NEW SOUTH WALES
BAR ASSOCIATION

Our ref: DIV24/527

7 November 2024

Senator Nita Green
Chair
Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600
By email: legcon.sen@aph.gov.au

Dear Chair,

Advice - Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024 and AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym) **[2018] HCA 58**

1. I write in relation to the Legal and Constitutional Affairs Legislation **Committee**'s **Inquiry** into the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024.

2. During the Committee's public hearing of 30 October 2024, Senator David Shoebridge enquired as to whether witnesses had obtained legal advice concerning the application of the principles articulated in *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* [2018] HCA 58.

3. In response to Senator Shoebridge's enquiry, the NSW Bar **Association** sought advice from Tim Game SC and Hugh Atkin in relation to this issue.

4. The Association has enclosed this advice for the consideration of Committee members and for publication on the Inquiry's website.

5. If you would like any further information, please do not hesitate to contact Edward Clapin, Senior Media and Policy Officer at eclapin@nswbar.asn.au in the first instance.

Yours sincerely,

Dr Ruth Higgins SC
President

SMR AND TIPPING OFF PROVISIONS – EFFECT ON LAWYER / CLIENT RELATIONSHIP

JOINT ADVICE

1. We have been asked to provide advice addressing the following question.

> Do the suspicious matter reporting obligations and the tipping off provisions in ss 41 and 123 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (**AML Act**), as proposed to be amended by the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024 (Cth) (**Amending Bill**), in their application to legal practitioners, engage the considerations identified by the High Court in the Lawyer X case (*AB v CD* (2018) 93 ALJR 59; [2018] HCA 58 at [10])?

2. In short, our answer is "Yes".

3. One of the matters considered by the High Court in the Lawyer X case was the relationship of trust and confidence which exists between a legal practitioner and their client, and the fundamental importance of that relationship to the integrity of the judicial system and the maintenance of the rule of law more generally. To compel a legal practitioner to make a report concerning their client to an investigative authority, while also prohibiting the practitioner from disclosing the fact or contents of that report to their client, fundamentally undermines that relationship of trust and confidence.

4. The facts of the Lawyer X case are notorious and may be stated briefly. A Victorian barrister purported to act as counsel for accused persons while also, without her clients' knowledge or consent, providing information as an informant to Victoria Police which had the potential to undermine the defences of her clients. The High Court deprecated that conduct in the strongest of terms (at [10]):

> Here the situation is very different, if not unique, and it is greatly to be hoped that it will never be repeated. EF's actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court. Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging EF to do as she did and were

> involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will. As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system. It follows, as Ginnane J and the Court of Appeal held, that the public interest favouring disclosure is compelling: the maintenance of the integrity of the criminal justice system demands that the information be disclosed and that the propriety of each Convicted Person's conviction be re-examined in light of the information. The public interest in preserving EF's anonymity must be subordinated to the integrity of the criminal justice system.

5. It went without saying that a legal practitioner owes professional obligations to their client to promote the client's interests, protect the client's rights and to respect the client's confidences.[1] Those obligations generally require a legal practitioner to carry out their client's lawful instructions, to disclose to their client material information which the practitioner obtains in the course of the retainer and to inform the client of steps taken by the legal practitioner which may affect their client's interests. Those obligations are subject only to limited qualifications and exceptions.[2]

6. The relationship of confidence which subsists between a lawyer and client and the privilege which protects communications between them in the course of that relationship is "a fundamental condition on which the administration of justice as a whole rests".[3]

7. The suspicious matter reporting obligations and tipping off provisions of the AML Act are liable to cut across those professional obligations in significant respects. The proposed amendments to the AML Act create the real possibility that a legal

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[1] *Apple Computer Australia Pty Ltd v Wily* [2002] NSWSC 855 at [11], cited with approval in *Carey v Korda* (2012) 45 WAR 181 at [60]; *Perazzoli v BankSA* [2017] FCAFC 204 at [171].

[2] For example, rules 9.2.2, 9.2.4 and 9.2.5 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) permit disclosure by a solicitor of information confidential to a client where the solicitor is compelled by law to disclose the information, where the disclosure is made for the sole purpose of avoiding the probable commission of a serious criminal offence, and where the disclosure is made for the purpose of preventing imminent serious physical harm to the client or another person.

[3] *R v Derby Magistrates' Court, Ex parte B* [1996] 1 AC 487 at 507.

practitioner may be obliged to report a suspicious matter concerning their client to AUSTRAC, but to withhold the fact of that disclosure from their client.

8. Such a circumstance would differ from the Lawyer X case in that (a) the report to an investigative authority and the non-disclosure of that report to the client would be compelled by law rather than voluntary; and (b) privileged information would (or, at least, ought) not be communicated to AUSTRAC (see paragraphs 15-19 below). Nevertheless, it appears to us that the withholding from the client of the fact of the suspicious matter report would fundamentally undermine the relationship of trust and confidence necessary to a lawyer / client relationship.

9. A legal practitioner who made such a report would be placed in an impossible situation. The practitioner could not properly continue to act for the client while knowingly withholding the fact that they had made a suspicious matter report. The necessary relationship of trust and confidence would have been compromised. The practitioner could not comply with their professional obligation to disclose material information to their client, nor could they obtain their client's informed consent to any qualification or attenuation of that obligation.

10. But how could the legal practitioner who found themselves in that position terminate their retainer without breaching the tipping-off prohibition? A legal practitioner is not at liberty to terminate a retainer at will or for no cause. Speaking generally (as professional rules differ between jurisdictions and branches of the profession), a legal practitioner may only terminate a retainer on reasonable notice and for just cause. A legal practitioner who purports to terminate a retainer in circumstances where they are not entitled to do so may be liable in damages to their client and is likely to have engaged in unsatisfactory professional conduct or professional misconduct. If the legal practitioner terminated the retainer without explanation and was subsequently sued by the client or subject to professional disciplinary action, the practitioner would be prevented from defending their conduct.

11. A legal practitioner who had made a suspicious matter report in respect of their client (and who was prohibited from disclosing the fact of the report to the client) would likely have cause to terminate the retainer for the reasons given in paragraph 9 above.

However, the lawyer would be prohibited (by the tipping-off prohibition) from explaining the reason for the termination to the client. This gives rise to a conundrum. The very act of terminating a retainer without explanation may (in the circumstances of a given case) be liable to tip off the client. That is, the termination of a retainer without proffering an explanation of the reason for termination may allow an inference that the practitioner is prohibited from explaining the reason because they have lodged a suspicious matter report.

12. The scenarios discussed above are not speculative or far-fetched. Section 41 of the AML Act relevantly provides:

> (1) A suspicious matter reporting obligation arises for a reporting entity in relation to a person (the ***first person***) if, at a particular time (the ***relevant time***):
>
> (a) the reporting entity commences to provide, or proposes to provide, a designated service to the first person; or
>
> …
>
> and any of the following conditions is satisfied:
>
> …
>
> (f) at the relevant time or a later time, the reporting entity suspects on reasonable grounds that information that the reporting entity has concerning the provision, or prospective provision, of the service:
>
> (i) may be relevant to investigation of, or prosecution of a person for, an evasion, or an attempted evasion, of a taxation law; or
>
> (ii) may be relevant to investigation of, or prosecution of a person for, an evasion, or an attempted evasion, of a law of a State or Territory that deals with taxation; or
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> (iii) may be relevant to investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a State or Territory; or
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> (iv) may be of assistance in the enforcement of the *Proceeds of Crime Act* 2002 or regulations under that Act; or
>
> (v) may be of assistance in the enforcement of a law of a State or Territory that corresponds to the *Proceeds of Crime Act* 2002 or regulations under that Act;
>
> (g) at the relevant time or a later time, the reporting entity suspects on reasonable grounds that the provision, or prospective provision, of the service is preparatory to the commission of an offence covered by paragraph (a), (b) or (c) of the definition of financing of terrorism in section 5;

(h) at the relevant time or a later time, the reporting entity suspects on reasonable grounds that information that the reporting entity has concerning the provision, or prospective provision, of the service may be relevant to the investigation of, or prosecution of a person for, an offence covered by paragraph (a), (b) or (c) of the definition of financing of terrorism in section 5;

(i) at the relevant time or a later time, the reporting entity suspects on reasonable grounds that the provision, or prospective provision, of the service is preparatory to the commission of an offence covered by paragraph (a) or (b) of the definition of money laundering in section 5;

(j) at the relevant time or a later time, the reporting entity suspects on reasonable grounds that information that the reporting entity has concerning the provision, or prospective provision, of the service may be relevant to the investigation of, or prosecution of a person for, an offence covered by paragraph (a) or (b) of the definition of money laundering in section 5.

13. Importantly, the suspicious matter reporting obligation is not limited to circumstances in which the reporting entity believes that their services have been or are being sought in furtherance of a crime or other illegal object. In such circumstances, if the suspicion proves well-founded, there may not be a relationship of trust and confidence to begin with – there is no true relationship of lawyer and client, as the lawyer's services have been sought for an illegitimate purpose.[4] Even so, a legal practitioner would ordinarily be expected to notify the client of their suspicion and any proposal to communicate those suspicions to investigative authorities before such a communication was made. A client has a right to provide instructions to their legal practitioner so as to dispel any such suspicion, before the legal practitioner breaches the client's confidence. That would be impossible in the case of a suspicious matter report by reason of the tipping off prohibition.

14. The reporting obligation created by section 41(1)(f) of the AML Act is especially broad. In the course of a retainer, legal practitioners frequently come into possession of information that may be (or may become) relevant to investigation of, or prosecution of a person for, evasion of taxation laws or other offences. For example, a lawyer who advised a client as to how to structure a transaction so as to comply with taxation laws,

[4] See *R v Cox and Railton* (1884) 14 QBD 153.

but who subsequently learned that the transaction was the subject of investigation for evasion of taxation laws, would come under a suspicious matter reporting obligation notwithstanding that the lawyer did not hold any suspicion that any evasion had in fact occurred.

15. The Amending Bill does contain provisions designed to protect and preserve the legal professional privilege of a client. Proposed sub-section 41(2A) would provide:

> Despite subsection (2), the reporting entity may refuse to give the AUSTRAC CEO a report about the matter if the reporting entity reasonably believes that all of the information comprising the grounds on which the reporting entity holds the relevant suspicion is privileged from being given on the ground of legal professional privilege.

16. The Amending Bill also proposes repealing section 242 of the AML Act and replacing it with a general provision to the effect that nothing in the Act affects the right of a person to refuse to give information or produce a document on the ground of legal professional privilege.

17. These provisions do not alter our views concerning the interaction of the suspicious matter reporting obligation and the tipping off prohibition. This is because, as drafted, proposed sub-section 41(2A) would only apply where the legal practitioner reasonably believed that all of the information comprising the grounds on which the practitioner held the relevant suspicion is privileged from being given on the ground of legal professional privilege. If any of the information comprising the grounds on which the practitioner held a relevant suspicion was not privileged (e.g. because it was in material served by another party, as would be common), then sub-section 41(2A) would not apply, and the practitioner would be required to give the AUSTRAC CEO a report about the matter.

18. Where a legal practitioner's suspicion was based partly on privileged material and partly on non-privileged material, proposed sub-section 41(3)(aa) would operate. That sub-section provides that:

> if the reporting entity reasonably believes that some (but not all) of the information required to be contained in the report about the matter is privileged from being given on the ground of legal professional privilege – [the suspicious

> matter report must] be accompanied by an LPP form in relation to the information.

19. While a legal practitioner would not be obliged to disclose privileged information or documents to the AUSTRAC CEO as part of a suspicious matter report, that does not resolve the dilemma we have addressed at [9]-[11] above. It is the fact that a practitioner has made a suspicious matter report, and is obliged to withhold that information from their client, that undermines the integrity of the lawyer / client relationship.

20. It is not clear how the "LPP form" regime is intended to work. Proposed section 242A permits the Minister to make guidelines in relation to making or dealing with claims or assertions of legal professional privilege, including the use of LPP forms. But the privilege is that of the client, who (in the scenario contemplated above) does not know that a suspicious matter report has been made in respect of them or that an LPP form has been provided by their lawyer in relation to their privileged information or documents. There is no proper way for a claim of legal professional privilege to be resolved without the knowledge and involvement of the holder of that privilege.

21. During the hearing of the Legal and Constitutional Affairs Legislation Committee on 30 October 2024 (**Committee**), there was discussion of the possibility of a legal practitioner being permitted to inform their client, after the passage of a specified period of time (say, a month), of the fact of a suspicious matter report having been made. That does not resolve the problem of whether the practitioner can properly remain acting for the client in the interim period between the making of the suspicious matter report and the disclosure of that report to the client. For the reasons given above, we doubt that they could in most circumstances.

22. Further, that proposal would not reverse the chilling effect that the suspicious matter reporting obligation would of itself have on the freedom of communication between lawyer and client. The rationale for legal professional privilege is that it is of fundamental importance that persons be able to consult lawyers freely and make full and frank disclosure about matters of concern without fear that the making of that disclosure will prejudice their interests. The very possibility that consultation of a lawyer may prompt the making of a suspicious matter report by the lawyer is liable to

impair that freedom of communication between lawyer and client, which is of significant public importance.

23. As in the Lawyer X case, there is a real likelihood that the suspicious matter reporting obligation, coupled with the tipping off prohibition, may lead to convictions of accused persons being quashed as being the product of a substantial miscarriage of justice.

24. Take, by way of example, a legal practitioner instructed to represent a client both in proceedings under proceeds of crime legislation and in defence of related criminal charges. As noted in the NSW Bar Association's submission of 14 October 2024 at [81]-[83], representation of a client in proceeds of crime litigation will frequently require the practitioner to provide advice about prospective transactions concerning the clients' assets and financial affairs. In those circumstances, it is highly likely that (a) the practitioner will provide a designated service of the kind specified in items 1, 2, 4 or 6 of proposed Table 6; and (b) the practitioner will suspect that information that the practitioner has concerning the provision of the designated service (i.e. the advice) may be of assistance in the enforcement of proceeds of crime legislation for the purposes of s 41(1)(f)(iv)-(v). As such, the legal practitioner will come under a suspicious matter reporting obligation.

25. Assume further that the legal practitioner makes a report to the AUSTRAC CEO (as the suspicion is based, in part, on confidential instructions from their client and, in part, on material served in the proceeds litigation), but does not disclose the fact of the report to their client (by reason of the tipping off prohibition) and continues to represent the client in the criminal proceedings (contrary to their professional obligations addressed above), with the client ultimately being convicted. In our view, the conviction would be liable to be quashed.

26. A circumstance in which an accused's lawyer has, unbeknownst to the accused or the Court, provided information relevant to the charges against the accused to an investigative authority, yet continued to represent the accused at trial (in breach of their professional obligations) would most likely be characterised as so serious a departure from the essential processes of a fair trial as to have necessarily resulted in a substantial miscarriage of justice, irrespective of the strength of the prosecution case – i.e. the

defect in the trial would be of such a fundamental kind that the conviction could not be saved by application of the proviso.[5]

7 November 2024

Tim Game SC

Hugh Atkin

[5] *Weiss v The Queen* (2005) 224 CLR 300 at [45]; *Cesan v The Queen* (2008) 236 CLR 358 at [126] per Hayne, Crennan and Kiefel JJ; *Kalbasi v Western Australia* 264 CLR 62 at [16] per Kiefel CJ, Bell, Keane and Gordon JJ, at [126] per Nettle J, [155]-[156] per Edelman J.