NEW SOUTH WALES
BAR ASSOCIATION

Our ref: DIV24/527

14 October 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,

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024

1. The New South Wales Bar **Association** welcomes the opportunity to provide a submission to the Commonwealth Legal and Constitutional Affairs Legislation **Committee**'s inquiry into the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024 (Cth) ('**Bill**'), which was introduced and second read in the Commonwealth Parliament on 11 September 2024. The Association is particularly interested in the Bill's proposed expansion of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ('**AML/CTF Act**') to designated services provided by professionals, including legal practitioners.

Key Recommendation

2. The Association is supportive of the objects articulated in s 3 of the AML/CTF Act, and supports amendments that provide for measures to detect, deter and disrupt money laundering, the financing of terrorism, and other serious financial crimes that are balanced and proportionate to the legal and economic interests of law-abiding Australians and are consistent with the fundamental obligations of the legal profession, and in particular barristers as independent practitioners with an important role to play in the administration of justice.

3. The Association is of the view that the Committee should recommend that the Bill be amended to include a provision which specifies that services provided by a person in the course of legal practice as a barrister on the instructions of a solicitor are not taken to be designated services.

4. In this submission, the Association addresses the reasons why such a provision is justified. In summary:

    a. As presently drafted, the legislation captures barristers who are engaged to "assist" or are "otherwise acting for or on behalf of a person in a transaction" identified in Table 6, including where briefed to advise on a transaction, or where advising in relation to

settlement of disputes that may involve a transaction that falls within one of the items in Table 6;

b. including barristers who are instructed by a solicitor who is also a reporting entity by the operation of Table 6 unnecessarily duplicates the regulatory burden on the profession in a way that will not produce any additional information to the Australian Transaction Reports and Analysis Centre (**AUSTRAC**);

c. burdening solicitors and the barristers they instruct with the obligations imposed by the AML/CTF Act has the potential to impede access to justice, either by duplicating the increase to legal fees that will result from additional compliance costs for legal practices, or because barristers will stop accepting work that may involve the provision of designated services;

d. the potential impacts on access to justice are likely to impact ordinary Australians seeking legal advice or representation in disputes for matters that carry low inherent risk;

e. the AML/CTF Act and the Bill, if enacted, will disproportionately impact many of the core duties which barristers owe as independent practitioners participating in the proper administration of justice.

Key issues

5. The structure of the Association's submissions is as follows:

a. The nature of a barrister's practice and the current regulatory and ethical framework governing that practice.

b. The inclusion of barristers in the AML regime in relation to legal advice provided to a solicitor or client engaged in a designated service, and the extent to which this will achieve the objects of the AML/CTF Act, having regard to the current regulatory and ethical frameworks for barristers.

c. The compliance burdens, costs and impacts on small law practices of the AML requirements to undertake risk assessments, develop and implement AML programs and undertake "client due diligence."

d. The suspicious matter reporting (**SMR**) obligation, and the associated prohibition against "tipping off".

e. The proposed provisions addressing claims for legal professional privilege.

A. Barristers' work and regulatory framework

6. The independent bar comprises legal practitioners who practise exclusively as barristers and sole traders.

7. The exception to this is barristers who practise as government employees such as Crown Prosecutors or Public Defenders. Crown Prosecutors appear on behalf of the Director of Public Prosecutions whose client is the Crown in right of the State of New South Wales. Public Defenders are engaged by Legal Aid solicitors for publicly funded accused in criminal proceedings. Neither of these examples present any ML/TF risks as they do not charge any fees and do not (subject to what is said in Section B below) advise on, or act in relation to, proposed designated services.

8. Barristers occupy a unique position in the administration of justice. Their practices are regulated by the *Legal Profession Uniform Law (NSW)* (**LPUL**) and *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) (**Barristers' Rules**).

9. Key aspects of barristers' roles and obligations are contained in the Barristers' Rules, which may be summarised as follows:

    a. As a general rule, a barrister must not engage in conduct that is dishonest or otherwise discreditable to a barrister, prejudicial to the administration of justice, or likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute (Rule 8). The rule operates as an overriding obligation that underscores the importance of barristers acting independently and in accordance with the law. It arises regularly in the administration of the Association's professional conduct and discipline jurisdiction.

    b. A barrister has an overriding duty to the court to act with independence in the interests of the administration of justice. That includes, but is not limited to, obligations of candour to the Court and to opponents (Barristers' Rules, 23 to 34).

    c. A barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person. That duty includes obligations to inform and assist the client to reach a compromise of the case (Barristers' Rules, 35 to 38).

    d. A barrister has duties of independence that moderate their obligations to the client: they must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently. That includes prohibitions against exercising undue influence over the client or otherwise engaging in financial dealings with the client beyond the receipt of the fee (Barristers' Rules, 42 to 48).

    e. A barrister has duties of confidentiality to clients and other persons that precludes disclosure of confidential information received in the course of the barrister's practice without the client's or other person's consent or by compulsion of law (Barristers' Rules, 114 to 118).

    f. A barrister has specific duties in relation to clients involved in delinquent or guilty behaviour. Those duties in each case preclude the barrister from themselves informing the Court or any other person of the client's behaviour without the client's authorisation,

except in cases in which threatened behaviour creates a risk to a person's safety, in which case the barrister may inform the Court or the police (Barristers' Rules, 79 to 82).

g. There are specific circumstances in which a barrister must, and may, refuse or return a brief to appear. Put broadly, the rules requiring return of the brief concern instances in which the client's interest in the matter may be compromised by the barrister's interest, including but not limited to when a barrister has knowledge of information confidential to another person that is relevant to the client's case (Barristers' Rules, 101 to 104, 118 in relation to briefs to advise). Circumstances in which a barrister may return a brief concern matters relevant to the barrister's practice, and include where the brief is not offered by a solicitor (Rule 105).

10. Barristers' practices are regulated by the Legal Services Commissioner and the Association as a local regulatory authority. Every aspect of a barrister's practice is regulated and supervised by the Association, including:
    a. The qualifications and suitability requirements for admission to the profession;
    b. The ongoing entitlement to practise;
    c. Continuing legal education; and
    d. Professional conduct and discipline.

Admission requirements

11. Barristers are subject to the same admission rules as solicitors when they first apply for admission as legal practitioners, which is administered by the Legal Professions Admissions Board (**LPAB**). Those rules are premised on satisfaction that the barrister has achieved appropriate academic and practical training qualifications and is a fit and proper person for admission to the Australian legal profession (sections 16-17 of the LPUL). The practical legal training requirements for admission as a lawyer include modules relating to professional ethics and conduct of trust accounts.

12. In order to be entitled to practise as a barrister, applicants must complete the bar exams and the bar practice course. Both include exams and exercises requiring demonstration to the Association's satisfaction that the applicant is familiar with the applicable rules and principles of professional ethics and conduct.

Ongoing entitlement to practise

13. Barristers' practising certificates must be renewed annually. On each occasion, the barrister must satisfy the Bar Council as the relevant designated local regulatory authority under the LPUL that the barrister remains a fit and proper person to hold a practising certificate (s 45(2) of the LPUL). In assessing whether a barrister is a fit and proper person, the Bar Council may have regard to matters including: issues of insolvency, in both a personal capacity and in corporate capacity; whether the barrister has been convicted or found guilty of an offence in Australia or a foreign country; the applicant's disciplinary history, as a lawyer and in any other profession or occupation, in Australia and overseas; whether the applicant has contravened trust money or trust account provisions in either Australia or overseas; and issues surrounding capacity to manage a business or legal practice (Rule 13 of the *Legal Profession General Rules 2015* (NSW)).

Continuing legal education

14. Barristers are required to complete 10 points of Continuing Professional Development (**CPD**) each year (*Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* (NSW), Rule 8), including activities in each of the following categories: Ethics and Professional Responsibility; Substantive Law, Practice, Procedure and Evidence; Barristers' Skills; and Practice Management and Business Skills (Rule 9). Barristers are required to certify on renewal of their practicing certificate that they have complied with the CPD Rules, and the Bar Council has the power to audit barristers' compliance with the CPD Rules, which is undertaken across the profession (Rules 14 and 15).

Professional conduct and discipline

15. The Association's principal regulatory function is to facilitate the investigation of complaints about barristers, show cause events, and other disclosures. Those functions are administered by the Professional Conduct Department which also:
    a. facilitates the provision of ethical guidance to barristers;
    b. assists the Bar Council in connection with enquiries from, and reports submitted to, the LPAB about the fitness and propriety of applicants to legal practice;
    c. liaises with the Association's Professional Development Department in relation to CPD and other training issues which come to notice in connection with regulatory matters.

16. Complaints about a barrister's conduct in NSW are made to the NSW Legal Services Commissioner. The Commissioner refers most disciplinary matters concerning barristers to the Bar Council for assessment, investigation and determination. All such matters are assessed and investigated by one of the four professional conduct committees established by the Bar Council, comprising barrister and community members. The committees report to the Bar Council, which makes a determination in respect of each complaint.

17. In addition, the LPUL requires barristers to notify the Bar Council of (i) automatic show cause events, that is, certain bankruptcy matters, a conviction for a serious offence or a tax offence (defined as any offence under the *Taxation Administration Act 1953* (Cth)); and (ii) designated show cause events (DSCE) under section 90 of the LPUL, which include engaging in legal practice outside the conditions to which their practising certificate is subject and ceasing to hold the required professional indemnity insurance. Barristers' practising certificates are also subject to a statutory condition to disclose matters to the Bar Council within seven days, such as being charged with a serious offence or tax offence and being convicted of certain summary offences (s 51 of the LPUL, see also Rule 15 of the *Legal Profession (General) Rules 2015* (NSW)). Once the barrister has made a disclosure in connection with an application for a grant or renewal of a practising certificate, the Bar Council is required to determine whether the barrister remains a fit and proper person. The investigation of show cause events is carried out by the Association's professional conduct committees.

18. The Association's Ethical Guidance Scheme enables members of the Association to seek ethical guidance from the Senior Counsel serving on the Association's professional conduct committees. Thirty-one Senior Counsel were available to assist members in 2022-2023.

19. The self-regulatory model for barristers in NSW involves ensuring that barristers are educated in relation to their professional obligations and are regularly monitored and vetted in respect of their fitness to practise. The system in place places responsibility on barristers to ensure that they are compliant with the law and to make sufficient disclosures when they are not so that their fitness to practise can be assessed. This model has been effective in operating as a deterrent to the involvement of barristers in criminal conduct, even as many of them provide important services to the criminal justice system.

Barristers' work

20. The NSW Bar comprises approximately 2,363 practising barristers.[1]

21. Rule 12 of the Barristers' Rules mandates that barristers are sole practitioners. That requirement is important for a number of reasons. It ensures that barristers can be counted upon for their independence. It also ensures that barristers' practices can be run efficiently, with a minimum of administration and overheads. The leanness of barristers' practices better ensures access to legal representation for clients.

22. Rule 11 of the Barristers' Rules sets out the work barristers may perform, as follows:
    a. appearing as an advocate;
    b. preparing to appear as an advocate;
    c. negotiating for a client with an opponent to compromise a case;
    d. representing a client in a mediation or arbitration or other method of alternative dispute resolution;
    e. giving legal advice;
    f. preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs;
    g. carrying out work properly incidental to the kinds of work referred to in (a)-(f); and
    h. such other work as is from time to time commonly carried out by barristers.

23. Barristers are, predominantly, litigators. The majority of barristers' work involves advocacy or chamber work for the purpose of advocacy. Barristers can also be engaged to advise outside the context of contentious matters. Conventionally, barristers obtain work by being briefed by a solicitor either for advice on discrete questions of law or for the purpose of advocacy in litigation and the preparation of matters for litigation. This remains the method by which barristers obtain most of their work.

24. Rule 9 of the Barristers' Rules provides that a barrister must not engage in another vocation which is liable to adversely affect the reputation of the legal profession or the barrister's own reputation, is likely to impair or conflict with the barrister's duties to clients, or prejudices a barrister's ability to attend properly to the interests of the barrister's clients.

25. Rule 13 of the Barristers' Rules sets out the work that a barrister must *not* do. That includes the following (where undertaken in the course of the barristers' practice):
    a. act as a person's general agent or attorney in that person's business or dealings with others,

[1] New South Wales Bar Association, 'Annual Report 2023-24', p 10.

b. conduct correspondence in the barrister's name on behalf of any person otherwise than with the opponent in litigation,
c. conduct the conveyance of any property for any other person,
d. administer any trust estate or fund for any other person,
e. incorporate companies or provide shelf companies for any other person,
f. prepare or lodge returns for any other person, unless the barrister is registered or accredited to do so under the applicable taxation legislation, or
g. hold, invest or disburse any funds for any other person.

26. It follows that a barrister is precluded from acting on behalf of a client so as to carry out transactions in the nature of the proposed designated services referred to in table 6, section 6 of the Bill. A barrister's role, if any, in such transactions is to advise on their legal effectiveness. The usual practice when providing such advice is for the solicitor to prepare a brief for the barrister with the documents and information the solicitor considers to be relevant to the question to be addressed by the barrister. It is possible, but not common, for the barrister to meet and confer with the client for the purposes of obtaining information and instructions relevant to the provision of the advice. When this occurs, the usual convention is that the conference occurs in the presence of the solicitor. Moreover, the provision of advice does not itself facilitate any transaction: further steps will be required to bring it about. A solicitor may be involved in those steps but a barrister cannot.

27. Accordingly, the nature of a barrister's work is such that it involves little, if not negligible, risk that they will be used by clients as means to advance money laundering and/or counter-terrorism financing conduct. Where there is some interface between proposed designated services and the barristers' advisory work, other service providers will be directly involved in bringing about transactions in the manner contemplated by the current drafting of table 6, section 6 of the Bill, and those service providers are better placed by reason of their contact with the client to effectively perform AML/CTF obligations.

28. We further note that a barrister is not permitted, knowingly to allow his or her services to be used to advance unlawful activity. Professional conduct rules strongly preclude such conduct and the regulatory consequences under the LPUL are serious and include restrictions on practice and in serious cases, removal from the roll of legal practitioners. In addition, section 465 of the LPUL requires local regulatory bodies and other persons involved in the regulation of barristers' professional conduct to report to police a reasonable suspicion that a person has committed a serious offence. That ensures that ML/TF activity will be reported to the relevant law enforcement authorities where detected by those regulating barristers' conduct.

29. Additional regulation for the purpose of detecting and deterring ML/TF activity would have little if any substantial effect but, if widely expressed, would be likely to impose significant compliance burdens and undermine the purpose of legal professional privilege, as addressed further below.

The cab-rank rule

30. Rule 17 of the Barristers' Rules imposes the 'cab-rank rule.' The cab-rank rule requires a barrister to accept a brief where the work is within the barrister's skill and expertise, the barrister is available to take on the work and the fee is acceptable. The purpose of the rule is to preserve independence and

enhance access to justice.[2] A barrister cannot refuse a brief simply because the identity of a client or the nature of the work is disagreeable to the barrister.

31. The operation of the cab-rank rule ensures that within our adversarial system of justice, those in need of a barrister are able to access a barrister. It follows that a barrister must accept a client even if there are aspects of the client's business that would raise a reasonable suspicion for the purposes of the reporting obligations under the AML/CTF Act. The imposition of sections 41 and 123 of the AML/CTF Act on barristers may result in a barrister having to refuse to act further for a client as to continue to act would potentially compromise their duty to the client.[3] The tipping-off provision is particularly anathemic to the relationship of trust and confidence that is at the heart of a legal practitioner's duty to the client. The application of sections 41 and 123 directly conflicts with confidentiality, duty to a client, the cab-rank principle and legal professional privilege, as addressed further below.

Record keeping

32. The conventional practice of barristers and solicitors is such that the solicitor maintains the client's file in a matter, the solicitor prepares and sends briefs to counsel, and the barrister returns the brief when he or she has completed the task that it requires. The returned brief becomes part of the solicitor's file. The barrister does not create or retain anything that could be called a file for a particular matter or client.

33. This practice is of long standing. It is important in securing the efficiency of a divided profession. The hourly rates charged by barristers are considerably lower than the rates charged by solicitors of equivalent expertise, standing or experience because the barrister's professional establishment is much leaner. The barrister has relatively little in the way of support staff, premises and storage.

34. Imposition of record-keeping obligations on barristers in relation to AML/CTF compliance will require barristers to create and maintain a set of records that exist only for the purpose of the barrister's AML/CTF compliance, if any obligations to comply arise under the AML/CTF Act. The only way to cover the cost of this exercise would be in higher fees to all clients. Further, the records created would duplicate the matters that an instructing solicitor is separately required to record.

Direct briefing

35. Whilst barristers may accept direct briefs, most (about 70%[4]) do not. Of these barristers, 82% accepted 5 or fewer direct access briefs and 94% accepted fewer than 10 direct access briefs in 2022/23.[5] The junior criminal bar comprises a large proportion of barristers who accept direct briefs (for example, for appearances in local court summary criminal matters such as driving offences where the cost of retaining a barrister and solicitor together would be prohibitive).

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[2] Rule 4(f) of the Barrister's Rules explains that the provision of advocates for those who need legal representation is better secured if there is a Bar whose members: (i) must accept briefs to appear regardless of their personal beliefs, (ii) must not refuse briefs to appear except on proper professional grounds, and (iii) compete as specialist advocates with each other and with other legal practitioners as widely and as often as practicable.

[3] Barrister's rules 35 to 38 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015.*

[4] New South Wales Bar Association, Practising Certificate Renewal Survey data on direct access briefs (2022/23).

[5] Ibid.

36. Moreover, many other barristers accept direct briefs only for the purposes of undertaking pro bono work – that is, work for no fee for clients in need of legal assistance. The Association and State and Federal Courts and Tribunals maintain pro bono referral schemes, many of which currently make a majority of referrals for pro bono assistance on a direct access basis. Many pro bono cases involve matters of public interest. The fact that barristers accept pro bono briefs itself furthers the public interest in access to justice.

37. Where a barrister accepts a brief on a direct access basis he or she is subject to an increased compliance burden in the sense of additional cost and other disclosure requirements pursuant to s 174 of the LPUL and rule 22 of the Barristers' Rules. These additional requirements are directed to ensuring that a client is fully informed of the fees that the barrister intends to charge and the estimated costs of the engagement (in circumstances in which, were the barrister retained by a solicitor, the solicitor would undertake this function relying on information provided by the barrister).

38. The Association acknowledges that the engagement of barristers directly by clients, without the interposition of a solicitor that is subject to the obligations of the AML/CTF Act in respect of Table 6 designated services presents a higher residual risk than when a barrister is retained through a solicitor. However, any regulatory controls in respect of that risk must be proportionate to the burden imposed by them and the other public interests that are served by the provision of services on a direct access basis, including access to justice and the efficient and effective disposal of matters before the courts.

39. The imposition of customer due diligence requirements would impose a substantial additional burden on practitioners engaged on a direct access basis. To require a barrister engaged on a direct access basis to undertake the additional administrative burden of verifying a customer's identity and understanding their risk profile before accepting instructions to act risks providing a disincentive to accepting work on a direct access basis.[6] Moreover, clients who engage barristers on a direct access basis may be vulnerable, at least in the sense that they cannot afford a barrister and solicitor. Many direct access clients (such as in criminal, family and migration cases) are vulnerable in other respects, and compliance with know your customer requirements at the outset of an engagement has the potential to be intimidating and to interfere with the trust and confidence needed for the barrister to discharge their duty to the client.

40. These risks are more acute where barristers are engaged on an urgent basis. This often occurs in pro bono matters where a barrister is retained by referral arrangements with a Court or Tribunal where a litigant in need of legal assistance is identified. To require a barrister to undertake customer due diligence before the barrister is permitted to act in such cases would significantly impair access to justice and potentially deny clients the effective exercise of their legal rights.

Barristers' trust accounts

41. As a general rule, barristers do not maintain trust accounts. Barristers are precluded from maintaining trust accounts for the purposes of holding client money for transactional purposes (for example,

[6] A barrister is, notwithstanding the cab rank rule, able to refuse a brief on the basis that they will not be instructed by a solicitor: Rule 21.

controlled money or transit money).[7] Because of their preclusion on undertaking other vocations, barristers also do not maintain client accounts for other purposes that are not regulated as trust money.[8]

42. The traditional arrangement as between barristers and solicitors is that solicitors will hold client funds in their trust accounts (regulated by the LPUL) in advance of fees payable to the barrister. Those funds are deposited to the trust account on the basis of an estimate by the barrister as to the fees likely to be payable on the brief, and paid to the barrister on issue of in invoice for the fees after the work is complete. Any surplus in funds is refunded to the customer. The ML/TF risks of such arrangements are low, because the source and destination of the trust money is at all times accounted for and there is no opacity to the transactions involved in the arrangement.

43. Recent changes to the law provide for barristers to maintain trust accounts for the sole purpose of holding fees in advance for direct access work. Regulation 15 of the *Legal Profession Uniform Law Application Regulation 2015* (NSW) prescribes the circumstances in which and the conditions on barristers maintaining such accounts. In summary, they are as follows:
    a. the barrister may use trust money accounts solely for the purpose of receiving fees in advance where engaged on a direct access basis;
    b. the barrister must maintain a 'trust money account' with an Authorised Deposit-taking Institution for the sole purpose of holding fees in advance;
    c. the trust money account cannot be linked to any credit or mortgage facility;
    d. the barrister must notify the Association of the name and certain details of the account, within 14 days of opening the account (a notification form is available on the Bar Association's website);
    e. fees in advance must be deposited in the trust money account as soon as practicable after they are received by the barrister;
    f. the barrister must provide a detailed written receipt as soon as practicable to the person from whom the money is received (a sample receipt is available on the Association's website);
    g. the money must remain deposited in the trust money account until a bill is given to the client, or the money is refunded to the client or paid to a solicitor later engaged by the client; and
    h. the barrister must appoint an external examiner to carry out an annual examination for the relevant reporting period, with the report to be submitted to the Association by no later than 7 June of each year.

44. A very small number of barristers maintain trust money accounts in accordance with these provisions. The Association's records indicate that 1.5% of barristers have notified that they maintain trust money accounts in accordance with the Regulation. Moreover, the manner in which the trust money accounts are regulated makes plain that (a) the source and destination of funds are at all times documented and notified to the local regulatory authority, the Association; and (b) the accounts are overseen by an independent examiner who is also required to report to the Association.

[7] Clause 15 of the *Legal Profession Uniform Law Application Regulation 2015* (NSW).
[8] See for example the distinction outlined in the definition of 'trust money' in s 129 of the LPUL.

45. There can therefore be confidence that the ML/TF risks associated with maintenance of trust money accounts by barristers is low.

B. How the proposed changes will affect Barristers' work

Civil practice

46. The designated services described in proposed Table 6, section 6 in the Bill would capture a large number of services that barristers routinely provide in the course of civil practice. This includes services provided both in litigious and in purely advisory work. The breadth of the wording is such that barristers' services would be designated services even where a barrister is instructed by a solicitor. As addressed further below, this would be duplicative, unnecessary and undesirable. Moreover, the carve-outs from items 1 and 2 of Table 6 for transfers effected pursuant to, or resulting from, orders of courts or tribunals are very limited in scope and many services provided by barristers in connection with litigation would be designated services, notwithstanding those exceptions.

47. The nature of a barrister's work[9] is such a barrister cannot act, or arrange for another person to act, in the various capacities set out in items 3, 7 or 8 of proposed Table 6.

48. The following observations may be made from the outset about the language used in proposed Table 6 of the Bill (and in particular, items 1, 2, 4 and 6 of Table 6):

    a. *First*, "assisting a person" is apt to capture all forms of assistance, including the provision of advice in respect of a transaction at whatever stage;

    b. *Second,* "planning or execution" introduces a broad temporal element to the provision of assistance, so that it may take place at a time wholly remote from when the transaction is brought about (or even when the transaction does not eventuate);

    c. *Third,* "otherwise acting for or on behalf of a person in a transaction" is likely to catch any other role played by a barrister briefed to represent a client who is involved "in a transaction";

    d. *Fourth,* the carve-outs in items 1 and 2 of table 6 in respect of "transfers pursuant to, or resulting from" a court or tribunal order are ambiguous: is it intended that the order must give legal effect to the transfer by express reference to it? Or is it intended by "resulting from" that any transaction that is causally linked to the order is caught? If the effect of the order is to bring about a sale or purchase of real estate, or a body corporate or legal arrangement, why is that not caught by the carve-out? How is the circular definition of "transfer" in s 5 of the AML/CTF Act intended to operate in respect of orders giving effect to declarations and alterations of interests in property settlement proceedings, where those orders involve considerations of economic and non-economic value?

49. The broad drafting of Table 6 will have the result that barristers who accept briefs in common areas of civil practice will risk providing designated services in the course of their representation of a client.

[9] Rules 11–16, *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW).

As addressed above, barristers are required to be sole practitioners, and the large compliance costs involved in potentially being a provider of designated services will have to be met by each individual barrister in civil practice, should they wish to continue practising.

50. In order to explain how barristers in civil practice will be affected by the proposed legislation, the relevant Items of Table 6 are addressed in turn below, and non-exhaustive examples of the types of barrister's work that would be captured are given.

Item 1 – assistance in the planning of real estate transactions

51. The designated service described by Item 1 of Table 6 is "assisting a person in the planning or execution of a transaction, or otherwise acting for or on behalf of a person in a transaction to (a) sell real estate; or (b) buy real estate; or (c) transfer real estate (other than a transfer pursuant to, or resulting from, an order of a court or tribunal)".

Advice and representation in the settlement of real estate disputes

52. A large proportion of the litigation which occupies the time and resources of the courts concerns disputes as to the ownership of real property and as to transactions concerning real property. These can include disputes between family members, disputes between vendors and purchasers, disputes between lessors and lessees, disputes concerning property development.

53. In New South Wales, this would include the types of matters commenced in or allocated to the Supreme Court's Real Property List and Possession List, as well as many of the commercial disputes which are managed in the Supreme Court's Commercial List. By way of example, in 2022 and 2023 there were 2,474 filings in the Possession List[10] and 614 filings in the Real Property List[11] of the Supreme Court of NSW.

54. Barristers routinely advise clients as to the terms of proposed settlements of real estate disputes and act for clients in the negotiation of such settlements. As addressed above a barrister's duty to the client includes the obligation to inform or assist them to achieve resolution of a contested claim by compromise, obligations which reflect the real and substantial public interest in parties settling litigious disputes. The provision of those services may take place in the course of a formal alternative dispute resolution process, such as mediation, or in less formal negotiations. Services to achieve settlement of disputes are core aspects of barrister's work and may involve designated services as defined within item 1 of Table 6, where the settlement involves any sale, purchase or transfer of real estate.

55. Only a small fraction of the abovementioned disputes are ultimately resolved by the making of orders by a court or tribunal. The majority of real estate disputes are resolved consensually, through settlements reached either before or after litigation is commenced. The resolution of disputes concerning real property will frequently involve sales, purchases and transfers of real property – for example a transfer of the registered title to a property so as to record a previously unregistered beneficial interest; the execution of a sale contract in specific performance proceedings; the transfer

[10] Supreme Court of NSW, 'Annual Review 2022', p 38; Supreme Court of NSW, 'Provisional Statistics 2023', p 12.
[11] Supreme Court of NSW, 'Annual Review 2022', p 44; Supreme Court of NSW, 'Provisional Statistics 2023', p 17.

of a lease where the dispute concerns the lessor's withholding of consent to the transfer; the registration of an easement or covenant. The scope of the designated services in Item 1 of Table 6 would also likely capture a range of other commercial disputes connected to real estate, such as the exercise of put or call options, the exercise of rights of pre-emption and the winding up of companies, or oppression suits concerning corporations that hold real estate assets.

56. The exception for a "transfer pursuant to, or resulting from, an order of a court or tribunal" is not one which is likely to be of much practical significance. As noted above, the vast majority of disputes concerning real estate are resolved by consensual transactions and are not effected by the making of formal orders, other than orders dismissing proceedings.

57. A barrister will not know when accepting a brief in relation to a dispute:
    a. whether the matter will be resolved by settlement or by adjudication of proceedings to judgment;
    b. whether the resolution of the matter will involve a sale, purchase or transfer of real property, because matters can be resolved by giving effect to transactions that do not reflect the relief sought in proceedings; and
    c. whether the terms of the settlement will involve a court or tribunal order which include a transfer pursuant to or resulting from the order (which may attract the exception), or whether they will involve the sale or purchase of real property (which will not).

58. Moreover, the barrister will ordinarily ascertain that a potential settlement may involve a designated service within item 1 of Table 6 when the relationship with the client is well established. For the reasons explained below, triggering of SMR obligations must ordinarily result in the barrister having to return the brief. There is therefore a significant risk that the public interest in settlement of legal proceedings will be compromised by the removal of the barrister from the settlement process.

59. Proceedings involving real property that are typically disposed of by formal orders such as in family law proceedings or estate proceedings under the *Succession Act 2006* (NSW), need not be resolved in that way. For example, property settlement proceedings in family law claims are commonly resolved by consent orders which are subject to the supervision of the Court pursuant to ss 79 or 90SM of the *Family Law Act 1975* (Cth), but may also be resolved before or after proceedings are commenced by entry into a binding financial agreement pursuant to ss 90D or 90UD, which does not involve the making of any orders by the Court other than to record the discontinuance of the proceedings. Family law barristers are frequently briefed to advise in relation to property settlement matters before proceedings are commenced, and will not know, at the time of accepting the brief, whether the resolution of the spousal or de facto claim will attract the exception or not.

60. The uncertainty as to whether any given brief will ultimately involve the provision of a designated service within item 1 of table 1 will make it extremely difficult for barristers to make an effective AML/CTF risk assessment or develop an effective AML/CTF policy pursuant to proposed ss 26C and 26F of the Bill. It will be extremely difficult for a barrister to identify and assess the risks the barrister may reasonably face in providing designated services when it is impossible to predict when the barrister will be providing designated services in accordance with item 1 of Table 6. The greater the diversity of a barrister's practice, the more difficult it becomes to determine when legal services will engage the definitions in item 1 of Table 6 and whether it will be excluded.

Advisory work in relation to proposed real estate transactions

61. From time to time, some barristers give advice in non-litigious matters in relation to aspects of transactions, or review transaction documents, in such a way that would be caught by the definition of one or more of the designated services. For example, barristers can be briefed to provide advice to a party to a proposed real estate transaction. Such advice may concern the proposed terms of a given transaction, or the legal consequences of the transaction (e.g. tax consequences). The purpose of such advice will usually be to assist the ultimate client in the planning or execution of the proposed transaction. As drafted, the provision of such advice will usually be a designated service, given the breadth of the concept of "assisting a person".

62. This would appear to be the case whether the barrister is briefed by solicitors retained by the party (as is usual) or is briefed directly (as is far less common). In each case, the person who is assisted by the barrister's advice is the party to the proposed transaction. The fact that the barrister's assistance (i.e. advice) may be procured and provided through solicitors would not, as presently drafted, obviously cause the barrister's assistance to fall outside the designated service as defined.

63. The money laundering and terrorism financing risk arising from transactional advice given by a barrister is very low, because the barrister in providing an opinion in those circumstances:
    a. would, necessarily, not be involved in carrying out the relevant transaction on which advice is given, given the constraints of the Barristers' Rules; and
    b. would be very likely unaware of the source and destination of the funds that relate to the proposed transaction, as in many cases those facts will not be relevant to the provision of the opinion.

64. Any money laundering or terrorism financing risk that did exist would be addressed completely in circumstances where the barrister providing the transactional opinion was briefed by a solicitor who is a reporting entity.

65. For almost all, if not all, barristers, advice on transactional work is a very limited, non-core part of their practice. The obligation to adopt and maintain an anti-money laundering and counter-terrorism financing program and to undertake customer due diligence requirements would therefore give rise to a disproportionate burden. To the extent that this encourages barristers to make a decision to decline to provide transactional advice, there is a potential impact on the legal effectiveness of real estate and other transactions, which creates the potential for increased litigation. Barristers, having regard to their specialist expertise and their duties to act independently, have an important role to play in ensuring that real estate and other transactions are undertaken in accordance with law. This protection would be removed if barristers declined to provide advisory services in respect of transactions due to the compliance burden of doing so.

66. For example, there is the potential to restrict an important bulwark against tax avoidance. Many proposed transactions have been abandoned as a result of obtaining negative opinions from the Australian tax bar, from barristers who mainly advise on disputes and may very well be disinclined to continue to provide transactional tax advice if it attracts a disproportionate administrative burden.

Item 2 – assistance in the planning of corporate, trust, partnership, joint venture and other transactions

67. The designated service described by Item 2 of Table 6 is relevantly similar to Item 1 save that it concerns the sale, purchase or transfer of "a body corporate or legal arrangement" rather than "real estate". The phrase "legal arrangement" means an "express trust, a partnership, a joint venture, an unincorporated association or any similar arrangement".

68. There is real potential confusion and ambiguity created by the use of the defined phrase "legal arrangement" in Item 2 of Table 6. Many of the "legal arrangements" are not obviously (or ordinarily) capable of being bought, sold or transferred as such. What does it mean to sell a trust or a partnership? Does the sale of the property of a trust constitute a sale of the "legal arrangement"? Similarly, does the sale of the property or business of a partnership constitute a sale of a "legal arrangement"? Unincorporated associations, by definition, have no legal personality and are incapable of being owned. How is it that an unincorporated association could be bought, sold or transferred? The intended application of Item 2 to "legal arrangements" should be clarified.

69. At present, the only sensible approach a barrister could take would be to treat the phrase as ambiguous, and in order to protect the barrister from the consequences of non-compliance, assume that any transfer of an interest in, or an interest held by, a corporation, trust or partnership is captured, which would give the provision an extraordinary breadth to capture many aspects of ordinary commerce. The compliance costs involved in this approach are unduly onerous for barristers operating as individual small businesses. The better approach is for the legislation to be drafted with clarity and precision, and with a clear focus on the differences between direct and indirect transfers and legal and beneficial transfers.

70. The points made above about item 1 of Table 6 otherwise apply with equal force to item 2. Many civil disputes concern agreements to buy, sell or transfer bodies corporate: e.g. a dispute as to the sale of a small business, structured as a sale of the trading entity. These are common and regular disputes in the Local, District, Supreme and Federal Court, depending on the size of the business in question in relation to the jurisdictional limit (if any) of the court, and are commonly coupled with contractual claims and claims under the Australian Consumer Law (for example, allegations of misleading or deceptive conduct in the course of the negotiation of the sale). Most of these disputes never reach the courts, and few are resolved by contested hearings. A barrister who advises or represents a client in the negotiation of a settlement of such a dispute, where the settlement involves any transfer of a body corporate or "legal arrangement" as proposed to be defined in s 5, may be providing a designated service. Again, the barrister cannot know on receipt of a brief to appear in proceedings whether a settlement of the proceedings will involve the provision of designated services as defined in item 2 of table 6, and whether the exception will apply in the circumstances of the settlement.

71. Barristers can also be briefed to advise about the proposed sale, purchase or transfer of bodies corporate. Again, such advice will typically concern the terms of the proposed transaction or its legal consequences. The purpose of such advice is usually to assist in the planning of the transaction, and the fact that advice may be procured and provided through a solicitor would not clearly exempt the barrister's services from Item 2.

Item 4 – assistance in organising, planning or executing a transaction for equity or debt financing relating to a body corporate or a legal arrangement

72. The drafting of Item 4 is convoluted and ambiguous as well as being broad. Much of the ambiguity and breadth is created by the phrase "relating to". The transaction for equity or debt financing must "relate to" a body corporate (or proposed body corporate) or legal arrangement (or proposed legal arrangement). Presumably that captures (at least), circumstances in which the financing is provided by, to, or for the purposes of, the body corporate or legal arrangement.

73. This designated service would be liable to capture much advisory work of barristers, especially tax advice, which frequently concerns the organisation and planning of financing transactions. Barristers can also be briefed to provide advice on discrete aspects of other financing transactions: e.g. the efficacy of security arrangements including under the *Personal Property Securities Act 2009* (Cth); the application of relevant provisions of the *Corporations Act 2001* (Cth); whether other contractual arrangements would breach the covenants and other promises given under the financing documents. As with the other items, on its face, the provision of such advice will constitute a designated service whether or not the barrister was briefed by the solicitor, as the barrister's assistance is provided to the person organising or planning the transaction, and not to the solicitors themselves.

Item 6 – assistance or representation in the creation or restructuring of bodies corporate and legal arrangements

74. The application of Item 6 to barristers' work in civil litigation is potentially very broad. Much civil litigation involves disputes as to the terms or operation of "legal arrangements": e.g. disputes as to the operation of a trust, disputes as between business partners or joint venturers. Many such disputes result from underlying features of the legal arrangements: e.g. ambiguities as to their terms, or flaws in their conceptual design. Often, the best and natural solution is to restructure the legal arrangement so as to resolve the extant dispute and to minimise the prospect of further dispute going forward. Barristers are frequently involved in advising on and negotiating such restructures, in the course of disputes. For example, a barrister who advised on and negotiated an amendment to a joint venture agreement as part of the broader settlement of a civil dispute between the joint venturers would likely be providing a designated service as defined.

75. Further, many non-contentious corporate and other restructures are effected through civil proceedings. Examples include transfers of the business of an insurer under the *Insurance Act 1973* (Cth) and the *Life Insurance Act 1995* (Cth); schemes of arrangement and corporate reconstructions under ss 411 and 413 of the *Corporations Act* 2001 (Cth); trust schemes under s 63 of the *Trustee Act* 1925 (NSW); and administrators' share transfers under s 444GA of the *Corporations Act 2001* (Cth). A barrister who appears in such a proceeding is likely to act for or on behalf of a client so as to provide designated services for the purposes of item 6 of the Table. However, item 6 omits the limited exception found in items 1 and 2 of Table 6. There would appear to be no principled basis for omitting the exclusion from Item 6. In fact, the exception makes more sense in Item 6 because a barrister briefed in relation to such a transaction has some certainty that the outcome of the matter will be court orders, whereas, for the reasons already explained, that cannot be reliably predicted for the types of matters captured by Items 1 and 2. Moreover, each of these transactions requires scrutiny by the relevant regulator (ASIC or APRA as the case may be) before orders approving them will be made by the court. Those features significantly minimise the AML/CTF risks associated with the transaction.

76. As with the items discussed above, Item 6 would capture much advisory work done by barristers in civil practice. In addition to general corporate and trusts advisory work, and tax advice, this item would be liable to capture much insolvency advice provided by barristers. Such advice will often involve the planned restructure of bodies corporate or other legal arrangements.

Criminal practice

77. The work of barristers practising in the criminal law does not ordinarily involve advising or acting for clients in relation to proposed transactions of the kind described in Table 6. Barristers practising in crime are typically briefed to advise on liability or sentence after the relevant conduct or circumstance has taken place. The focus on past conduct and circumstances makes it unlikely that the barrister will be asked to assist in the planning or execution of a transaction.

78. Notwithstanding the foregoing, there are aspects of practice in the criminal law and related areas which may expose a barrister to the possibility of providing a "designated service". Three examples follow.

Acting for a client in bail proceedings

79. Applying for bail for a client, or responding to a prosecution detention application, is an important aspect of criminal practice. A grant of bail usually involves the imposition of bail conditions.[12] Bail conditions are imposed to address "bail concerns" held by the court and the related risks posed by a grant of bail.[13] A bail condition can require security to be provided for compliance with a bail acknowledgement. Security may be in the form of an agreement to forfeit cash in the event of non-compliance, depositing cash with the bail authority, or, relevantly, depositing "acceptable security" with the bail authority.[14] "Acceptable security" frequently involves real property or an interest in real property.

80. A barrister representing a client who seeks bail will have a role in advising on, and proposing to the court, appropriate bail conditions. It is conceivable that in doing so, a barrister may be required to obtain instructions about a client's assets and financial position, or to advise on the sale or transfer of assets (including real property). Given the breadth of the words "assisting" and "planning" used throughout proposed Table 6, it is possible that this aspect of a barrister's work may be caught by items in the Table and hence constitute a "designated service". While the imposition of the bail condition would ultimately form part of a court order, owing to the factual and temporal scope of items 1 and 2 it is not at all clear that advice to the client in preparation for the bail application would fall within the exception relating to transfers "pursuant to, or resulting from, an order of a court".

[12] Section 20A and Part 3, Div 3, *Bail Act 2013* (NSW).
[13] Sections 17 and 19, *Bail Act 2013* (NSW).
[14] Section 26, *Bail Act 2013* (NSW).

Acting for a client in proceeds of crime forfeiture proceedings

81. It is not uncommon for barristers acting for clients in substantive criminal proceedings to also be briefed in related confiscation and forfeiture proceedings brought pursuant to proceeds of crime legislation.[15] This work will usually involve the barrister seeking instructions and advising on the client's assets and financial affairs. In particular matters, especially in respect of 'white collar' crimes such as taxation fraud, money laundering offences or dishonesty offences under the *Corporations Act 2001* (Cth), the barrister may be required to advise on complex financial structures or entities.

82. In order to pursue settlement of the case before a final hearing, the barrister may have to advise on a prospective transaction which would permit settlement to occur. Again, it is possible that this aspect of a barrister's work may constitute a "designated service". Clients involved in confiscation and forfeiture proceedings will ordinarily be subject to orders restraining them from dealing with their interests in property. Accordingly, the approval of the relevant 'proceeds authority' will usually be required before any proposed transaction take place. While the transaction might ultimately require a court order before it can take effect (e.g. variation of a restraining order), the ambiguities in the drafting of the exemption mean that a barrister cannot be certain whether advice to the client in respect of the proposed mechanism of settlement would fall within the exception relating to court orders, particularly if the advice related to a transaction that did not ultimately form part of any court order.

83. The AML/CTF regime may impede settlements of proceeds litigation, where it is clearly in the public interest that such settlements be pursued and reached. The necessary involvement of a 'proceeds authority' in any such settlement (and the need for their approval in dealing with restrained property) provides further reason why imposition of AML/CTF obligations in this context is inapposite and likely to prove disruptive.

Acting for a client in domestic violence proceedings

84. Domestic violence proceedings make up a significant proportion of criminal cases before the courts. They almost always involve related applications for an apprehended domestic violence order (ADVO).[16] Unsurprisingly, ADVO proceedings are frequently connected with family law proceedings arising from the breakdown of a domestic relationship.

85. ADVO applications will typically seek the imposition of orders limiting or prohibiting contact between the defendant and the 'person in need of protection'. Representing litigants in ADVO proceedings may require the barrister to consider the property arrangements as between the affected parties and to advise on a prospective dealing which is impacted by an ADVO. Whether that advice will result in a transfer falling within the exception for court orders is unlikely to be ascertained before the advice is provided.

[15] Such legislation includes the *Proceeds of Crime Act 2002* (Cth) and the *Criminal Assets Recovery Act 1990* (NSW).
[16] See Part 4, *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

Contrary to the public interest to make barristers practising in criminal law subject to the AML/CTF Act

86. It is contrary to the public interest to extend the operation of the AML/CTF Act to barristers practising in the criminal law. The following reasons support this conclusion.

87. Each of the examples given above indicates that exposure to the proposed AML/CTF provisions will occur in very limited and tangential ways, and in areas of work that are quite ancillary to a criminal law practitioner's core work. The risk of a barrister being used to facilitate money laundering or terrorism financing in such circumstances is remote.

88. The examples also illustrate that because of the tangential nature of the potential exposure and the ambiguity in the drafting of the items in Table 6, there is resulting uncertainty as to whether the barrister is in fact providing a "designated service". Given the onerous obligations under the AML/CTF regime, it is highly undesirable that barristers acting in serious criminal litigation be exposed to such uncertainty.

89. Barristers in the criminal law typically practice in small legal teams, often consisting only of the barrister and an instructing solicitor. The burden of complying with the proposed AML/CTF obligations will be disproportionately felt by practitioners in this field.

90. Extension of the AML/CTF obligations to barristers in the criminal law will have likely consequences contrary to the public interest. The most important of these is that the potential exposure may prove a disincentive to barristers to accept work affecting vulnerable clients (i.e. persons accused of crimes or the subject of alleged domestic violence) because the work possibly or indirectly engages AML/CTF obligations. It is essential to the administration of criminal justice that criminal barristers be able to properly advise and represent their clients.

Mediators

91. Barristers' work also includes conducting a mediation or arbitration or other method of alternative dispute resolution (Barristers' Rules, 11(d)).

92. When acting as a mediator or in similar capacity in relation to an informal dispute resolution process, a barrister is performing an important role in achieving the public interest in achieving early settlement of legal proceedings. The barrister is typically retained by both parties to conduct the mediation, each of which are typically represented by solicitors. Everything that is said at a mediation is confidential and in many courts is not admissible in evidence, by force of statute or by operation of settlement privilege (see s 52B of the *Federal Court of Australia Act 1976* (Cth) and s 131 of the *Evidence Act 1995* (Cth).

93. The resolution of proceedings by way of mediation is likely to give rise to the potential for designated services to emerge in the course of determining the mechanism by which settlement can be achieved, in the same way as is identified above in relation to proposed item 1 and 2, Table 6 services. Barristers practising as mediators are likely to fall within the definition of "assisting a person in the planning or execution of a transaction" to the extent that they assist the parties to devise the settlement terms and convey offers in relation to those terms. Mediators will therefore be confronted with the same issues as identified above, and because the parties to a mediation are typically represented by

solicitors, the risks associated with the delivery of potential designated services by a mediator are minimal and regulation of barristers acting in that capacity would be disproportionate to the risk and to the public interest in achieving early settlement.

C. Impact of proposed changes on Barristers' practice

94. The matters outlined above lead to the following conclusions about the impact of the proposed Table 6 designated services on barristers.

95. *First*, barristers are sole practitioners with existing fiduciary and regulatory obligations pursuant to the legal services legislation that are directed to ensure that they act as independent officers of the court and in furtherance of the administration of justice. The practice rules imposed on barristers are all directed at various important public interests associated with the administration of justice, including the need to operate in accordance with the law. Barristers' professional obligations and professional conduct regulation operate so as to minimise the risk of any facilitation of criminal activity.

96. Barristers' work cannot involve the receipt or disposal of any property on behalf of a client, nor can they take any steps to effect or execute a transaction. Their role is limited to specialist advocacy and advice. On some occasions, in particular in relation to settlement of proceedings, that advice may relate to transactions. Accordingly, the residual risk arising from barristers' potential involvement in the proposed designated services is very low. Where the barrister is instructed by a solicitor that is subject to the AML/CTF Act in respect of Table 6 services, that will reduce the residual risk even further and any information obtained by the barrister pursuant to the same obligations will be entirely duplicative.

97. *Second*, the nature of barristers' practices is such that it will be difficult to predict before or at the time of acceptance of a brief whether it will involve the provision of designated services as defined in Table 6. Unlike financial service providers, bullion dealers and gambling service providers the subject of the present Tables 1 to 3 of s 6 of the AML/CTF Act, barristers do not provide regular and systematised services the subject of which is predictable. Each brief received by a barrister is different and may or may not involve matters that involve designated services.

98. In order to avoid the risk of exposure to severe penalties pursuant to proposed ss 26E, 26F and s 175(5) of the AML/CTF Act, barristers will be forced to apply the AML/CTF obligations to the whole of their practice, even though the majority of their work does not comprise designated services and presents no AML/CTF risk. Undertaking and updating a risk assessment and developing and maintaining an AML/CTF Policy in compliance with proposed Part 1A, Divisions 2 and 3 of the AML/CTF Act will be very difficult in circumstances in which the barrister cannot predict in advance the number and type of cases that may involve the provision of designated services and identify or assess the nature or degree of the risk that may arise from those services in the circumstances of each case.

99. Assuming compliance can be achieved, the cost and time associated with maintaining the AML/CTF Policy and undertaking (or securing assistance to undertake) customer due diligence, transaction and suspicious matter reports and record keeping is likely to be disproportionately burdensome, particularly because a barrister does not have a direct relationship with a client (despite acting on

their behalf) where instructed by a solicitor. The increased regulatory burden will likely result in an increase in fees charged by barristers, which may impact on access to justice for many clients. The impact of increased costs is likely to be more severe where the value of the dispute or transaction is relatively low and the client of relatively limited means.

100. Alternatively, a barrister may determine that the regulatory burden of performing work that may involve designated services is too great and simply decline or to refuse to accept work that carries a risk of performance of designated services (for example, real property disputes or schemes of arrangement). Again, the likely outcome is an adverse effect on access to justice for many clients, contrary to the intention of the cab rank rule and an impact on the public interest in settlement of proceedings.

101. *Third*, the residual risk associated with briefs received by solicitors that are also reporting entities is negligible, because the solicitor will already be subject to the client due diligence and reporting obligations under the AML/CTF Act. AUSTRAC will derive no further benefit from barristers' compliance with the AML/CTF Act because:

    a. requiring barristers to undertake customer verification will not produce additional information. A barrister undertaking KYC verification is necessarily dependent on the solicitor for the material necessary to undertake this verification. That is because the barrister is engaged by the solicitor and not the client and the barrister does not have a direct line of communication to the client. The barrister will not be able to undertake any different or further enquires to that which the solicitor has undertaken and will be confined to the very same material the solicitor has used because that material must be obtained from the solicitor.

    b. Requiring a barrister to report suspicious matters is unlikely to produce additional information. This is because a barrister receives his or her information about the matter from the solicitor, and any such information is privileged where it is provided for the purposes of the barrister providing advice or appearing in litigation (which is in essence all a barrister is permitted to do (Barristers' Rules, 11)). A barrister cannot make independent enquiries about the transaction as it will place him or her at risk of becoming a witness (Barristers' Rules, 13).

    c. Requiring barristers to comply with the information keeping requirements will not lead to additional information being kept, given that a barrister receives his or her information about any transaction from the solicitor. The solicitor will need to retain copies of this material anyway under the AML/CTF regime. Indeed, solicitors are already required to keep this material for 7 years under the Australian Solicitors Rules; barristers are not and by convention return the brief to the solicitor at the end of the retainer (thereby keeping the cost of briefing barristers lower since they do not need to maintain storage facilities).

102. *Fourth*, the residual AML/CTF risk will be higher when a barrister is providing services to clients without an instructing solicitor that is subject to the AML/CTF Act. However, barristers performing such services are already subject to increased regulatory burdens in relation to their clients. The imposition of additional burdens may cause barristers to refuse to undertake direct access work in areas in which vulnerable clients require assistance, including pro bono briefs and paid briefs in minor

civil and criminal matters where the client cannot afford a barrister and a solicitor. That outcome will have a serious impact on access to justice. The Association submits that any amendments to the AML/CTF Rules should include rules that address this outcome.

103. *Fifth,* the reporting obligations imposed in particular by s 41 of the AML/CTF Act are wholly inconsistent with barristers' relationship of trust and confidence with a client, as addressed further below.

104. Having regard to all of the above matters, the Association submits that the burden imposed by inclusion of barristers in the AML/CTF regime where briefed on instructions by a solicitor is disproportionate to the risk associated with barristers' involvement in designated services as defined in the Bill. Further, imposing AML/CTF obligations on barristers in these circumstances has the capacity to disproportionately interfere with barristers' role in the administration of justice and the importance of the services they provide to clients in that capacity.

105. In light of the considerable uncertainty associated with application of Table 6 services to barristers' practice, the Association submits that the clearest and most efficient means of addressing the concerns outlined above is for there to be a legislative provision that excludes barristers from the operation of the AML/CTF Act where acting on the instructions of a solicitor.

D. SMR obligations, compulsory notices and tipping off offence

106. A consequence of subjecting barristers to the AML/CTF Act in respect of Table 6 designated services is that they will be required to make SMRs in respect of clients (s 41 of the AML/CTF Act), either before or in the course of provision of designated services. The SMR obligation arises for barristers only in respect of clients. It therefore directly raises a conflict between the duty that the barrister owes to their client (including duties of confidentiality) and the obligation to make reports to AUSTRAC about the client's affairs.

107. The Barristers' Rules are clear on the circumstances in which a barrister is permitted to disclose confidential information of the client without authorisation (see Barristers' Rules, 114 to 122). Disclosure without the client's authorisation is permitted only under compulsion of law and in circumstances in which the barrister believes on reasonable grounds that there is a risk to the safety of a person. A risk to the safety of a person is a more immediate and acute risk than a risk of money laundering, terrorism financing or other, predominately economic, crimes.

108. In *AB (A Pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1; [2018] HCA 58 at [10] the High Court said of a barrister who acted as an informant against her clients: "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." The barrister's actions (and those of the Victorian Police) were described as "debas[ing] fundamental premises of the criminal justice system."

109. The High Court identified two aspects in which the barrister's conduct was wrongful. The first is that the barrister was in breach of her duties to her clients in informing against them. The second is that the conduct had the tendency to undermine the integrity of the court and public confidence in the criminal justice system, because the evidence obtained by means of the barrister's information

against the client (whether used directly or indirectly) was unfairly obtained, contrary to a client's right to silence, to the extent that any criminal proceedings were likely to be stayed or any conviction obtained as a result was liable to be quashed. Moreover, non-disclosure of the fact that the barrister has informed against the client breaches the fiduciary duty to disclose to a client facts that may be material to their defence: *O'Reilly v Law Society of NSW* (1988) 24 NSWLR 204, 213-215.

110. In response to the above case, the Association published *Guidance for NSW Barristers in the wake of the matter of Lawyer X*, which identified the ethical breaches outlined in the above paragraph. In that Guidance, the Association advised:

> The independence of the bar is such an integral aspect of a barrister's professional obligations and the rule of law itself, that a barrister should not be subservient to the Executive. Acting as a registered source to a law enforcement agency carries with it so serious a risk to a barrister's independence that counsel is likely to be confronted with major ethical difficulties should he or she become an informant even against individuals who are not clients.

111. The same ethical issues arise in relation to obligations under ss 41 (and ss 49, proposed 49B and 49C of the AML/CTF Act), even if the reporting obligation is under compulsion of law. Any compulsive requirement to disclose client information should be proportionate to the objects of the Act seeking to impose the requirement, weighed against the importance of confidentiality to the relationship between legal practitioner and client and the administration of justice. Should the Act impose obligations on barristers that erode confidentiality and legal professional privilege, it would directly conflict with their professional obligations. Moreover, it would affect the confidence that clients have in the legal profession and broader access to justice principles.

112. Proposed s 49C is intended to provide authorisation to persons to give the AUSTRAC CEO such information as may assist him in the performance of his functions, despite any general law obligation of confidentiality protecting that information. When applied to barristers, it is capable of operating as a rider to inform on clients that would create the same risks to the independence and ethical position of the barrister in relation to their client and the Court as arose in the Lawyer X matter.

113. Such are the compromises to the barrister-client relationship arising from reporting suspicions about their conduct that a barrister would have to return the brief because the client's interest in the matter is in conflict with the barrister's own interest in complying with the obligation to make a suspicious matter report (Barristers' Rules, 101(b)). However, the barrister is then placed in an impossible position by the proposed amended tipping-off provision in s 123 of the AML/CTF Act. Ordinarily, a barrister returning a brief would be expected to explain to the instructing solicitor and/or the client the basis on which the brief is returned. However, s 123(1) precludes the barrister from doing that. Two potential consequences emerge:

    a. *First*, in the absence of an explanation, the client complains to the Legal Services Commissioner about the conduct of the barrister, and the barrister is precluded from disclosing to either their professional indemnity insurer, the Bar Council or a court or tribunal adjudicating any professional conduct proceedings the justification for returning the brief. Section 123(1) precludes any disclosure in the barrister's defence and section 123(6) operates to overcome any ability of a court or tribunal to compel such a disclosure

(for example by answering questions in evidence and/or in response to a subpoena or similar requirement). Even assuming that disclosure to a "person" for the purposes of s 123(1) does not include disclosure to a court, any defence necessarily involves disclosure to the other parties and s 123(1) would be contravened. In that way, s 123 has the capacity to deny a barrister procedural fairness in defending professional consequences brought about by that very section.

b. *Second*, the mere act of returning the brief without explanation is sufficient to be "reasonably be expected to prejudice an investigation" for the purposes of s 123(1)(d) of the AML/CTF Act, and the barrister will expose themselves to criminal liability under s 123(1).

114. The provisions apparently applicable to barristers facing such a dilemma do not offer any protection:

a. Section 123(4) provides for an exception to disclosure of the making of a suspicious matter report to a client where the disclosure is made for the purposes of dissuading the customer from engaging in conduct that constitutes, or could constitute, evasion of taxation laws or commission of a State or Commonwealth offences. However, a barrister who has made a suspicious matter report is no longer in a position to dissuade the client, by way of legal advice, from engaging in such conduct, because they are no longer in a position to retain the brief by reason of the conflict of interest created by making the report.

b. Section 124(2) provides that evidence is not admissible in any Court or tribunal proceedings as to whether a suspicious matter report was prepared or provided to AUSTRAC. That has the result that the barrister cannot adduce evidence as to the making of a report as an explanation for returning a brief. Moreover, that immunity does not extend to criminal proceedings for offences against s 123 of the Act or civil penalty proceedings under s 175 of the Act, so that the barrister remains exposed for any alleged failure to make or transmit a report.

c. Likewise, s 235(1) provides an immunity to any "action, suit or proceeding (whether civil or criminal)" in relation to anything done or omitted to be done in good faith in compliance with requirements under the Act or the Rules, but it provides no practical protection in circumstances in which the barrister is unable to defend themselves for the above stated reasons, and in any event it does not apply in respect of civil or criminal proceedings brought against the barrister for contraventions of the AML/CTF Act.

115. The fundamental and irresolvable ethical issues arising from the obligation to make a suspicious matter report and the preclusion on disclosure of that fact are another reason why barristers represented by instructing solicitors should not be made subject to AML/CTF obligations and should instead be exempted from the inclusion in the definition of designated services in proposed Table 6 of the Bill. Moreover, they are of such fundamental importance that consideration should be given by the Committee to excluding all barristers from the requirements of the SMR and tipping-off provisions.

E. Legal professional privilege

116. At the heart of legal professional privilege is confidentiality. In turn, confidentiality is essential to the trust and confidence inherent in the relationship between legal practitioner and client. The proposed amendments in relation to legal professional privilege do not, in the Association's submission, strike an appropriate balance between the reporting and record-keeping requirements of the AML/CTF Act and the duties of lawyers to their clients, including the duty to preserve the clients' fundamental common law right to legal privilege and to access to lawyers.

117. The Bill creates a regime whereby a law practice may claim privilege on behalf of their client where required to make reports or respond to requests and notices requiring information, by issuing an "LPP form" which among other things must set out the grounds on which privilege is claimed. Where the law practice believes that "all of the information comprising the grounds on which the reporting entity holds the relevant suspicion" is privileged, it may refuse to give a SMR. Otherwise, where some of the information forming the basis for a reasonable suspicion is privileged, or where information requests and notices (including those to be issued pursuant to ss 49 and 49B) catch privileged material, the law practice must give to the AUSTRAC CEO a LPP form. How privilege claims are to be resolved on submission of the LPP forms is to be the subject of guidelines made by the Minister under proposed s 242A. At least in the first instance, the privilege claims articulated in the LPP form are to be directed to AUSTRAC, and the explanatory memorandum states that the guidelines will be directed to "an approach which will best assist AUSTRAC in deciding whether to accept, review or challenge a legal professional privilege claim."

118. The Association supports the proposal that a reporting entity need not give a SMR where the information supporting any reasonable suspicion for the purposes of s 41 is privileged. However, the Association has misgivings about the balance of the scheme, for the following reasons.

119. *First*, the requirement to give an LPP form in relation to reports and notices under ss 41, 49 and proposed 49B will be impossible to comply with because proposed s 123(2) precludes disclosure of receipt of a notice or the proposed making of a SMR. The law practice will be prevented from seeking instructions from the client, the owner of the privilege, about the privilege claim to be made on their behalf. The fundamental disadvantage created by this situation will persist through to the resolution of the privilege claim, and a client may find themselves in the position of losing privilege over their information without even knowing that this has occurred or having an opportunity to be heard in relation to it.

120. *Second,* the requirement to give an LPP form in the context of the information and records held by law practices will be a difficult burden to discharge. All confidential communications between lawyers and clients for the purpose of providing legal advice or legal services in respect of litigation attract the privilege. That generally covers the great majority of the information communicated to lawyers by their clients and the records of that information held by the lawyers. That information comprises much of the content and records of the business undertaken by lawyers that will be subject to AML/CTF Act compliance. Requiring a legal practice to identify and articulate claims for privilege in respect of all of the information it would be required to communicate is extremely burdensome, particularly when the privilege belongs to the client and can be disclosed (including as to its existence) only with the client's informed consent. The burden of articulating privilege claims in detail within

a confined timeframe, under threat of a civil penalty, is likely to lead to inadvertent disclosure of privileged information.

121. *Third*, the Association has concerns about the intention behind the guidelines for resolution of privilege claims, at least to the extent that it suggests that AUSTRAC would have a role in determining those claims. AUSTRAC is in no way an independent arbiter of a claim for privilege: it wants the information the subject of the claim. Lawyers should not have to prove to AUSTRAC's satisfaction that a suspicion is held but that it is based on privileged information, or that documents or information are the subject of a claim for privilege. Such a requirement is fundamentally incompatible with the obligations of confidence owed to clients and the reasons for those obligations: namely that the encouragement of full and frank disclosure to lawyers by clients promotes the efficient and effective administration of justice. The Association submits that the proper vehicle for ultimate resolution of disputed claims for privilege must always be a Court. Where alternative means of resolution are to be deployed, they must be wholly independent from AUSTRAC. In either case, the client must have the opportunity to be heard in relation to any dispute as to the existence of a privilege that is theirs to claim.

122. Thank you for the opportunity to provide a submission in relation to this important matter. Should you require 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