Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

2 December 2021

Dear Committee Secretary,

RE: The adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to answer these Questions on Notice for the Legal and Constitutional Affairs References Committee.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving the law to promote both social justice and social stability.

If further information is required, please contact us at anulrsjresearchhub@gmail.com.

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Questions on Notice

This submission is a response to the Questions on Notice received by the Research Hub at the public hearing on 10 November 2021. The Research Hub was asked to provide a response to the Law Council of Australia's Submission, and to comment on the implications of 'grey-listing' for a country.

1. Response to the Law Council of Australia's Submission

The Law Council of Australia's (Law Council) submission consists of two central arguments. Firstly, imposing AML/CTF regulation on legal practitioners is inconsistent with legal professional privilege, and this makes regulation overly complex. Secondly, the cost of this regulation will burden small practices.

Legal Professional Privilege Concerns

Legal professional privilege forms an important part of a lawyer's ethical duties, and generally, it is in the public interest to uphold this 'right'.[1] However, there is a recognised need to access AML/CTF data from the legal profession to form a complete view of the extent of money laundering in Australia,[2] and to help AUSTRAC to fulfil its function as a data collection entity. Costly litigation in *Canada (Attorney-General) v Federation of Law Societies*,[3] which read down and struck out several provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* on grounds of incompatibility with lawyers' ethical obligations,[4] highlights the importance of consultation and careful drafting when expanding the regime to include the legal profession. In that case, the Canadian Supreme Court found legislation that imposed similar regulations to those proposed in this inquiry were inconsistent with client-legal privilege, recognising a "principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes".[5] It is therefore important to remain alive to these principles when drafting the Tranche II legislation.

Legal professional privilege reinforces the role of lawyers as trusted advocates and encourages complete and honest disclosure by clients.[6] Pertinently, the privilege does not attach to a communication involved in the facilitation of fraud or crime. The purpose of the privilege was articulated in *Baker v Campbell*,[7] where Justice Dean stated:

> That general principle represents some protection of the citizen - particularly the weak, the unintelligent and the ill-informed citizen - against the leviathan of the modern state. Without it, there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without risk of prejudice and

[1] Jonathan Auburn, *Legal Professional Privilege: Law and Theory* (Bloomsbury Publishing, 2000) 21-22.
[2] Sue Lannin, 'Australia a 'place of choice' for money laundering due to lack of regulation: ANZ: A lack of political will has seen successive Australian governments fail to extend money laundering laws to cover lawyers, real estate agents and accountants, ANZ Bank says', ABC Premium News (online, 13 July 2017).
[3] 2015 SSC 7 ('*Canada v Federation of Law Societies*').
[4] Ibid (n 3) [117].
[5] *Canada v Federation of Law Societies* (n 3) [84].
[6] *Baker v Campbell* (1983) 49 ALR 385.
[7] Ibid.

> damage by subsequent compulsory disclosure on the demand of any administrative officer with some general statutory authority to obtain information or seize documents.[8]

When determining the scope of a new statute that purports to abrogate the privilege, it is important to keep in mind these common law origins. Namely, that the privilege exists to protect "the weak, the unintelligent and the ill-informed citizen",[9] not, as it has evolved in practice, to shield large corporations or sophisticated actors from external scrutiny.[10]

In this case, two public policy issues have to be balanced. The first is legal professional privilege itself, which promotes clients' "confidence... in legal advisers".[11] The second is the detriment money laundering through the legal profession is causing to the Australian community, which itself erodes public faith in the rule of law. Accordingly, regulation of legal practitioners should uphold the privilege as much as possible, while still addressing the social evil that arises from entrenched corruption and money laundering. Although legal professional privilege is considered a fundamental common law right,[12] it can be abrogated by express parliamentary intention.[13] Therefore, if parliament deems the social utility arising out of anti-money laundering regulation to be greater than the potential harm to this common law right, it is within its power to legislate to override legal professional privilege. The complexity lies in striking the balance between these two areas in a way that does not unacceptably intrude into the rights held by legal clients. Accordingly, there is a need to consult academic experts in legal ethics and the legal profession to achieve this balance.

The Law Council also raised the issue of burdening lawyers with the duty to determine whether a communication is disclosable.[14] Concerns about placing lawyers in a double jeopardy type situation, where disclosing a communication that should not have been disclosed makes them vulnerable to civil action,[15] and failure to disclose a communication means they face penalties under the AML/CTF regime,[16] could be ameliorated if the regulation for lawyers included an immunity from suit by clients. The Law Council also noted that many of the existing obligations of legal practitioners are analogous to the terms of the AML/CTF regime.[17] It follows that there must be some scope for regulation of the legal profession, although what exactly this looks like is unclear. Joy, writing on the existence of an ethical duty to investigate clients in the United States, notes that regulation should be specific, appropriately framed, and alive to the practicalities of the legal profession.[18] Joy gave the following example to demonstrate the complexity of regulating the legal profession.

> Consider a lawyer representing an immigrant client who entered the United States lawfully but used a fraudulent Social Security number to gain employment, and whose employer failed to pay her for hours worked. As Christine Cimini explains: "It is a crime to use a false Social

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[8] *Baker v Campbell* (n 6) 436-437 (Deane J).
[9] *Baker v Campbell* (n 6) 436 (Deane J).
[10] Andrew Higgins, 'Legal Advice Privilege and its Relevance to Corporations' (2010) 73(3) *The Modern Law Review* 371, 372.
[11] Auburn *(*n 1) 15.
[12] Auburn (n 1) 21-22.
[13] Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws* (Report No 129, 2016) 12.
[14] Law Council of Australia, Submission No 30 to the Senate Legal and Constitutional Affairs References Committee, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (2021) 29.
[15] Ibid, 29 [105].
[16] Law Council of Australia (n 14) 29 [105].
[17] Law Council of Australia (n 14) 12 [25].
[18] Peter A Joy, 'Ethical Duty to Investigate Your Client?' (2021) 11(2) *St Mary's Journal on Legal Malpractice and Ethics* 414, 453.

> Security number to obtain benefits, but the crime is completed when the false representation is made" - i.e., when the client seeks legal assistance in obtaining the wages owed. But, if the lawyer represents the client and the client's claim is successful, would the lawyer be assisting the client in a crime or fraud if the client used the money recovered to stay in the United States? If so, before taking the case, would the duty to investigate require the lawyer to ask the client what the client would do with the money if the lawsuit is successful?[19]

On balance, regulation under the AML/CTF Act must and should look different for the legal profession. Case studies like the one above highlight the complexities that differentiate the legal profession from other Tranche II industries. In determining the scope of regulation, it is important to keep in mind both the reputational costs of poor regulation in Australia,[20] and the extent to which lawyers are involved or complicit in money laundering.

Cost of implementation concerns

The Law Council emphasised in their submission the various ways in which existing regulation on the Legal Profession is "analogous to the AML/CTF regime".[21] In this case, a framework where Legal Practitioner regulators share information with AUSTRAC may be an alternative means of incorporating the Legal Profession into the AML/CTF regime in a cost-effective way.

Once again, we submit that including Tranche II industries in the regime will not be overly burdensome to small business, given that around 80% of entities currently regulated by the regime are considered small businesses.[22] Consulting with legal profession experts, and employing legally trained professionals to administer the legal branch of the AML/CTF scheme within AUSTRAC will help to further mitigate the risk of imposing costly and overly broad regulation**.** The common feeling among Tranche II industries facing greater regulation is a concern that the regime, broadly put, is not compatible with the way their industries work.[23] We submit that a focus on collaboration, flexibility, and consultation, in line with AUSTRAC's existing practices, is the best way to ensure a smooth transition and ensure that regulations under the scheme are compatible with and sensitive to the needs of particular Tranche II industries. AUSTRAC is well-placed to facilitate this expansion because of its experience regulating Tranche I industries. That is, the manner and form of Tranche II legislation is not yet determined and should be created with input from key stakeholders.

However, it is important to note that, in their submission to this inquiry, the Australian Criminal Intelligence Commission identified that the one way the legal profession contributes to money laundering in Australia is not through transactions per se, but rather through active support or wilful blindness to the fact of money laundering, and through providing advice regarding how to obscure

[19] Ibid, 458.
[20] Nathan Condoleon, 'Risky Business: AML regulation and legal ethics' (2019) *PROCTOR* 26, 26.
[21] Law Council of Australia (n 14) 12 [25].
[22] AUSTRAC, Submission No 33 to the Senate Legal and Constitutional Affairs References Committee, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (2021) 26 [148].
[23] See generally Law Council of Australia (n 14); Real Estate Institute of Australia, Submission No 18 to the Senate Legal and Constitutional Affairs References Committee, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (2021).

the source and ownership of funds.[24] In this sense, it is unclear whether introducing reporting requirements will address this specific aspect of money laundering in Australia.

2. The Implications of Grey-Listing by the FATF

Addition to the grey list would signal that Australia is deficient in terms of the robustness of its AML/CTF measures. More specifically, being designated as a 'jurisdiction under increasing monitoring' means that, upon review by the FATF, Australia would have been deemed to hold 'strategic deficiencies' in its anti-money laundering regime.[25] If Australia were added to the grey list, it would join 23 other countries including Albania, Panama, Pakistan, Yemen and Syria.[26]

The normal process of grey-listing involves two steps. Firstly, the International Cooperation Review Group would conduct a review of Australia's AML/CTF regime,[27] a lengthy process that can last over a year.[28] Following the review, the FATF would create an "action plan", and monitor Australia's implementation of that plan.[29] Secondly, Australia would be placed on the 'grey-list'.[30] However, in a single plenary meeting in 2018 the FATF identified that Pakistan held "strategic deficiencies" and simultaneously placed Pakistan on the grey-list, thereby significantly departing from established procedures of grey-listing a country.[31] Shah notes that geopolitics can play an important role in the speed at which a country is placed on the grey-list.[32] In light of this, Australia should consider its geopolitical relationships with key FATF stakeholders in determining the timeline for implementing Tranche II regulation.

There is uncertainty as to the specific implications of grey listing, however, a growing body of research in the area suggests that being greylisted has negative consequences. The IMF Working Paper on the Impact of Grey Listing on Capital Flows identified that grey listing leads to significant reductions in capital inflows.[33] In that study, which used machine learning to review grey-listed countries' capital inflows from 2000 to 2017, Kida and Paetzhold found that the negative impact on a country's capital is on average 7.6% of that country's GDP.[34] Similarly, in its 30 year report, the FATF noted the implications of grey-listing, contending that the measure is an effective tool for encouraging compliance:

> As a result [of grey-listing], trading partners may face higher costs or may no longer be able to do business at all. This will have a significant impact on the identified jurisdictions' position

[24] Australian Criminal Intelligence Commission Submission No 38 to the Senate Legal and Constitutional Affairs References Committee, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (2021) 6.
[25] FATF, *Jurisdictions Under Increased Monitoring - October 2021* (Report, October 2021).
[26] Ibid.
[27] FATF, *Financial Action Task Force - 30 years* (Report, 2019) 64.
[28] Abdur Rehman Shah, 'The geopolitics of Pakistan's 2018 greylisting by the Financial Action Task Force' (2021) 76(2) *International Journal* 280, 287.
[29] Ibid.
[30] *Financial Action Task Force - 30 years* (n 27) 65.
[31] Shah (n 28) 287.
[32] Shah (n 28) 288.
[33] Mizuho Kida and Simon Paetzold, 'The Impact of Gray-Listing on Capital Flows: An Analysis Using Machine Learning' (Report, International Monetary Fund, May 27 2021), 1.
[34] Ibid, 23.

> in the global economy, which will put pressure on the country to make the necessary reforms.[35]

On balance, while the specific extent to which Australia would be affected by grey-listing is dependent on a number of variables, it is in Australia's best interests to avoid the prospect of grey-listing, to protect its economic and reputational interests.

[35] *Financial Action Task Force - 30 years* (n 27) 65.