NEW SOUTH WALES
BAR ASSOCIATION

Our ref: DIV24/240

3 June 2024

Attn: Economic Crime Team
Attorney-General's Department
4 National Circuit
BARTON ACT 2600

By email: economiccrime@ag.gov.au

Dear Economic Crime Team,

Reforming Australia's anti-money laundering and counter-terrorism financing regime – second phase consultation

1. The New South Wales Bar **Association** welcomes the opportunity to provide input to the Attorney-General's Department (**AGD**) Second Stage Consultation Paper 2 Modernising Australia's anti-money laundering and counter-terrorism financing regime: **Consultation Paper** on reforms to simplify and modernise the regime and address risks in certain professions, particularly its proposed expansion of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) to the legal profession.

2. The Association has limited its contribution to those matters raised in the Consultation Paper that affect barristers.

3. In this letter, the Association makes reference to its submission to the AGD dated 8 June 2023 in relation to Stage 1 of the consultation process (**Stage 1 Submissions**). The Stage 1 Submissions are **enclosed** with this letter.

Scope of Tranche 2 regime – Exemptions recognised by AGD and designated services

4. The Association notes that the Consultation Paper provides that 'work undertaken by barristers' and 'representing a client in legal proceedings' is not intended to be captured by the proposed designated services outlined in the Consultation Paper.[1] It is not clear whether it is proposed to introduce into the AML/CTF Act an exclusion or exemption covering work of this nature.

5. For the reasons stated in paragraphs 33 to 36 and 67 to 69 of the Stage 1 Submission, it is necessary and appropriate for there to be an express exclusion of barristers (acting in that capacity) from the operation of the AML/CTF Act. That is especially so where:

    a. the Consultation Paper suggests that 'businesses that provide 'designated services' in the course of carrying on a business would be regulated under the regime regardless of how they brand their business or identify themselves'[2];

[1] Consultation Paper, p7.
[2] Consultation Paper, p7.

b. it is unclear whether advice in respect of documents that bring about the settlement of legal proceedings would fall within proposed designated services 1, 2, 4 or 5 where the settlement of the proceedings involves aspects of the transactions covered by those services; and

c. in limited circumstances, some barristers give advice in non-litigious matters in relation to aspects of transactions or review transaction documents in such a way as to fall within the descriptions for proposed designated service 2[3] proposed designated service 4[4] or proposed designated service 5[5] but *do not* involve the barrister carrying out those transactions.[6]

6. In the circumstances explained in paragraphs 33 and 34 of the Stage 1 Submissions, that is that a barrister is briefed to advise on the effectiveness of a proposed transaction or corporate structure and does so on instructions from a solicitor who is retained to advise on or assist in carrying out the transaction, there is minimal residual risk[7] of the barrister being used as a means to facilitate money laundering or terrorism financing, and any risk that could arise is addressed by the obligations that solicitors will bear in carrying out the proposed designated services.

7. For barristers to be subject to the AML/CTF Act in respect of very limited, non-core aspects of their practice will impose a disproportionate burden on them, particularly in respect of the obligation to adopt and maintain an anti-money laundering and counter-terrorism financing program in compliance with sections 81 and 84 of the AML/CTF Act and undertaking customer due diligence requirements. The likely outcome is that barristers decline to provide those services. The impact of this on the intention of the cab rank rule is addressed in paragraphs 37 to 39 of the Stage 1 Submissions.

8. Moreover, there is a well-recognised public interest in facilitating settlement of court proceedings. The work of barristers and solicitors is important to further this interest, both in participating in mediation or settlement negotiations, and by advising on the effective disposition of the proceedings by agreement. If a barrister is to be subject to AML/CTF Act obligations in connection with advice as to the settlement of a dispute (which typically occurs at a point when the relationship between a barrister and a client is well established) there is a real risk that the public interest in facilitating settlement of legal proceedings will be compromised because a barrister is unable to freely participate in the process.

9. For the above reasons, the Association submits that work undertaken by barristers and work in connection with legal proceedings should be expressly excluded from the scope of the proposed

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[3] Consultation Paper, p 9, second and third bullet points.
[4] Consultation Paper, pp 10-11, proposed definition of 'preparing for, carrying out, or organising transactions for contributions.'
[5] Consultation Paper, p 5, first and second bullet points.
[6] For example, it is not uncommon for senior counsel to be briefed to advise on the operation of a specific proposed clause in transaction documents in large commercial matters in the course of negotiations as to the terms of those documents, but otherwise be unfamiliar with the mechanics of the transaction as a whole, and in particular, the source and destination of funds that are associated with the proposed transaction.
[7] When regard is had to the controls described in paragraphs 14 to 32 of the Stage 1 Submissions.

designated services pursuant to s 247 of the AML/CTF Act,[8] in the manner proposed for prescribed disbursements in respect of proposed designated service 3.[9]

Legal professional privilege and confidentiality

10. The Association makes submissions in respect of this issue separately to its position on whether barristers should be made subject to the AML/CTF Act. The reason for this is that the proposal for addressing legal professional privilege in the Consultation Paper presents an unacceptable imposition on the relationship between lawyer and client and presents real concerns for the integrity of the profession and the administration of justice.

11. The Association submits that the proposal outlined in the Consultation Paper in relation to confidentiality and legal professional privilege should be reconsidered. As presently framed, the proposal does not strike an appropriate balance between the fundamental purpose of confidentiality and legal professional privilege on the one hand and the objects of compliance with the AML/CTF Act on the other.

12. 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 Consultation Paper does not engage with the tension between the reporting and record-keeping requirements of the AML/CTF Act and the duties of lawyers to their clients. Paragraphs 59 to 63 of the Stage 1 Submission address the consequences for clients and lawyers if lawyers are placed in a position where they are forced to effectively waive a client's privilege by compliance with reporting and disclosure requirements under the AML/CTF Act.

13. The Consultation Paper does not explain why, or how, the proposed regime for claiming legal professional privilege in the context of AML/CTF compliance appropriately balances the objects of the AML/CTF Act against citizens' fundamental common law right to legal privilege and to access to lawyers with all of the incidents of the lawyer-client relationship, including confidentiality.

14. The proposal in the Consultation Paper contains two critical misconceptions.

15. The first misconception is that undertaking matters such as customer due diligence, ongoing customer due diligence, record keeping and co-operation with AUSTRAC monitoring does not affect confidentiality or legal professional privilege. 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.

16. The second misconception is that compliance with AML/CTF requirements and investigations is equivalent to that imposed under other regulatory regimes such as the *Corporations Act 2001* (Cth), *Australian Securities and Investments Commission Act 2001* (Cth) and the *Competition and Consumer Act*

[8] Or in the AML/CTF Act, as comprehended by Consultation Paper 5: Broader Reforms to simplify, clarify and modernise the regime, p 31.
[9] Consultation Paper, p 11.

2010 (Cth). Those regimes are typically directed to investigations initiated in respect of suspected contraventions of the Act, confined to a particular transaction or aspect of an entity's business. In those circumstances, identifying and articulating a claim for legal privilege is an onerous but attainable task. AML/CTF compliance covers the whole of a reporting entity's business. Where that business is a legal practice, it is likely that much of the information to be disclosed to AUSTRAC will be covered by obligations of confidentiality and privilege. Requiring a legal practice to identify and articulate claims for privilege in respect of all of the information it would be required to communicate to AUSTRAC under the AML/CTF Act 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.

17. The regime proposed in the Consultation Paper is not consistent with the interpretative note to the Financial Action Task Force (**FATF**) recommendation 23[10] which relevantly provides:

> Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.

18. The FATF note suggests that lawyers should be relieved of the requirement to submit suspicious matter reports where the source of the suspicion is confidential or privileged. It does not suggest that lawyers should *have to prove* to AUSTRAC's satisfaction that a suspicion is held but that it is based on privileged information. 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.

19. For the above reasons, the AGD should reconsider its approach to confidentiality and legal professional privilege as they apply to legal practitioners. Various obligations under the AML/CTF Act and Rules should be modified in their application to lawyers so as to strike the appropriate balance between the objects of the Act and the fundamental common law rights to privilege and access to justice.

20. Thank you for the opportunity to contribute to the Law Council's submission. Should you have any questions about the Association's feedback please do not hesitate to contact Harriet Ketley, Director, Policy and Law Reform at hketley@nswbar.asn.au in the first instance.

Yours sincerely,

[redacted]

Dr Ruth Higgins SC
President

Enc: NSW Bar Association letter to the Attorney-General's Department dated 8 June 2023 in relation to stage 1 of the AML/CTF Consultation process

[10] FATF Recommendations updated November 2023, p 92.

NEW SOUTH WALES
BAR ASSOCIATION

Our ref: 17/550, 22/76

8 June 2023

Attn: Economic Crime Team
Attorney-General's Department
4 National Circuit
BARTON ACT 2600

By email: economiccrime@ag.gov.au

Dear Economic Crime Team,

Modernising Australia's anti-money laundering and counter-terrorism financing regime: Consultation paper on reforms to simplify and modernise the regime and address risks in certain professions

1. The New South Wales Bar Association (the **Association**) welcomes the opportunity to provide input to the Attorney-General's Department (**AGD**) Consultation Paper *Modernising Australia's anti-money laundering and counter-terrorism financing regime regime: Consultation paper on reforms to simplify and modernise the regime and address risks in certain professions* (the **Consultation Paper**), particularly its proposed expansion to the legal profession.

Summary of the New South Wales Bar Association's position

2. This submission addresses Part 2 of the Consultation Paper, being the proposed framework for tranche-two entities and the impact of the proposed second tranche reforms of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**the Act**) on members of the New South Wales Bar. In particular, we address questions 23 to 28 of the Consultation Paper.

3. In the Association's view, the proposed exclusion for a practitioner representing a client in litigation should extend to all aspects of barristers' work. The extension of the anti-money laundering and counter-terrorism financing (**AML/CTF**) regime to barristers is unnecessary and inappropriate as it would:

    a) present unacceptable conflict with the discharge of the special obligations barristers owe to the Courts and the administration of justice, and to their clients. The key regulatory obligations, particularly those stipulated in sections 41 and 123 of the AML/CTF Act, are inconsistent with the fundamental values of practice as a barrister and will compromise the effective administration of justice;

    b) impose significant and unnecessary administrative burdens that would increase costs to practitioners and clients and impede access to justice; and

c) balanced against these impacts, contribute little toward achieving the objects of the Act, namely the detection and prevention of money laundering and terrorism financing offences.

4. The Association's position is based on five key reasons:

(i) First, barristers are sole practitioners operating under a referral model whereby the majority of engagements are with solicitors on behalf of clients. Barristers' work involves specialist advocacy and advice. Professional conduct rules preclude barristers from undertaking virtually all of the services proposed by the AGD to engage AML/CTF obligations (**proposed designated services**).

(ii) Second, the sole exception to the restrictions on barristers undertaking transactional work in the nature of the proposed designated services is the provision for barristers to maintain trust accounts for the sole purpose of holding fees in advance when acting for a client without a solicitor. Those accounts are used by a very small number of barristers, are regulated under the *Legal Profession Uniform Law* (NSW) (**LPUL**) and must be held with an authorised deposit-taking institution, itself a reporting entity under the Act. Having regard to the purpose and restrictions placed on barristers' trust accounts, any associated AML/CTF risk is very low.

(iii) Third, barristers' contractual clients are primarily solicitors. Contact between barristers and clients is limited, which would make compliance with the customer due diligence and transaction reporting requirements of the Act unduly burdensome and costly, with potential implications for access to justice.

(iv) Fourth, where barristers are retained by solicitors to advise in respect of transactions that would fall within proposed designated services, those solicitors will owe obligations under the Act. Requiring barristers to also perform obligations under the Act would be unnecessarily duplicative.

(iv) Fifth, extension of the AML/CTF regime to barristers impinges on the trust and confidence (including in respect of obligations of confidence and legal professional privilege) that underpins the relationship between a barrister and their client and which is fundamental to the administration of justice.

We detail our concerns below.

Money laundering

5. Money laundering refers to activities designed to conceal the true source of funds. It can be inferred that any person engaged in money laundering is dealing with the proceeds of crime.

6. The Act and the *Criminal Code Act 1995* (Cth) (**Criminal Code**) each contain offences concerned with money laundering.

7. The objects of the Act include:[1]

    a) to provide measures to detect, deter and disrupt money laundering, the financing of terrorism, and other serious financial crimes;

    b) to provide relevant Australian government bodies and their international counterparts with the information they need to investigate and prosecute money laundering offences and offences constituted by the financing of terrorism;

    c) to support cooperation and collaboration among reporting entities, the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) and other government and law enforcement agencies, to detect, deter and disrupt money laundering and the financing of terrorism;

    d) to promote public confidence in the Australian financial system; and

    e) to address matters of international concern and fulfil Australia's international obligations.

Tranche-two entities

8. The Consultation Paper proposes including tranche-two entities in the AML/CTF regime, namely legal practitioners, accountants, conveyancers and trust and company service providers. The justification for such extension is that '[o]perating… behind a professional advisor can provide a veneer of legitimacy to criminal activity' and such entities provide services 'that can be exploited to disguise [beneficial] ownership…[and] conceal the origins and purposes of financial transactions' by creating 'complex structures that create distance between criminals and their illicit wealth' as well as 'obscuring property ownership [and] providing ideal opportunities for laundering large volumes of illicit funds.'[2]

9. The Consultation Paper proposes extending the AML/CTF regime to apply to lawyers, notaries, other independent legal professionals and accountants where they are involved in preparing or carrying out proposed designated services, being the following transactions:

    a) buying and selling of real estate;

    b) managing of client money, securities and other assets;

    c) management of bank, savings or securities accounts;

    d) organisation of contributions for the creation, operation or management of companies;

    e) creation, operation or management of legal persons or arrangements; and

    f) buying and selling of business entities.

[1] Section 3 of the Act.
[2] Consultation Paper, p 17.

10. Presumably this will be achieved by adding to the tables defining the provision of a designated service in section 6 of the Act.

11. Examining the operation of the Act as it would apply to the work done by barristers requires consideration of the nature of the profession and the regulatory and professional conduct rules governing the profession. The Association considers that the unique position of a barrister in the legal profession is such that to bring them within the AML/CTF regime would provide little added benefit or oversight to AUSTRAC or law enforcement on potential or actual money laundering or counter-terrorism financing activity. Imposing AML/CTF obligations on barristers would only act to overburden specialist sole practitioners and risk compromising the effective administration of justice.

Barristers

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

13. The exception is barristers who practise as government employees, such as Crown Prosecutors or Public Defenders. The client of Crown Prosecutors is the State of New South Wales and their instructing solicitor is the Office of the Director of Public Prosecutions. Public Defenders are engaged by solicitors from Legal Aid NSW and the Aboriginal Legal Service NSW/ACT on behalf of publicly funded accused in criminal proceedings. Neither of these examples present any money laundering or terrorism financing (**ML/TF**) risks as they do not charge any fees and do not advise on, or act in relation to, proposed designated services.

Existing regulatory framework

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

15. Barristers' practice is regulated by the Office of the Legal Services Commissioner (**OLSC**) and the Association as a Designated Local Regulatory Authority (**DLRA**) under the LPUL. 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.

The qualifications and suitability requirements for admission to the profession

16. Barristers are subject to the same admission rules as solicitors when they first apply for admission, 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, having regard to the matters set out in [17] below (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.

17. Before entitlement to practise as a barrister, applicants must complete the bar exams and the bar practice course. Both of these entry requirements include exams and exercises relating to professional ethics and conduct.

18. If a barrister has been struck off the roll of lawyers and subsequently applies for readmission, the LPAB provides the applicant's material to the Association's Bar Council for consideration and the Bar Council provides its view on the suitability of the former barrister for readmission.

The ongoing entitlement to practise

19. Barristers' practising certificates are required to be renewed by 30 June each year. On each occasion, the barrister must satisfy the Bar Council as the relevant DLRA that the barrister remains a fit and proper person to hold a practising certificate, in accordance with section 45(2) of the LPUL. In assessing whether a barrister is a fit and proper person, the Bar Council may have regard to the matters set out in Rule 13 of the Legal Profession General Rules 2015 (NSW). Those matters include: issues of insolvency, in both a personal capacity and in corporate capacity;[3] whether the barrister has been convicted or found guilty of an offence in Australia or a foreign country;[4] the applicant's disciplinary history, as a lawyer and in any other profession or occupation, in Australia and overseas;[5] whether the applicant has contravened trust money or trust account provisions in either Australia or overseas;[6] and issues surrounding capacity to manage a business or legal practice.[7]

Continuing legal education

20. Barristers are required to complete 10 points of Continuing Professional Development (CPD – previously known as Continuing Legal Education) each year in accordance with the requirements of the *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* (**CPD Rules**) (see Rule 8). Those hours must include activities in each of the following four CPD categories: Ethics and Professional Responsibility, Practice Management and Business Skills,

[3] See Rule 13(1)(b).
[4] See Rule 13(1)(c).
[5] See Rule 13(1)(f), (g), (h) and (i) respectively.
[6] See Rule 13(1)(j).
[7] See Rule 13(1)(k) and (l).

Substantive Law, Practice and Procedure and Evidence, and Barristers' Skills (see Rule 9). When applying to renew their practising certificate each year, barristers are required to certify pursuant to Rule 14 that they have complied with the CPD Rules. Under Rule 15 the Bar Council has the power to conduct an audit to monitor compliance by a barrister with the CPD Rules.

Professional conduct and discipline

21. The Association's Professional Conduct Department's principal regulatory function is to facilitate the investigation of complaints about barristers, show cause events, and other disclosures. The Department also:

    - facilitates the provision of ethical guidance to barristers;
    - responds to queries from barristers, solicitors and members of the public regarding complaints and regulatory processes;
    - assists the Bar Council in connection with enquiries from, and reports submitted to, the LPAB;
    - 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.

22. 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.

23. In addition, the LPUL requires barristers to notify the Bar Council of (i) automatic show cause events (**ASCE**) under section 86 of the LPUL, that is, certain bankruptcy matters, a conviction for a serious offence (as defined in the legislation) 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 pursuant to section 51 of the LPUL to disclose certain other 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 (see also Rule 15 of the *Legal Profession General Rules 2015*). Once the barrister has notified that he or she has been the subject of either an ASCE or DSCE, or has made a relevant 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 to hold a practising certificate. The investigation of show cause events is carried out by the Association's professional conduct committees.

24. 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. Twenty seven senior counsel were available to assist members in 2021-2022.

25. 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 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

26. The NSW Bar comprises approximately 2,296 independent barristers. There are a number of features of their work which address ML/TF risk.

27. By law, all barristers are sole practitioners: see Rule 12 of the Barristers' Rules. 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, thereby ensuring access to representation for clients.

28. Rule 11 of the Barristers' Rules sets out the work barristers may perform. It is in the following terms:

    Barristers' work consists of:

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

29. 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. Barristers obtain most of their 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.

30. 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.

31. 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 barrister's practice):

    a) act as a person's general agent or attorney in that person's business or dealings with others;
    b) conduct correspondence in the barrister's name on behalf of any person otherwise than with the opponent 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.

32. 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 the Consultation Paper.

33. 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 effect a transaction. A solicitor may be involved in those steps, but a barrister cannot.

34. 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 a means to advance money laundering and/or terrorism financing. Where there is some interface between proposed designated services and a barrister's advisory work, other service providers will be directly involved in bringing about transactions in the manner contemplated by the current drafting of section 6 of the Act, and those service providers are better placed by reason of their contact with the client to effectively perform AML/CTF obligations.

35. We further note that a barrister is not permitted to knowingly allow his or her services to be used to advance unlawful activity. Professional conduct rules strongly preclude such conduct.[8] The regulatory consequences under the LPUL are serious, including restrictions on practice and in serious cases, removal from the roll of legal practitioners. In addition, section 465 of the LPUL requires DLRAs and other persons involved in regulating 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.

36. Additional regulation of the legal profession for the purpose of detecting and deterring ML/TF activity would have little if any substantive effect. It is instead likely to impose significant compliance burdens and undermine the purpose of legal professional privilege, as addressed further below. The experience of the legal profession in the United Kingdom suggests that the imposition of AML/CTF compliance on legal practitioners in that jurisdiction has produced 'tick-a-box' compliance, the burden of which is passed on to the client.[9]

The Cab-rank rule

37. 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. A barrister cannot refuse a brief simply because the identity of a client or the nature of the work is disagreeable to the barrister.

38. 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 Act. The imposition of sections 41 and 123 of the 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.[10]

39. The tipping-off provision is particularly anathema 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 of the Act to the legal profession would directly conflict with the duty of confidentiality, the cab-rank principle and legal professional privilege, as addressed further below.

[8] See Rule 8 of the Barristers' Rules, which provide a barrister must not engage in conduct that is dishonest, 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.
[9] See *Law Society response to HM Treasury's Call for Evidence: Review of the UK's AML/CTF regulatory and supervisory regime* (2021), p 1, available here.
[10] Rules 35 to 38 of the Barristers' Rules.

No file retention

40. The conventional practice of barristers and solicitors is 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 required. 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.

41. This practice is of long standing. It is important in securing the efficiency of a divided profession. The hourly rates charged by many barristers are considerably lower than the rates charged by solicitors in any matter because the barrister's professional establishment is much leaner. The barrister has relatively little in the way of support staff, premises and storage, and builds fewer overheads into the fees that they charge.

42. Once the barrister's work on the matter is complete the brief is returned to the instructing solicitor. Barristers do not create files or keep documentation relevant to a matter after their services are complete.

43. To impose record-keeping obligations on barristers in relation to AML/CTF compliance would 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 Act. The only way to cover the cost of this exercise would be to increase fees to all clients. Further, the records created would duplicate the matters that an instructing solicitor is separately required to record.

44. We note that, in its submission to the 2021-2022 *Inquiry into the adequacy and effectiveness of Australia's AML/CTF regime* by the Senate Legal and Constitutional Affairs References Committee (the **Senate Inquiry**), the Law Council estimated that compliance costs for legal practices would be approximately $119,000 for small firms, $523,000 for medium firms and $748,000 for large firms.[11] We also note with concern that a comprehensive cost/benefit analysis of extending the AML/CTF regime to tranche-two entities has not been released, though we understand the federal Government commissioned such analysis in June 2017 from KPMG.

Direct briefing

45. Whilst barristers may accept direct briefs, most (about 80%)[12] do not. Only about 3% of barristers accept more than five briefs annually on a direct access basis.[13] Anecdotally, the junior criminal bar comprises a large proportion of barristers who accept direct briefs (for example, for appearances in summary criminal matters in the Local Court such as driving offences where the cost of retaining a barrister and solicitor together would be prohibitive). Moreover, many other

[11] Based on a 2017 survey by the Queensland Law Society. See Law Council of Australia, *The adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime* (15 September 2021), available here, p 35.
[12] New South Wales Bar Association, Practising Certificate Renewal Survey data on direct access briefs (2019/20 and 2020/21).
[13] Ibid.

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. 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.

46. Where a barrister accepts a brief on a direct access basis he or she is subject to an increased administrative burden in the sense of additional cost and other disclosure requirements pursuant to section 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). They are certain and predictable.

47. The imposition of customer due diligence requirements would impose a substantial additional burden on practitioners engaged on a direct access basis, particularly because it can be difficult to identify at the point of engagement the precise nature of the services to be provided and whether they may engage proposed designated services that would enliven AML/CTF obligations.

48. 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 disincentivising barristers from accepting work on a direct access basis.[14] 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.

49. 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 arrangements with a court where a litigant in need of legal assistance is identified. To require a barrister to undertake customer due diligence before they are 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

50. 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, controlled money or transit money).[15] As they are precluded from other vocations,

[14] 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 of the Barristers' Rules.
[15] See Regulation 15 of the Legal Profession Uniform Law Application Regulation 2015 (NSW).

barristers also do not maintain client accounts for other purposes that are not regulated as trust money.[16]

51. The traditional arrangement between barristers and solicitors is that solicitors will hold client funds in their trust accounts 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 an 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; first, because the source and destination of the trust money is at all times accounted for and there is no opacity to the transaction, and secondly, because the fees payable to all but the most marketable barrister are finite and comparatively modest.

52. Recent changes to the law provide for barristers to maintain trust accounts for the sole purpose of holding fees in advance. Regulation 15 of the Legal Profession Uniform Law Application Regulation 2015 (NSW) (**LPUL Application Regulation**) prescribes the circumstances in which and the conditions on barristers maintaining such accounts. In summary:

    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 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.

53. 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 LPUL Application Regulation. The manner in which the trust money accounts are regulated makes plain that, firstly, the source and destination of funds are at all times documented and notified to the relevant DLRA, the Association; and secondly, the accounts are overseen by an independent examiner who is also

[16] See for example the distinction outlined in the definition of 'trust money' in section 129 of the LPUL.

required to report to the Association. Moreover, the Association's Professional Conduct Department informally advises on the proper practice in relation to trust money accounts. In 2021 to 2022, the Professional Conduct Department dealt with approximately 40 queries relating specifically to fees in advance and trust money accounts.

54. There can therefore be confidence that the ML/TF risks associated with barristers maintaining trust money accounts are low, and there is sufficient oversight of the accounts within the existing regulatory framework for any ML/TF typologies that are identified to be investigated and notified by the regulatory authorities responsible for barristers' conduct.

55. The Association therefore submits that to impose the additional regulatory burdens of AML/CTF compliance on the small proportion of barristers that use these accounts is disproportionate to any ML/TF risk that they present. The Association predicts that if such obligations are imposed, barristers will simply stop using the accounts, thus depriving them of an important and well-regulated means of securing their fees while providing services on a direct access basis.

Legal professional privilege and confidentiality

56. As noted above, barristers occupy a unique position within the legal system. Barristers' essential independence and duty to provide frank advice engenders a strong relationship of trust and confidence with clients. The foundation of clients' trust and confidence is the robust law of privilege.

57. The Consultation Paper notes:[17]

> Legal professional privilege is essential to the foundational principles of access to justice and rule of law… This privilege protects an individual's ability to access the justice system by encouraging complete disclosure to the individual's lawyer without the fear that any disclosure of those communications may prejudice them in the future. The privilege is a fundamental and important long-standing principle…
>
> Legal professional privilege is currently protected by section 242 of the Act. During the Senate [Committee inquiry], the legal sector raised concerns with extending the AML/CTF regime to cover the legal sector. Concerns included that it would create an irreconcilable tension between lawyers' ethical duties and the AML/CTF obligations that would fundamentally change the nature of the lawyer/client relationship.

58. The Act purports in section 242 not to affect legal professional privilege. However, the imprecise nature of this non-abrogation provision would be difficult to apply if barristers and other legal practitioners were to be directly subject to the reporting and record-keeping requirements of the Act.

[17] Consultation Paper, pp 22-23.

59. Moreover, compliance with the reporting and record-keeping requirements of the Act may interfere with the barrister's duty of confidentiality. The obligation to keep communications with a client confidential encourages clients to make full and frank disclosure to their solicitor or barrister. It is based on a secure knowledge that their legal representative will not disclose to a third party discussions or documents. It is similar to, and an incident of, the fundamental characteristics of legal professional privilege, with the distinct difference being that the duty of confidentiality applies to all communications regardless of whether they are for the purpose of legal advice or advice in anticipation or in the course of litigation.

60. Barristers' Rule 114 provides the parameters in which barristers may be allowed to disclose confidential material:

> A barrister must not disclose (except as compelled by law) or use in any way confidential information obtained by the barrister in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep the information confidential unless or until:
>
> (a) the information is later obtained by the barrister from another person who is not bound by the confidentiality owed by the barrister to the first person and who does not give the information confidentially to the barrister, or
>
> (b) the person has consented to the barrister disclosing or using the information generally or on specific terms.

61. The duty of confidentiality imposed by the Barristers' Rules contains an exception for disclosures made under legal compulsion. However, any compulsive requirement 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.

62. If legal practitioners are required to comply with the Act, the Association considers the obligations imposed would erode a client's right to confidentiality and legal professional privilege and adversely affect the relationship a client has with their legal practitioner. Importantly, confidentiality and legal professional privilege are rights that reside with the client. That is, barristers are required to observe confidentiality and legal professional privilege, do not have the right to waive them and do not have a discretion to decide when they do and do not apply. Barristers are bound to preserve the client's privileged communications in relation to advice and litigation of a matter.

63. Should the Act impose obligations on legal practitioners that diminish 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. For example, the tipping-off provisions place the barrister in an impossible position whereby they are precluded from telling their client that they have breached their client's

confidence in making a report to AUSTRAC in compliance with their obligations under the Act. For this reason, the exemptions in subsections 123(4) and (5) must be not only maintained but extended if the Act is extended to legal practitioners. Any amendments to the Act to impose obligations on legal practitioners must reinforce in express terms the obligation of barristers to claim privilege on behalf of their client.

The New Zealand experience

64. The experience of New Zealand, in which lawyers are required to lodge suspicious matter reports, is instructive. There, the obligation to lodge suspicious transaction reports is qualified on the grounds of a reasonable belief that the information is sourced from a privileged communication.

65. However this is further qualified, including where there is a prima facie case that the communication or information is made, received, compiled or prepared for a dishonest purpose, or to enable or aid the commission of an offence. Where a person refuses to disclose information because it is a privileged communication, a District Court judge may make an order determining whether or not the claim of privilege is valid.[18] The imposition of multiple qualifications on the client's right to claim privilege and the involvement of the Courts in resolving disputed claims is apt to generate confusion, increase costs and interfere with the relationship between barrister and client. In evidence to the Senate Inquiry, the Law Council indicated that law firms in New Zealand have simply ceased practising in areas attracting the operation of the AML/CTF regime because the compliance burden is too high.[19]

66. The above matters raise doubt around the utility of extending the Act to barristers. For example, the nature of barristers' work (which is limited to advising and appearing in litigation, that is the circumstances in which statutory and general law legal professional privilege apply) means there are few, if any, scenarios where a barrister would become privy to information that is *not* the subject of legal professional privilege. Accordingly, imposing AML/CTF obligations on barristers would significantly increase administrative compliance costs without materially achieving the objects of the Act.

Conclusion

67. The Consultation Paper notes the AGD's proposal to exclude legal practitioners representing a client in litigation. The Association submits that, for the reasons outlined above, this is necessary and appropriate. It is also necessary and appropriate to exempt barristers from the obligations under the Act where those obligations are being fulfilled by solicitors who have briefed them.

68. However, the issues outlined in this submission suggest that the preferable course, and the course that logically follows from balancing the public interest in the crucial contribution of barristers to

[18] Anti-Money Laundering and Countering Financing of Terrorism (Class Exemptions) Amendment Notice (No 2) 2021 (NZ), available here.
[19] Dr Jacoba Brasch KC, Law Council of Australia, *Committee Hansard*, 10 November 2021, p 38, available here.

the administration of justice against the limited benefits of making them subject to the Act, is that they should be excluded from the operation of the Act altogether.

69. A better course, and one which is appropriately tailored to the nature of barristers' work and the self-regulation model adopted under NSW legislation, is for the professional associations to work with the AGD and AUSTRAC to devise professional conduct rules and educational guidance and material to address AML/CTF risks where they genuinely arise and in harmony with barristers' existing professional conduct obligations.[20]

Recommendations

70. In light of the above the Association recommends as follows:

Recommendation 1
Barristers should be wholly excluded from the proposed tranche-two reforms.

Recommendation 2
In the alternative, should reporting entity obligations be extended to the barrister arm of the legal profession:

- Barristers should be excluded from the operation of the Act when representing clients in litigation or anticipated litigation;
- Provision should be made for barristers to rely on reporting entity obligations undertaken by solicitors where engaged by them in respect of the proposed designated services.

Recommendation 3
Section 242 of the Act should be amended to make express that ongoing customer due diligence, suspicious matter reporting and transaction reporting obligations are not enlivened where information relevant to those obligations is subject to legal professional privilege.

71. The Association would welcome the opportunity to further engage with the AGD on these important issues. Should you have any questions about this letter, please contact in the first instance Harriet Ketley, Director, Policy and Law Reform at hketley@nswbar.asn.au.

Yours sincerely

[redacted]

Gabrielle Bashir SC
President

[20] The example of the Canadian experience can be instructive in this regard. See for example, Commission of Inquiry into Money Laundering in British Columbia, *Final Report* (June 2022), Pt VII, available here.