourages lawyers to engage with the risk of ML and TF and to respond by undertaking Customer Due Diligence by:

    (1) identifying and verifying each client;

    (2) identifying and verifying the identity of the 'beneficial owner' of any client - defined as the natural person(s) with ultimate control for the client, when such an analysis is warranted on a risk based analysis of the circumstances; and

    (3) obtaining enough information to understand the clients circumstances, business and objectives.

36. In June 2011 the Law Council published the *Australian Solicitors' Conduct Rules* and in August 2013 completed and released the accompanying Commentary to the Rules. The development of further AML specific guidance is set to proceed in 2014 as part of the broader legal profession's continuing process of enhancing the regulatory sub-structure to adjust and respond to risks as they emerge.

37. The Law Council notes that it has been the Government's longstanding intention to introduce a second tranche of reforms that would expand the regulatory regime to encompass so called 'gatekeeper' sectors, including the legal profession.

38. Tranche 1 of the AML regime applies to legal practitioners only so far as they are also financial services licensees involved in the provision of relevant *designated services* (primarily financial services provided by financial institutions). The introduction of Tranche 2 is expected to significantly expand the range of *designated services* that are subject to the regime.

39. The Law Council notes the work of the Attorney General's Department in 2007 in developing proposed new tables of *designated services* to be inserted into section 6 of the AML/CTF Act. Adoption of these new tables as part of the Tranche 2 measures would likely affect much of the legal profession by prescribing that legal services ordinarily provided by legal practitioners in the course of legal practice are *designated services* for purposes of the Act.

40. Presently legal practitioners are subject to the AML/CTF regime's cash transaction reporting obligations. Pursuant to section 15A of the *Financial Transaction Reports Act* 1988 legal practitioners are required to report transactions involving a cash amount of $10,000 or more to the AUSTRAC.

41. AUSTRAC and the Australian Institute of Criminology have periodically published Typologies and Case Studies Reports and other analyses that describe the incidence and nature of serious financial criminology. However these research documents have not produced evidence of systemic involvement by legal practitioners or the unwitting use of legal practitioners or legal services as mechanisms of money laundering, the financing of terrorism or other serious criminal activity that is the focus of the AML/CTF regime.

Responses to Issues Paper

Regime Scope; Industry Sectors

42. The Issues Paper mentions (at part 3) the Review's intention to consider extending the AML/CTF regime so as to encompass certain DFNBPs including lawyers.

43. Tranche 2 of the AML/CTF regime will, if implemented, impose three broad categories of obligations on the legal profession as follows:

- register with AUSTRAC as a reporting entity so that AUSTRAC can (among other things), receive transaction reports and assess and recover a regulatory cost recovery levy;
- to require every reporting entity that intends to provide a designated service to develop adopt and maintain, an AML/CTF program as part of the ordinary business operations and processes of the entity – referred to as an 'AML/CTF Program' – which comprises two elements, each of which must comply with the requirements specified in the AML/CTF Rules:
    - 'know your customer' requirements involving client identity verification and ongoing identification due diligence (known as Part B elements of the AML/CTF Program); and
    - internal controls for ongoing assessment of money laundering or terrorism financing risks, which involve: screening, training and monitoring of employees; transaction monitoring; appointment of an AML/CTF Compliance Officer; and regular independent reviews of the AML/CTF program to assess its effectiveness, compliance and implementation of the program (known as Part A elements of the AML/CTF Program).
- compel the reporting of client transactions involving a designated service above a threshold amount, and the secret reporting of suspicious matters[6].

44. Over the years as the AML/CTF regime was developed and implemented, the Law Council has engaged in significant advocacy (both in discussion and by way of written submissions) that articulates the Law Council's opposition to the extension of the regime to the legal profession. While the following extract is from its Submission dated 2 May 2006[7] to the Attorney-General's Department on the *Anti-Money Laundering and Counter-Terrorism Financing Exposure Draft Bill, Draft Rules and Guidelines and Supporting Information,* the Law Council's views and reasoning remain unchanged. The Submission said:

> *The Law Council strenuously and unequivocally opposes tranche one law reforms on AML/CTF impacting legal practitioners. The Law Council cannot support new compliance arrangements which are incompatible with the independence of the legal profession underpinning the administration of justice.*

[6] Suspicious matter reporting obligations arise under section 41(1) of the *Anti- Money Laundering and Counter- Terrorism Act 2006* (Cth).

[7] Law Council of Australia, Submission to the Attorney- General's Department on *Anti-Money Laundering and Counter-Terrorism Financing Draft Bill, Draft Rules, Guidelines and Supporting Information,* 2 May 2006 available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/LawCouncilSubmission_Tranche1AMLCTFReforms02052006-3.pdf

The Law Council believes that tranche one of the AML/CTF law reforms which require legal practitioners to make a judgement about their clients, for example to determine whether a client is suspicious and if they are, to report them to authorities, compromises a legal practitioner's duty to the court, intrudes on the independence of the legal profession and impacts squarely on the due administration of justice … while all legal practitioners are not affected, the central feature of the Exposure Draft Bill remains at odds with the fundamental role of legal practitioners in the legal system.

The Law Council is fundamentally opposed to the imposition of reporting obligations on legal practitioners which undermine the independence of the profession and which are at odds with legal practitioners' well established duties to their clients, the court and the public.

The Law Council believes that any AML/CTF reforms affecting the legal profession should be dealt with separately from the regulation of other business relationships. This is appropriate both because of the special nature of the lawyer-client relationship and because the Australian legal profession is already subject to extensive specialist regulation.

The Bill specifically states that it does not affect the law relating to legal professional privilege. This is an important protection. However, the Law Council strongly believes that merely protecting client legal privilege is inadequate. The Law Council believes that it is essential for client confidentiality beyond legal professional privilege to be maintained and the independence of the legal profession to be protected in order to safeguard the administration of justice.

The preservation of legal professional privilege impacts on how rather than whether the Bill regulates any legal practitioners which are captured by it. Although legal professional privilege may severely circumscribe the reporting obligations of legal practitioners under the Bill, it does not alter the fundamental, underlying premise of the Bill that it is appropriate for legal practitioners to monitor and report on their clients on behalf of the Executive.

The Law Council supports the Federal Government in its commitment to address money laundering and counter terrorism financing. The Law Council acknowledges the need to strengthen current laws and introduce reforms to improve Australia's intelligence gathering capability. However, such reforms should not be at the expense of Australia's system of justice.

The Law Council believes that the duties of legal practitioners, which are central to the administration of justice, must be safeguarded and protected.

As recommended in the Law Council's earlier submissions on this proposed legislation, the Law Council believes that legal practitioners should be explicitly exempted from the current AML/CTF Bill. Any future AML/CTF reforms affecting the legal profession should be dealt with in legislation which is specific to the profession, and which takes account of the particular duties and responsibilities of the profession.

45. The Law Council maintains its strident opposition to the extension of the AML/CTF regime to legal practitioners. The obligations that arise particularly in relation to suspicious matter reporting and 'tipping off' offences are fundamentally incompatible with the fiduciary role of legal practitioners and interfere with the relationship of trust between lawyers and their clients.

Common law principles

46. The extension of the AML/CTF regime to the legal profession threatens the operation of certain common law principles, which will result in real and tangible impacts on clients of law practices and the functioning of the justice system. Those common law principles include the following:

Client legal privilege

47. The purpose of client legal privilege is to encourage full and frank communication between lawyers and their clients, thereby serving the broader public interest in encouraging observance of the law and supporting the proper functioning of the administration of justice.

48. A substantive principle of the common law[8] recognised by the court[9], client legal privilege is founded upon necessity in the interest of the adversarial system of justice, the assistance of persons knowledgeable in the law and skilled in its practice, whose advice and guidance can only be safely received when free from the consequences of the apprehension of disclosure. Central to the concept of democratic society, client legal privilege enables clients to communicate with their lawyers in confidence, essentially preserving the clients' fundamental right to effective counsel[10].

49. The privilege thus encourages clients to seek out and obtain guidance to conform their conduct to the law, but it also facilitates self-investigation into past conduct to identify shortcomings and remedy problems, to the benefit of society at large.

50. The privilege 'belongs' to the client in the sense that only the client can waive the privilege as he/she deems appropriate. Because the privilege does not apply where the communication is in furtherance of an unlawful object or made for the purpose of frustrating the processes of the law[11], it cannot be relied upon to assist persons involved in complicit misconduct.

51. Rather than disclosing a clear intent to extinguish or modify the privilege, the AML/CTF Act specifies that it does not affect the law relating to client legal privilege.[12] Yet the obligation to report suspicious matters conflicts with the lawyer's duty to keep information about the client's affairs secret and could well also interfere

[8] See for example French CJ *The Common Law ands the Protection of Human Rights* Speech given at the Anglo Australasian Lawyers Society, 4 September 2009 at page and available at: http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj4sep09.pdf; also codified as a rule of evidence under the uniform evidence legislation- which applies federally and in NSW Vic Tasmania, ACT and NT *Evidence Act* 1995 (Cth); *Evidence Act* 2011 (ACT); *Evidence Act* 1995 (NSW); *Evidence Act* 2001 (Tas); *Evidence Act* 2008 (Vic)

[9] *Baker v Campbell* (1983) 153 CLR 52 at 127, 129 per Dawson J. It was judicially referred to as 'the oldest and best established privilege in our law ' by Doherty JA in *General Accident Assurance Co v Chrusz* (2000) 180 DLR (4th) 241 at 271 available at http://www.canlii.org/en/on/onca/doc/1999/1999canlii7320/1999canlii7320.html

[10] Described both as a common law right and a fundamental human right. see for example French CJ *The Common Law ands the Protection of Human Rights* Speech given at the Anglo Australasian Lawyers Society, 4 September 2009 and available at: http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj4sep09.pdf ;see also United Nations, Office of the High Commissioner for Human Rights *Basic Principles on the Role of Lawyers* adopted by Australia at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990 available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx

[11] *Varawa v Howard Smith & Co Ltd* (1910) CLR 382; *Attorney General (NT) v Kearney* (1985) 61 ALR 55 at 64

[12] Sections 234 and 242 of the *Anti- Money Laundering and Counter- Terrorism Act 2006* (Cth).

with the operation of the privilege. For example, the privilege attaches to communications arising out of the lawyerclient relationship, yet the obligation to report a suspicion (and the grounds on which it is based) extends to 'potential clients' and in relation to information about the provision or prospective provision of a designated service. As the suspicion (and grounds on which it is based) must be reported within three business days or in some circumstances 24 hours, the obligation to report may arise before there is a business relationship between the lawyer and potential client.

52. The Law Council strongly supports the preservation of the privilege and opposes intrusive policies, practices and procedures that have the effect of eroding the protection that the privilege creates.

Confidentiality

53. A lawyer's duty of client confidentiality guarantees that clients can speak frankly and openly with their lawyers about their difficulties and concerns in the knowledge that their confidential personal information will not be disclosed.

54. Under the AML/CTF regime, information that a client discloses to his/her legal practitioner within a confidential setting, would be potentially reportable where such information is not also privileged in circumstances that may well result in negative legal consequences for the client.

55. Effectively by the client disclosing the information, pursuant to AML/CTF obligations, a lawyer would be statutorily compelled to become an agent in the client's downfall, a role that is inherently inconsistent with the lawyer's obligations to the client. In short, lawyers would become compelled to disclose information that they are duty-bound to keep confidential.

Independence

56. The application of the AML/CTF regime to lawyers would undermine the client-lawyer relationship by compromising a lawyer's duty of undivided loyalty to his/her client and by weakening the independence of the legal profession.

57. The administration of justice and public confidence relies on the expectation that lawyers are free to fulfil their essential and unique function as loyal advocate without risk of interference by the state.[13]

Client lawyer relationship

58. It has been argued that the AML/CTF regime only applies when lawyers choose to act as financial intermediaries and otherwise does not impede a lawyer's ability to provide clients with legal advice. However in practice it is not possible to view the services provided by lawyers and the protection afforded to the client-lawyer relationship as divisible along such lines. The essential role of the lawyer is as advisor to a client with respect to the extent of the law and its application in a client's relevant circumstances. This requires the lawyer, to counsel fearlessly and frankly a client with respect to legitimate behaviours.

59. Typically lawyers handle client funds in several contexts including for example, effecting the settlement of legal disputes, the payment of judgement debts and the

[13] See for example the statement at Principle 16, United Nations, Office of the High Commissioner for Human Rights *Basic Principles on the Role of Lawyers* adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990 available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx

carrying out of commercial transactions, all of which relate to the retainer agreement and to legal services and advice sought.

60. The nature of services which are provided by the legal profession and which would likely become subject to regulation under Tranche 2 reforms are for the most part concerned with assisting clients to undertake business activities in compliance with the law and in a manner that maximises their protection under the law. They are not services which are in and of themselves inherently risky from a money laundering risk perspective. They are services which benefit the community and enhance the efficacy and stability of the economy.

61. The compelled creation of records and disclosure of client information concerning such activities for law enforcement purposes is wholly inconsistent with the nature of the client-lawyer relationship.

The Existing Regulatory Environment

62. Australian legal practitioners are subject to onerous enforceable legal and professional obligations that arise by virtue of the legal profession regulatory regime and other legislation.[14]

63. The legal profession regulatory regime, though its structures and processes vary across jurisdictions, rests on findings about a practitioner's conduct. However following a finding that a legal practitioner's conduct constitutes *unsatisfactory professional conduct* or the more serious finding of *professional misconduct*, a range of sanctions may be imposed. The sanctions available range in severity from a caution to being struck off the roll of practitioners and imprisonment. Available sanctions include, for example:

- Removing the practitioner's name from the roll of practitioners;[15]
- Suspending, cancelling, or imposing condition upon the practitioner's practising certificate;[16]
- Cautioning or issuing a reprimand to the practitioner;[17]
- Fining the practitioner- maximum fine ranging $10,000 to $100,000;[18]

[14] The regulation of the legal profession is a matter of state/ territory concern. The specific regulatory regime, for example in Queensland is constituted by the *Legal Profession Act* 2007 (Qld) *Legal Profession Regulation* 2007(Qld); the Australian Solicitors Conduct Rules and the Australian Consumer Law set out in Schedule 2 of the *Competition and Consumer Act* 2010 (Cth)

[15] *Legal Profession Act 2004* (NSW) ss 565(3), 588(2); *Legal Profession Act 2007* (Qld) ss 461(3), 484(2); *Legal Practitioners Act 1981* (SA) ss 89(2)(d), 90AF(6); *Legal Profession Act 2007* (Tas) ss 480(3), 508(2); *Legal Profession Act 2004* (Vic) s 4.4.37(2); *Legal Profession Act 2008* (WA) ss 444(2)(b), 463(2); *Legal Profession Act 2006* (ACT) ss 431(3)(b), 460(2); *Legal Profession Act 2006* (NT) ss 528(3), 552(2).

[16] *Legal Profession Act 2004* (NSW) ss 540(2)(d), 562(2)(b)–(d), 562(3)(b)–(d), 562(4)(j); *Legal Profession Act 2007* (Qld) ss 456(2)(b)–(d), 456(3)(b)–(d), 456(4)(j); *Legal Practitioners Act 1981* (SA) ss 77AB(1)(d), 82(6)(a)(iii)–(iv), 89(2)(b)–(c), 89A(c)–(d); *Legal Profession Act 2007* (Tas) ss 471(b)–(d), 472(b)–(d), 473(n); *Legal Profession Act 2004* (Vic) ss 4.4.17(b)–(d), 4.4.18(b)–(d), 4.4.19(j); *Legal Profession Act 2008* (WA) ss 439(a)–(c), 440(b)–(d), 441(m); *Legal Profession Act 2006* (ACT) ss 425(3)(b)–(d), 425(4)(b)–(d), 425(5)(i); *Legal Profession Act 2006* (NT) ss 525(3)(b)–(d), 525(4)(b)–(d), 525(5)(i).

[17] *Legal Profession Act 2004* (NSW) ss 540(2)(a)–(b), 545(1)(f), 562(2)(e); *Legal Profession Act 2007* (Qld) ss 456(2)(e), 458(2)(a); *Legal Practitioners Act 1981* (SA) ss 77AB(1)(c), 82(6)(a)(i), 89(2)(a); *Legal Profession Act 2007* (Tas) ss 454(2)(a), 456(7)(a), 471(e), 476; *Legal Profession Act 2004* (Vic) s 4.4.19(k); *Legal Profession Act 2008* (WA) ss 426(2)(a), 439(d); *Legal Profession Act 2006* (ACT) ss 413(2)(a)–(b), 425(3)(e), 429(c); *Legal Profession Act 2006* (NT) ss 499(2)(a), 525(3)(e).

- Imprisonment.[19]

64. As a result, legal practitioners are subject to, and (as a profession) bear the cost of, significant professional regulation designed to maintain the integrity of the legal services system.

Flows of money through law practice accounts

65. In terms of the flows of client funds through a law practice, it is relevant to note that money entrusted to law practices on behalf of clients (or third party payers) in the course of legal practice or in connection with the provision of legal services is characterised as trust money.[20]

66. Trust money can only be deposited into specialised accounts and dealt with in accordance with strict accounting rules. The regulation relating to trust accounts under the legal profession legislation is procedurally detailed and comprehensive[21] prescribing for example, processes for investigations, external examinations, approval of authorised deposit taking institutions, management of statutory deposits and other matters.

67. In practice, the regulatory regime of the legal profession legislation also requires that law practice accounts are subject to independent oversight that provides supervision, investigation and audit of accounts. For example, in NSW the Trust Accounts Department of the Law Society of NSW is the regulatory authority that ensures the compliance of law practices across the entire jurisdiction with the stringent laws concerning the receipt, holding and disbursement of trust money.

68. The Trust Accounts Department discharges its regulatory functions by conducting investigations of solicitors' trust and controlled money accounts as well as the review of general account records in order to detect and prevent fraud.

69. To encourage understanding of this complex area, the Trust Accounts Department also conducts education programs and provides advice to legal practitioners and legal support staff.

70. To promote best practice the Trust Accounts Department develops and maintains a range of practical resources that assist practices comply with their stringent accounting obligations. [22]

[18] *Legal Profession Act 2004* (NSW) ss 562(4)(a), 562(7); *Legal Profession Act 2007* (Qld) ss 456(4)(a), 458(2)(b); *Legal Practitioners Act 1981* (SA) ss 82(6)(a)(ii), 82(6)(b)–(c); *Legal Profession Act 2007* (Tas) ss 454(2)(b), 473(a); *Legal Profession Act 2004* (Vic) s 4.4.19(b); *Legal Profession Act 2008* (WA) ss 426(2)(b), 441(a); *Legal Profession Act 2006* (ACT) ss 413(2)(e), 413(3), 425(5)(a), 427; *Legal Profession Act 2006* (NT) ss 499(2)(b), 499(3), 525(5)(a).

[19] *Legal Profession Act 2004* (NSW) ss 5(1)(h), 643, 675; *Legal Profession Act 2007* (Qld) ss 25(1)(2); 74(1), 115(2), 121(1)(a), 121(2)(a) , 354(1)(b); *Legal Practitioners Act 1981* (SA) ss76(4), 76(4B), 77A(4); *Legal Profession Act 2007* (Tas) ss 13(1), 551, 585); *Legal Profession Act 2004* (Vic) s 2.2.2(1), 3.3.21(1), 5.5.15); *Legal Profession Act 2008* (WA) ss 502; *Legal Profession Act 2006* (NT) ss150, 166, 600.

[20] See for example the definition of *trust money* in the *Legal Profession Act* 2007 (Qld) at section 237, similarly in every Australian jurisdiction's legal profession regulatory counterpart.

[21] For example the *Legal Profession Act* 2007 (Qld) contains dedicated trust accounting provisions that span from sections 236 to 298 and in the Legal Profession Act 2007 (Qld) from regulations 26 to 78.

[22] The *legal profession legislation* of every Australian jurisdiction is very similar with regards the obligations that arise for the receipt, holding and disbursement of all client funds.

The Australian Solicitors Conduct Rules

71. The Law Council has carefully considered the existing risk management controls and other internal procedures required by the legal profession legislation and professional conduct rules of every jurisdiction.

72. In particular the principles that underpin a number of the Australian Solicitors' Conduct Rules (ASCR) are relevant in considering the extent to which legal practitioners are already required to conduct their legal practices so as to avoid or minimise the risk that the legal services provided are used to further an unlawful or illegal purpose, whether it is money laundering, fraud or some any other purpose.

- ASCR 3 emphasises a practitioner's paramount duty to the court and the administration of justice. The duty applies not merely in the conduct of litigation but also underpins legal practitioners' actions. The requirements of this rule would include that legal services are provided in a way that minimises the risk that those services facilitate an illegal purpose, thereby undermining the administration of justice.
- ASCR 4 mandates other fundamental ethical duties including among other things, that a legal practitioner must provide legal services competently, diligently and in doing so avoiding compromise to his/her integrity. The requirements of this rule would include avoiding the risk that the law practice and legal practitioners are used wittingly or unwittingly to facilitate money laundering or terrorism financing.
- ASCR 5 on dishonest and disreputable conduct- requires that a legal practitioner must not engage in conduct, in the course of legal practise or otherwise, which demonstrates that the legal practitioner is not a *fit and proper person* to practise law, or which is likely to a material degree to be prejudicial to, or diminish public confidence in the administration of justice, or bring the profession into disrepute.
- ASCR 8 requires that a legal practitioner must follow a client's lawful, proper and competent instructions. This rule embodies the requirement that a legal practitioner must take reasonable steps and make reasonable enquiries to establish the *bona fides* of the client and the lawful purpose of the client's instructions.
- ASCR 37 Supervision of legal services requires a legal practitioner with designated responsibility for a matter to exercise reasonable supervision over legal practitioners and all other employees engaged in the provision of legal services in the matter.

73. The ASCR are rules of conduct that apply as principles-based statements of legal practitioners' professional obligations- which largely align with the requirements (other than reporting) of the AML/CTF regime. The ASCR are intended to create interlocking obligations that build on common law principles.

74. The Law Council's view is that promoting the risk management elements of the AML/CTF regime (other than reporting) is responsible and consistent with legal practitioners' obligations. However, at their June 2012 meeting, the Directors of the Law Council agreed that it is neither desirable, necessary nor appropriate to impose further conduct or legal practice rules that merely replicate the client identification and other internal risk management procedures and controls of the AML/CTF regime.

75. Instead the Law Council endorses the view that increasing awareness of money laundering and terrorism financing and promoting improvements in law practice

management that have the effect of minimising the risks of unwitting involvement, should be achieved through dissemination of guidelines, information and Continuing Professional Development products that complement existing conduct rules and legal profession regulatory obligations.

76. To this end the Law Council has developed and updated the *Anti-Money Laundering Guide for Legal Practitioners* and is investigating the form that further practical guidance could take to proactively promote appropriate risk management responses.

77. The aim is to develop guidance materials anchored in the duties and obligations implicit in the Australian Solicitors' Conduct Rules and which can build on existing regulatory processes and best practice procedures methodology.

Resource implications

The Impact of Regulatory Costs and Burdens on Small Businesses

78. The Law Council is concerned that the costs of compliance with the AML/CTF regime would place an unreasonable cost burden on legal practitioners particularly on smaller law practices and sole practitioners.

79. In 2011 over four-fifths of private law firms operating in Australia were sole practitioner businesses.[23] In some Australian jurisdictions, demographics about the size of law practices are even more pronounced. For example, of the 8,234 private law practices operating in New South Wales in 2011, all of the barristers and 86.41% of private solicitor practices were sole practitioner businesses.[24] A further 11.4% of New South Wales law practices comprised two to four partners or principals.[25]

80. In England and Wales while there are a number of large multinational banks, lawyers, accountants and casino operators, the vast majority of *regulated entities* are small to medium businesses. For example, in terms of the legal profession, around 40% of law firms are sole practitioner businesses and a further 45% have four partners or less.[26]

81. The position in England and Wales is relevant to the present discussion as legal practitioners are a 'regulated sector' for purposes of the UK's AML/CTF regime. There is concern in England and Wales about the utility of the obligations imposed there and the hidden cost to the legal services market of a lessening of international competitiveness. In evidence to the House of Lords Sub Committee inquiry into money laundering and terrorist finance, the Law Society of England and Wales noted:[27]

[23] Urbis Pty Ltd , *2011 Law Society National Profile- Final Report -July 2012,* prepared by Urbis Consulting for the Law Society of New South Wales at page II available at http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/640216.pdf

[24] Urbis Pty Ltd , *2011 Law Society National Profile- Final Report -July 2012,* prepared by Urbis Consulting for the Law Society of New South Wales at page 14.

[25] *Ibid*

[26] The Law Society of England and Wales, *Financial Action Taskforce Consultation Response; Reviewing the standards- preparing for the 4th round of mutual evaluations*, January 2011 at Part 3. The Law Society of England and Wales is the anti money laundering supervisor for solicitors in England and Wales and its report is available at http://www.lawsociety.org.uk/Advice/Anti-money-laundering/documents/Financial-Action-Taskforce-Consultation-Response-2011/

[27] The Law Society of England and Wales response to the House of Lords *Select Committee on the European Union- Sub Committee F (Home Affairs) Inquiry Into Money Laundering and Financing of Terrorism*, February 2009, at [1.4] and [1.5] available at http://www.lawsociety.org.uk/Advice/Anti-money-

The European anti-money laundering Directives impose quite burdensome obligations on certain parts of the private sector. The strict implementation of the Directives by the UK Government and its decision to impose criminal sanctions for all breaches of the Directive is negatively affecting the competitiveness of UK solicitors, particularly in comparison to other legal practitioners in the EU and around the world.

The Society encourages the UK Government, the European Commission and the Financial Action Taskforce (FATF) to comprehensively examine whether the benefits of the anti-money laundering and asset recovery regimes they have each instigated actually outweigh the burdens imposed.

Compliance costs

82. Solicitors in the UK have been subject to AML/CTF obligations for a number of years and have borne the corresponding significant increase in compliance costs. There is a general assumption that AML compliance programs are most expensive in their implementation stage. However, evolving processes, emerging technology and ever increasing regulatory demands and best practices often mean that there are also high ongoing compliance costs.[28]

83. While all citizens and businesses pay some portion of the cost of federal regulations, the distribution of the burden of such regulation is uneven and typically falls disproportionally on smaller organisations.

84. The Law Council is concerned that were AML/CTF obligations imposed over legal practitioners in Australia, the increase in compliance costs would almost certainly lead to an increase in the cost of legal services, making such services even less affordable.

85. As part of its response to the Review of the Money Laundering Regulations 2007(UK), the anti money laundering supervisor for the 150,000 solicitors in England and Wales[29] undertook to empirically quantify AML/CTF compliance costs expended by UK law firms.[30] By surveys of the *regulated community* of solicitors conducted in 2008 and 2009 it reported that law firms spent:[31]

- between £400 and £1.5 million developing their AML systems;
- between £1,000 and £800,000 on salaries for staff dedicated to AML compliance;
- up to £250,000 setting up customer due diligence systems;
- up to £100,000 a year on staff training;

laundering/documents/Law-Society-response-to-the-House-of-Lords-Sub-Committee-inquiry-into-money-laundering-and-terrorist-finance-2009/

[28] Katkov N, *Trends in Anti- Money Laundering 2011,* Celent Report, July 2011 at pages 4 and 5 available at http://amlcft.com/files/2011/09/Celent-AML-Trends-2011-2013-Report.pdf

[29] The *Money Laundering Regulations* 2007 (UK) provide that the Law Society of England and Wales is the AML and CTF supervisory authority for solicitors in England and Wales. The Law Society of England and Wales has delegated oversight of the supervised community to the Solicitors Regulatory Authority.

[30] The Law Society of England and Wales, *The Costs and Benefits of Anti- Money Laundering Compliance for Solicitors; Response by the Law Society of England and Wales to the Call for Evidence in the Review of the Money Laundering Regulations 2007,* December 2009 available at http://www.lawsociety.org.uk/Advice/Anti-money-laundering/documents/Law-Society-response-to-the-HM-Treasury-money-laundering-review-2009/

[31] The Law Society England and Wales Report of 2009 at pages 24 to 27 *Op Cit*

- experienced loss of fees for time spent considering and making disclosures of up to £300,000 a year ; and
- Between £26,000 and £1,035,000 per year on easily quantifiable AML costs.

86. Further the Report also mentioned what it referred to as *hidden costs* that though expended, are not readily quantifiable because they relate to time spent by staff members across the firm:[32]

- assessing the risks of clients;
- chasing up due diligence materials;
- monitoring clients and transactions for warning signs; and
- discussing suspicious and internal reports with Money Laundering Regulatory Officers and deciding whether or not a suspicious activity report is required to be made.

Exposure

87. Contemporary published data indicates that there are in the order of 15,400 private legal practices operating in Australia, including sole practitioners, law firms of partners, incorporated legal practices and multi-disciplinary partnerships and practices. The table below provides a breakdown of the accessible data obtained:

Table 1 – Private Law Practices by Jurisdiction

Jurisdiction	**Private Law Practices**
Victoria[33]	6,599
New South Wales[34]	5,324
Queensland[35]	1,653
Western Australia[36]	828
South Australia	625
Australian Capital Territory	169
Tasmania[37]	126
Northern Territory[38]	68

[32] The Law Society England and Wales Report of 2009 at pages 25 *Op Cit*

[33] Legal Services Board of Victoria and Legal Services Commissioner (Joint) Annual Report 2013, page 56, available at http://www.lsb.vic.gov.au/documents/2012-13_LSB+LSC_Annual_Report.pdf

[34] NOTE: 5,324 refers to solicitor practices only. Urbis Pty Ltd, *2013 Profile Of The Solicitors Of NSW – Annual Report,* prepared by Urbis Consulting for the Law Society of New South Wales December 2013 at page 18, available at: http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/823347.pdf

[35] Queensland Legal Services Commission, *2012-13 Annual Report*, at page 68, available at http://www.lsc.qld.gov.au/__data/assets/pdf_file/0014/216104/Legal-Services-Commission-2012-13-Annual-report.pdf

[36] Urbis Pty Ltd , *2011 Law Society National Profile- Final Report -July 2012,* prepared by Urbis Consulting for the Law Society of New South Wales, page 14, available at http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/640216.pdf

[37] The Law Society of Tasmania, *Annual Report 2011-12*, at page 10 table of The Private Legal Profession in Tasmania as at 25 September 2012, available at http://www.taslawsociety.asn.au/web/en/lawsociety/about/report/mainColumnParagraphs/07/document/ANNUAL%20%20%20REPORT%202011%202012.pdf

Total	**15,392**

Likely compliance costs

88. As mentioned above, the surveys conducted by the UK money laundering supervisory authority in 2008 and 2009 identified and quantified some of the compliance costs that arose from the following functions:[39]

- developing and implementing AML compliance system;
- staff dedicated to AML compliance functions;
- risks assessment and compliance materials;
- obtaining customer due diligence information and verification;
- training staff and continuing staff due diligence;
- assessing material and making disclosures to regulators.

89. An indication of the likely compliance costs that could be expected, were the Australian legal profession to become subject to the AML/CTF regime, was calculated by extrapolating the most modest level of the reported UK law firms' annual compliance costs, of £26,000 (based on 2009 data), and inflating that sum to equate to 2013 values.

90. For the purposes of developing an indication of the likely compliance costs and based on the assumption of all other matters being equal, it was speculated that costs to legal practices in Australia would be of a similar order as those experienced by law practices in the UK. It was also presumed that the value of costs described in pounds sterling could be directly converted to Australian dollars.

91. The much smaller scale of the Australian purchasing market for AML compliance services and products and the comparatively higher average wages are likely to mean that actual costs in the Australian context would be higher. However, for the sake of simplicity, a range of additional inflationary factors have been ignored.

Table 2 – Conservative compliance costs

Costs in England and Wales (lowest estimate provided) per firm, 2009 GBP	Costs in England and Wales (lowest estimate provided) *per* firm, 2009 AUD[40]	Indicative extrapolated compliance costs to Australian legal firm in 2013 AUD[41]
£26,000	$46,788	**$51,861.40**

92. The indicative extrapolated compliance costs *per* firm was then calculated by reference to the number of private law practices of each jurisdiction to conservatively estimate possible AML/CTF compliance costs by Australian jurisdiction:

[38] Law Society Northern Territory, *Annual Report 2012-2013*, page 29, see http://lawsocietynt.asn.au/images/stories/agm/AGM_2013/2012-2013_Annual_Report_unsigned_LR_web.pdf

[39] The Law Society of England and Wales Report of 2009 at pages 26-27 *Op cit*.

[40] Average GBP to AUD exchange rate for month December 2009 - 0.555695

[41] Using Reserve Bank Australia's online inflation calculator for 2009 to 2013, available at http://www.rba.gov.au/calculator/annualDecimal.html

Table 3 - conservative indicative compliance costs by Australian jurisdiction

Jurisdiction	Private Law Practices	Conservative Indicative Compliance costs AUD 2013
Victoria	6,599	$342,233,378.60
New South Wales	5,324	$276,110,093.60
Queensland	1,653	$85,726,894.20
Western Australia	828	$42,941,239.20
South Australia	625	$32,413,375.00
Australian Capital Territory	169	$8,764,576.60
Tasmania	126	$6,534,536.40
Northern Territory	68	$3,526,575.20
Total	**15,392**	**$798,250,668.80**

93. As AML compliance costs are sensitive to certain factors (for example such as the size and type of work undertaken) compliance costs would differ for any given legal firm. However, it can be conservatively estimated that indicative AML/CTF compliance costs to the Australian private legal profession could be in the order of $800 million in aggregate.

94. Further, as the base figure selected for calculating the comparison is the lowest value reported in the UK surveys, the actual compliances costs are likely to be significantly higher than the figure presented.

95. Not surprisingly, the Law Society of England and Wales has also observed that costs and obligations arising from compliance with the AML/CTF regime are having a serious impact on legal firms operating in the global market place.

96. By way of example, in 2011 it reported that the opening of a new international corporate client account can cost in the region of £5,000 due to the chargeable time lost by fee earners and compliance staff in chasing documents and undertaking research, even in circumstances that generally would not be considered to give rise to a risk of money laundering. It said that even for smaller law firms, the opportunity cost of and time spent on conducting due diligence checks on any client who is other than absolute standard, is more than the fees they are able to charge for the work being undertaken. This either results in the law firm taking on the client at a loss in the hope of future work or in simply turning away possible legitimate business.[42]

97. Equally concerning are the perceptions expressed by UK law firms and other organisations about the AML/CTF regulatory regime. It has been reported that two thirds of UK organisations comply with due diligence and other money laundering regulatory requirements in order to avoid sanctions for regulatory breach rather than

[42] The Law Society of England and Wales, *Financial Action Taskforce Consultation Response; Reviewing the standards- preparing for the 4th round of mutual evaluations*, January 2011 available at http://www.lawsociety.org.uk/Advice/Anti-money-laundering/documents/Financial-Action-Taskforce-Consultation-Response-2011/

because they perceive that the requirements represent good business practice or as effective at combatting money laundering.[43]

98. Given the evidence of the Law Society of England and Wales to the House of Lords Sub Committee inquiry into money laundering and terrorist finance in February 2009, and throughout subsequent reports, there are concerns that the strict implementation of AML/CTF obligations there have imposed quite burdensome obligations. This has negatively affected the competitiveness of UK solicitors, particularly in comparison to other legal practitioners in the EU and around the world.

Response to the Issues Paper's 'Questions for Consideration'

Page 15 - Are there barriers to the implementation of the risk based approach and if so what are they?

99. The Law Council welcomes the Issues Paper's renewed emphasis on reducing the regulatory burden on industry by embracing a *risk based* approach. Regulation should address the identified risks. Relevant to that exercise is the need to understand the incidence of risks and the consequences of them arising.

100. Risk analysis necessarily rests on evidence sufficient to assess the risk. Yet little if any empirical evidence - particularly in relation to the links between money laundering/terrorism financing and legal practitioners on even the most basic indicators of crime, proceeds of crime or money laundering - is available.

101. The lacunae in evidence and reliance on impressionistic data make valid estimations of risk difficult and the advantages of a risk based approach largely inaccessible except to larger sophisticated organisations that are well resourced and familiar with complex risk analysis methodology.

102. The Law Council supports the development of typologies that are practical meaningful and helpful in assisting legal practitioners to detect money laundering and terrorist financing in their client intake.

103. In particular, lawyer typologies tend to focus on complicit activities involving legal practitioners in the context of dense factual backgrounds. In some circumstances the legal practitioner is not engaged in the provision of legal services but rather undertaking a business activity that does not involve legal practice.

104. The Law Council contends that typologies that focus on how legal professionals are unwittingly involved in money laundering or terrorism financing would be more helpful, particularly where the client/criminal targets some aspect of the legal service or exploits a weakness in the legal professional's procedures. Considering the grey areas to identify nuanced issues and situations where the legal professional's services are used without the person's knowledge would assist in guarding against the risks.

[43] For example see Z/Yen Ltd for the City Of London, *Anti- Money Laundering Requirements: Costs, Benefits and Perceptions*, City Research Series, London June 2005 at page 32 available http://www.cityoflondon.gov.uk/business/economic-research-and-information/research-publications/Documents/2007-2000/Anti-Money%20Laundering%20Requirements_Costs%20Benefits%20and%20Perceptions.pdf and the Law Society of England and Wales, *Financial Action Taskforce Consultation Response; Reviewing the standards-preparing for the 4th round of mutual evaluations*, January 2011 available at http://www.lawsociety.org.uk/Advice/Anti-money-laundering/documents/Financial-Action-Taskforce-Consultation-Response-2011/

How should DFNBP's be regulated under the AML/CTF regime?

105. The Law Council notes the Government's long-standing intention to extend the AML/CTF regime to cover designated non financial businesses and professions including lawyers. The desire to ensure that exclusion of particular sectors does not create gaps or loopholes in the application of the regime is understandable. However, with respect to the legal profession there exists already an extensive and effective regulatory sub-structure which in the Law Council's view provides justified scrutiny. The Law Council is concerned that the highly intrusive legislative regime should not be extended automatically on top of the existing regulatory sub-structure without sound justification.

106. In the instance of the legal profession, consideration must be given to the harm that would be caused to the client-lawyer relationship and function that the legal profession performs in balancing democratic society.

107. The Law Council submits that the legal profession should not become subject to compliance with the AML/CTF regime in addition to the existing regulatory scheme, and the existing exemptions should be continued.

Conclusion

108. Notwithstanding a staggering global spend on AML compliance,[44] the effectiveness of compliance with AML programs in addressing money laundering remains very much in question.[45] Indeed even in jurisdictions where AML compliance regimes are implemented to a gold plated standard, some of the world's most prominent international banks have reportedly engaged in flagrant ongoing violations of AML regimes.[46]

109. It is a Guiding Principle of the Review to support better regulation and a simplified regulatory burden. However, as regulation is not costless the question that arises is whether the regulatory scheme is effective and represents value. The Productivity Commission recently observed that 85% of Australian regulators do not monitor the costs their regulation imposes on business. This is an important aspect of ensuring compliance costs are proportionate to the risks a business poses.[47]

110. The Law Council commends the Government's Inquiry into Access to Justice Arrangements[48] and its undertaking to minimise the impact of unnecessary regulatory burden and red tape costs on the business sector.[49] However, should the proposed extension of Tranche 2 to designated non financial businesses and professions be considered, it should in the Law Council's view, only proceed on an open acknowledgement of the actual and potential burdens and costs of AML/CTF controls as well as the potentially adverse effects on Australia's democratic institutions.

111. It is the Law Council's view that any proposed increase/extension of the regulation must be demonstrably justifiable by way of comprehensive cost benefit analysis, at the very least it must contain measures that ensure costs are minimised and that the benefits outweigh the costs.

112. It is the Law Council's submissions that:

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[44] See for example Katkov N, *Trends in Ant- Money Laundering 2011,* Celent Report, July 2011 at page 5 – estimates of the cost of AML compliance including operations and technology (but not government or implementation) in 2011 US$5.0 billion globally and in 2013 US$5.8 billion- while global spending on AML software alone was estimated to reach US$557 million in 2013. The Celent Report available at http://amlcft.com/files/2011/09/Celent-AML-Trends-2011-2013-Report.pdf

[45] Halliday T, Levi M, and Reuter P, *Global Surveillance of Dirty Money: Assessing Assessments of Regimes to Control Money Laundering and Combat the Financing of Terrorism*, published by the Center on Law and Globilisation 30 January 2014 and available at http://www.lexglobal.org/files/Report_Global%20Surveillance%20of%20Dirty%20Money%201.30.2014.pdf

[46] See for instance Smythe C, *HSBC Judge Approves $1.9 B Drug Money Laundering Accord,* Bloomberg News, 4 July 2013 available at http://www.bloomberg.com/news/2013-07-02/hsbc-judge-approves-1-9b-drug-money-laundering-accord.html Armistead L and Blackden R, *HSBC Boss Quits For Failing To Stop Money Laundering* 18 July 2012, Telegraph available at http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9407257/HSBC-boss-quits-for-failing-to-stop-money-laundering.html ; Murphy D, *Money Laundering and the Drug Trade: The Role of the Banks*, Center for Global research, 13 May 2013 available at: http://www.globalresearch.ca/money-laundering-and-the-drug-trade-the-role-of-the-banks/5334205,

[47] Productivity Commission, *Regulator Engagement with small business,* Research Report September 2013 at page 107 available at http://www.pc.gov.au/__data/assets/pdf_file/0007/128338/small-business.pdf

[48] Productivity Commission, *Access to Justice Arrangements* which focusses on constraining costs and promoting access to justice and equality before the law available at: http://www.pc.gov.au/projects/inquiry/access-justice

[49] As announced Massola J, *Tony Abbott's War on Red Tape Starts With Repeal Day* published 17 March 2014 Sydney Morning Herald and available at: http://www.smh.com.au/federal-politics/political-news/tony-abbotts-war-on-red-tape-starts-with-repeal-day-20140316-34ve5.html

- the extension of the AML/CTF regime's obligations to the legal profession should not proceed because it would have adverse consequences for the system of justice in Australia and would undermine the unique function of legal practitioners contemplated by democratic society;
- the exceptions created under the Anti-Money Laundering and Counter-Terrorism Financing Rules that exempt legal practitioners from being caught by obligations arising from the provision of designated remittance arrangements and obligations arising from the provision of custodial depository or deposit box services should be continued and the draft tables of designated services applicable to the legal profession be removed from the AML/CTF legislation;
- making legal practitioners less vulnerable to inadvertent or unintentional participation in money laundering or terrorism financing activities would be best achieved through:
    - Continuing Professional Development, raising awareness and promoting improvements in law practice management that have the effect of minimising risks of money laundering and terrorism financing involvement; and
    - proactive promotion of appropriate risk management tools and responses should be achieved through dissemination of guidelines, information and Continuing Professional Development products that complement existing conduct rules and legal profession regulatory obligations.

113. The Law Council looks forward to the opportunity of being able to discuss these submissions with the Attorney-General's Department and AUSTRAC and to further assist with the Review where possible. In this regard, the Law Council would be pleased to engage in the face-to-face consultations scheduled later in the Review process.

Attachment A: Profile of the Law Council of Australia

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

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

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

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

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

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

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