

SUBMISSION

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

Extending AML/CTF reporting obligations to designated non-financial businesses and professions

Submitted to the Senate Legal and Constitutional Affairs Committee by Dr Doron Goldbarsht

About the submitter

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Introduction

The involvement of legal professionals in the facilitation of money laundering and terrorist financing is of growing concern. According to an updated Financial Action Task Force ('FATF') recommendation, countries should require lawyers, notaries and other independent legal professionals – including sole practitioners, partners and employed professionals within firms (legal professionals)¹ – to identify, assess and mitigate their money laundering and terrorist financing risks. Legal professionals, states the recommendation, should document their assessments, keep them up to date, and have appropriate mechanisms in place to provide risk assessment information to competent authorities and self-regulatory bodies. This recommendation is in conflict with legal professional privilege, which plays an important role in the administration of justice. Nonetheless, **many countries have introduced new or amended regulatory regimes to cover the legal sector, thus complying with FATF's non-binding norms.**

Australia's AML/CTF regime is based on the international standards developed by FATF. Various pieces of legislation have been amended to align with the FATF recommendations. In 2006, the Australian government passed tranche I of legislation establishing a new AML/CTF regime covering the financial sector in order to meet Australia's international obligations as a FATF member. Australia promised to apply the *Anti-Money Laundering and Counter-Terrorist Financing Act 2006* (Cth) to legal professionals – tranche II – by 2008. In July 2010 – already well behind schedule – the government deferred discussion of tranche II until mid-2011 to allow time for recovery from the global financial crisis.² However, Australia has not yet fulfilled this promise.³ **Australian legal professionals do not have comprehensive AML/CTF obligations – at least not yet.**

¹ This submission adopts the definition of 'legal professionals' used by FATF: FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (June 2013) annex 3. The recommendations explicitly exempt corporate legal officers ('CLOs') and professionals working for government agencies, who may already be subject to AML/CFT measures. With regard to AML/CTF risks and CLOs, see Doron Goldbarsht, 'Am I My Corporate's Keeper? Anti-Money Laundering Gatekeeping Opportunities of the Corporate Legal Officer' (2020) *International Journal of the Legal Profession*, doi: 10.1080/09695958.2020.1761369.

² Lishan Ai, 'A Cost-Effective Strategy of Implementing International Anti-Corruption Initiatives' (2012) 16(1) *Journal of Money Laundering Control* 83, 86.

³ David Chaikin, 'Corporate Lawyers and the Challenge of the Professional Gatekeeper Paradigm' (Conference Paper, 5th International Conference on Financial Criminology, 2013). See also FATF, *Australia: 3rd Enhanced Follow-up Report & Technical Compliance Re-Rating* (November 2018) 8 ('MER 2018').

This submission addresses the role of legal professionals in money laundering and terrorism financing activities, along with their position in the AML/CTF regulatory landscape both nationally and globally. The submission includes a comprehensive table⁴ (see Annexure) showing Australia's compliance with all FATF recommendations over more than a decade.

Part I of the submission focuses on the extent to which legal professionals participate in the facilitation of money laundering and terrorist financing. Part II highlights the existing global regime that was introduced to mitigate this concern and the current Australian regime and its implementation of the international standard. Part III focuses on the costs and benefits of extending AML/CTF reporting obligations to the legal profession. The submission concludes by urging Australia to comply with the international standard by applying the AML/CTF regime to the legal profession.

Part I: The role of legal professionals in money laundering and terrorist financing

An emerging official narrative suggests that **the involvement of legal professionals in money laundering and terrorism financing is a significant and increasing problem.**⁵ The reliance of criminals on legal professionals, it is suggested,⁶ is due to the stringent AML/CTF controls imposed on financial institutions, making it more difficult to launder criminal proceeds and heightening the risk of detection, together with the use of increasingly complex laundering methods.⁷ In addition, criminals seek out the involvement of legal professionals in their money laundering activities – sometimes because a legal professional is required to complete certain transactions, and sometimes to access specialised legal and notarial skills and services that could assist in laundering the proceeds of crime.⁸ Furthermore, the perception among the launderers is that legal professional privilege or professional secrecy will delay, hamper or effectively prevent investigation or prosecution against them if they engage the services of legal professionals.⁹

Legal professional services may be targeted for money laundering and terrorist financing in the following ways. First, criminals may use legal practitioners to move cash; to deposit, transfer or withdraw funds; or to open bank accounts. This can conceal the connections between criminals and the proceeds of their crimes. Second, legal professionals may operate trust accounts to deposit, hold and disburse funds on behalf of clients. Criminals may use legal professionals to facilitate the movement of illicit funds through these trust accounts. Third, criminals may use legal professionals to move illicit funds disguised as the proceeds of legitimate debt recovery action. Fourth, legal professionals may unwittingly assist criminals in money laundering and terrorist financing through real estate activities by establishing and maintaining domestic or foreign legal entity structures and accounts; facilitating or conducting financial transactions; receiving and transferring large amounts of cash; falsifying documents; establishing complex loans and other financial arrangements; and facilitating the transfer of ownership of property to nominees or third parties. Fifth, legal professionals have specialist knowledge of the establishment and administration of corporate structures. These structures allow criminals and terrorists to conceal illicit funds; obscure ownership through complex layers; legitimise illicit funds; and, in some cases, avoid tax and regulatory controls.¹⁰

⁴ The data collected for this complex table is kept with the author, who would be happy to provide it on request.

⁵ Valsamis Mitsilegas, 'Countering the Chameleon Threat of Dirty Money: "Hard" and "Soft" Law in the Emergence of a Global Regime against Money Laundering and Terrorist Financing' in A Edwards and P Gill (eds), *Transnational Organised Crime: Perspectives on Global Security* (Routledge, 2006) 202.

⁶ FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (June 2013) 7.

⁷ Kate Benson, 'Money Laundering, Anti-Money Laundering and the Legal Profession' in Colin King, Clive Walker and Jimmy Gurulé (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law, Vol 1* (Palgrave, 2018) 111; Ping He, 'Lawyers, Notaries, Accountants and Money Laundering' (2006) 9(1) *Journal of Money Laundering Control* 62.

⁸ FATF, *Typology Report* (2002).

⁹ FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (2013); FATF, *Risk-Based Approach: Guidance for Legal Professionals* (23 October 2008).

¹⁰ AUSTRAC, *Strategic Analysis Brief: Money Laundering through Legal Practitioners* (December 2015).

Part II: The existing global and Australian regimes

The global regime

Concerns about legal professionals acting as advisers and facilitators for money laundering and terrorist financing have been on the agenda of law enforcement and regulators for many years.¹¹ **In 2001, FATF included the legal profession among seven sectors identified as gatekeepers for money laundering and terrorist financing.**¹² FATF issued revised recommendations in 2003, recommending for the first time that they apply to legal professionals when preparing for or carrying out transactions for a client.¹³

In 2012, FATF completed a comprehensive review of its standards and published revised recommendations to bolster global safeguards and further defend financial system integrity by granting governments more effective tools for combatting financial crimes. The recommendations have since been revised many times, most recently in June 2021, to ensure that they remain up to date.¹⁴

Of particular relevance for legal professionals is Recommendation 22, which focuses on customer due diligence ('CDD'). This includes identifying and verifying the identity of the client and beneficial owners where relevant; understanding the nature and purpose of the business relationship, including the source of funds; and maintaining records of the CDD material. Also relevant is Recommendation 23, which deals with other measures.

Recommendation 22 provides that FATF CDD and record-keeping requirements (Recommendations 10, 11, 12, 15 and 17) apply to legal professionals acting for their clients in specified activities, including buying and selling real estate; managing client money, securities or other assets; managing bank, savings or securities accounts; organising contributions for the creation, operation or management of companies; creating, operating or managing legal persons or arrangements; and buying and selling business entities.

Under Recommendation 23, legal professionals must report suspicious transactions when, on behalf of a client, they engage in a financial transaction in relation to the activities described above. However, legal professionals acting as independent legal professionals are not required to report suspicious transactions (but they do need to perform CDD) if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.¹⁵

Impediments to Australia regulating legal professionals

To comply with their duty to the court and the administration of justice, legal professionals in Australia must not engage – in the course of practice or otherwise – in conduct which demonstrates that they are not a fit and proper person to practise law, or which is likely to a material degree to be prejudicial to, or diminish public confidence in, the administration of justice, or bring the profession into disrepute.¹⁶ A breach of the regulatory rules can constitute unsatisfactory professional conduct or professional

¹¹ Kim-Kwang Raymond Choo, 'Designated Non-Financial Businesses and Professionals: A Review and Analysis of Recent Financial Action Task Force on Money Laundering Mutual Evaluation Reports' (2014) 27(1) *Security Journal* 1. For guidance for lawyers, see American Bar Association, International Bar Association, and Council of Bars and Law Societies of Europe, *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* (2010).

¹² The other six sectors are casinos and other gambling businesses; dealers in real estate and high value items; company and trust service providers; notaries; accountants and auditors; and investment advisers. See FATF, *Annual Report 2001–2002* (2002) para 87.

¹³ FATF, *Annual Report 2002–2003* (2003) 6. For an argument that there is little evidence that the costs of the regime produce commensurate benefits to FATF members or other jurisdictions, see Law Council of Australia, Submission in Response to Consultation Paper *Legal Practitioners and Conveyancers: A Model for Regulation under Australia's Anti-Money Laundering and Counterterrorism Financing Regime* (7 February 2017) 15.

¹⁴ FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (updated June 2021).

¹⁵ FATF Recommendation 23, Interpretive note.

¹⁶ See, eg, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 5.1.

misconduct and may give rise to disciplinary action.¹⁷ The duty to the court and to the administration of justice is paramount and prevails to the extent of inconsistency with any other duty,¹⁸ even if the client gives instructions to the contrary.¹⁹ Therefore, when a lawyer becomes aware that a client is engaging in unlawful conduct, the lawyer must counsel the client against such conduct without participating in the conduct. When the client insists on taking a step that is, in the legal professional's opinion, dishonourable, the legal professional can stop acting for the client.

Money laundering and terrorism are criminalised under Division 400 of the Commonwealth Criminal Code.²⁰ Legal professionals who inadvertently allow money laundering to occur by failing to make proper enquiries can be prosecuted. The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ('AML/CTF Act') stipulates what a reporting entity must do if it reasonably suspects that a matter falls within the wide circumstances outlined in the Act.²¹ A legal professional is not a 'reporting entity'. The AML/CTF Act also states that the law relating to legal professional privilege is not affected by the Act.²² The operative sections of the AML/CTF Act – which include identification verification, ongoing CDD and reporting suspicious matters²³ – act to diminish the unique relationship that exists between lawyer and client, part of which involves legal professional privilege.

Australia's compliance with the global regime

FATF first conducted a mutual evaluation report ('MER') on Australia's AML/CTF policies in 2005.²⁴ The MER found that while Australia had indeed legislated according to the standards, there were deficiencies that amounted to a failure to comply with all accepted standards. Australia was deemed non-compliant with Recommendation 22 (which was then numbered Recommendation 12). In a subsequent evaluation, FATF noted that some progress had been made through the adoption, in 2006 and 2007 respectively, of the AML/CTF Act and the AML/CTF Rules, last amended in 2014. However, Australia deemed that only casinos and bullion dealers were subject to AML/CTF obligations under the standard. The AML/CTF Act also provides exemptions for legal professionals, even though these two sectors have been identified as high money-laundering threats in Australia's national threat assessment.

The AML/CTF Act applies to a 'reporting entity', which is a person who provides a designated service,²⁵ as well as legal professionals when they provide designated services; however, it does not affect the law relating to legal professional privilege. Legal professionals are obliged under the *Financial Transactions Reports Act 1988* (Cth) to report when they receive more than \$10,000 in cash,²⁶ but these obligations are not specific to legal professionals. As a result, Australia was again rated non-compliant with Recommendation 22.²⁷ Because it does not subject legal professionals to AML/CTF requirements on suspicious transaction reporting, instituting internal controls, and complying with higher risk country requirements, Australia was also rated as non-compliant with Recommendation 23.²⁸

¹⁷ Ibid r 2.3.

¹⁸ Ibid r 3.1.

¹⁹ As Mason CJ observed in *Giannerelli v Wraith* (1988) 165 CLR 543, 556.

²⁰ Mathew Leighton-Daly, 'Money Laundering Offences: Out with Certainty, in with Discretion?' (2015) 24(1) *Revenue Law Journal* 1.

²¹ *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ('AML/CTF Act') s 41.

²² Ibid s 242.

²³ Ibid ss, 3, 36 and 41.

²⁴ Financial Action Task Force, *Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism Australia* (October 2005) ('MER 2005'); Stuart Ross and Michelle Hannan, 'Australia's New Anti-Money Laundering Strategy' (2007) 19 *Current Issues in Criminal Justice* 135, 140.

²⁵ AML/CTF Act, ss 5, 6.

²⁶ *Financial Transactions Reports Act 1988* (Cth) s 15. It is important to note that the obligations under that Act do not apply to a transaction to which the AML/CTF Act applies.

²⁷ FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures – Australia* (April 2015) 168 ('MER 2015').

²⁸ Ibid.

The experience of other countries with regulating legal professionals

Many countries comply with the international standard for legal professionals.²⁹ This should not be taken for granted, considering the tension with legal professional privilege.³⁰ For example, in Hong Kong, there was no statutory obligation for CDD and record-keeping for legal professionals. In 2008, FATF rated Hong Kong non-compliant with the global standard.³¹ Hong Kong then took progressive steps to comply.³² The Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap 615) was amended by the Counter-Terrorist Financing (Financial Institutions) (Amendment) Ordinance 2018, including to apply statutory CDD and record-keeping requirements to legal professionals when they conduct specified transactions.³³ Singapore, in its third MER, was rated non-compliant with Recommendation 22.³⁴ FATF noted that AML/CFT measures for legal professional were not consistent with the FATF standards and there were deficiencies in the CDD measures for legal professionals. Singapore took steps to enhance its AML/CFT requirements with regard to the legal profession and in 2016 was rated partly compliant.³⁵ In 2007, the United Kingdom was rated partially compliant with the same requirements. By 2018, it has improved to achieve a rating of largely compliant.³⁶ Israel was rated non-compliant with the recommendations in 2008, as it imposed no reporting obligations on legal professionals. In 2014, Israel amended the Prohibition on Money Laundering Law (5760-2000) and, in 2018, FATF found that Israel met the CDD requirements for legal professionals.³⁷

Part III: Costs and benefits of extending AML/CTF obligations to the legal profession

Trend of positive compliance

Australia – a member of FATF since 1990 – shows ongoing amenability to implementing the international standard. Where the 2005 MER found the implementation to be insufficient, FATF recommended that Australia enact new legislation or amend existing legislation. Australia did so. Many of the deficiencies were addressed by the AML/CTF Act.³⁸ The 2015 MER found that, although Australia was not yet fully compliant, it had indeed improved its compliance with many of the deficiencies that had been identified. The same trend of positive compliance was found in the last follow-up report on Australia's AML/CTF regime.

As shown in the annexed table, FATF commenced its evaluations of Australia in 2005. It found Australia fully compliant with only eight of the 40 recommendations (20%). Australia improved, achieving full compliance with 12 recommendations (30%) by 2015 and 17 recommendations (42.5%) by 2018. In 2005, Australia did not comply at all with nine recommendations (22.5%), which was reduced to six recommendations (15%) by 2016 and five recommendations (12.5%) by 2018 – in other words, Australia was, in one way or another, compliant with 35 recommendations (87.5%). In addition,

²⁹ In Canada, legal professionals are subject to the Criminal Code but are exempted from the federal legislative regime under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ('PCMLTFA') due to constitutional principles (*Canada (Attorney-General) v Federation of Law Societies of Canada* 2015 SCC 7). The legal profession has adopted model rules designed to reflect the government's legislative objectives under the PCMLTFA. See AML/CTF Working Group, *Guidance for the Legal Profession* (February 2019) 8.

³⁰ Chaikin (n 3).

³¹ FATF, Mutual Evaluation Report of Hong Kong, China (11 July 2008) 152, 156.

³² FATF, *4th Follow Up Report: Mutual Evaluation of Hong Kong, China* (19 October 2012) 29–32. See Foster Hong-Cheuk Yim and Ian Philip Lee, 'Updates on Hong Kong's Anti-Money Laundering Laws' (2018) 21(3) *Journal of Money Laundering Control* 290.

³³ See 'Enhancing Hong Kong's Regulatory Regime for Combating Money Laundering and Terrorist Financing (I)' *Hong Kong Lawyer* (12 April 2018).

³⁴ FATF, *3rd Mutual Evaluation Report – Singapore* (2001) 208.

³⁵ FATF, *Mutual Evaluation Report – Singapore* (September 2016) 165–7.

³⁶ FATF, *Mutual Evaluation Report – United Kingdom* (2007) 284; FATF, *Mutual Evaluation Report – United Kingdom* (2018) 209.

³⁷ FATF, *Mutual Evaluation Report – Israel* (2008) 185; FATF, *Mutual Evaluation Report – Israel* (2018) 224.

³⁸ One of the objects of the AML/CTF Act is to address matters of international concern, including the FATF recommendations. See s 3(3)(a).

Australia's compliance improved for 13 recommendations between 2005 and 2015, and for another seven recommendations between 2015 and 2018 – an improvement for 20 recommendations (50%) from 2005 to 2018. **Australia has entirely ignored only three FATF recommendations: Recommendation 13, dealing with correspondent banking, and Recommendations 22 and 23, dealing with the legal profession.**

Risk to financial reputation

FATF has announced various measures to be taken against countries that do not remove detrimental rules and practices. Pending the adoption of appropriate laws and policies, FATF demands that countries scrupulously apply Recommendation 19, which holds that '[f]inancial institutions should be required to apply enhanced due diligence measures to business relationships and transactions with natural and legal persons, and financial institutions, from countries for which this is called for by FATF'. These enhanced due diligence measures should be proportionate to the risk. Countries should, for example:

- refuse to allow the establishment of subsidiaries, branches or representative offices of financial institutions from (or in) the country concerned, or otherwise take into account the fact that the relevant financial institution is from a country that does not have adequate AML/CTF systems;
- limit business relationships or financial transactions with the country, or persons within it;
- prohibit financial institutions from relying on third parties located in the country concerned to conduct elements of the CDD process; and
- require increased supervisory examination and/or external audit requirements for branches and subsidiaries of financial institutions based in the country concerned.³⁹

Any country that is subjected to such countermeasures suffers a blow to its international reputation and all banking operations within the country could be scrutinised for suspicious activity. While this does not, strictly speaking, amount to sanctions, it creates substantial difficulties for the country in question.

It is not suggested that FATF will apply such countermeasures to Australia for failing to comply with Recommendations 22 and 23. There also seems to be a low risk that FATF will find Australia to be among the 'high-risk jurisdictions'. This would occur only as a result of specific money-laundering, terrorist financing, or proliferation financing risks or threats. Therefore, the main reason for Australia to expand its regime to apply to legal professionals is to provide relevant information that can assist with mitigating the risks of money laundering and terrorist financing. **This would promote public confidence in the Australian financial system and fulfil Australia's domestic and international AML/CTF responsibilities.**

It is strongly in the interests of Australia to act now and amend the AML/CTF Act to include legal professionals. If the government waits until pressure from FATF (such as deadlines for compliance and, if necessary, a finding of non-compliance) forces it to comply, this may tarnish Australia's reputation and adversely affect the legitimacy and effectiveness of its AML/CTF regime. **Given Australia's record of compliance with the FATF regime, it is clearly a question of when – not if – Australian will extend its AML/CTF obligations to legal professionals.**

Conclusion

The full implementation of the AML/CTF regime in Australia, which will include legal professionals (in tranche II), has been delayed for many years. In April 2016, the Attorney-General's Department report on the statutory review of the AML/CTF regime identified the tranche II laws as a priority area for action. In order for Australia to maintain its internationally respected position, immediate action is needed to implement FATF Recommendations 22 and 23.

Therefore, **the government should act now to address the shortcomings identified by FATF.**

³⁹ FATF Recommendation 19.2(c), (e), (f) and (h).

Annexure: Australia's compliance with the 40 FATF recommendations

Number	Evaluation report 2005 (original number before 2012 revision) ⁴⁰	Evaluation report 2015 ⁴¹	3 rd follow up report 2018 ⁴²
1	N/A ⁴³	Partially Compliant	Partially Compliant
2	Largely Compliant (31)	Largely Compliant	Largely Compliant
3	Largely Compliant (1) & (2)	Compliant	Compliant
4	Compliant (3)	Compliant	Compliant
5	Largely Compliant (SRII)	Largely Compliant	Compliant
6	Largely Compliant (SRIII)	Compliant	Compliant
7	N/A ⁴⁴	Compliant	Compliant
8	Partially Compliant (SRVIII)	Non-Compliant	Largely Compliant
9	Compliant (4)	Compliant	Compliant
10	Non-Compliant (5)	Partially Compliant	Partially Compliant
11	Partially Compliant (10)	Largely Compliant	Largely Compliant
12	Non-Compliant (6)	Largely Compliant	Largely Compliant
13	Non-Compliant (7)	Non-Compliant	Non-Compliant
14	Partially Compliant (SRVI)	Largely Compliant	Largely Compliant
15	Non-Compliant (8)	Largely Compliant	Compliant
16	Non-Compliant (SRVII)	Partially Compliant	Partially Compliant
17	Non-Compliant (9)	Partially Compliant	Partially Compliant
18	Non-Compliant (15) & (22)	Partially Compliant	Partially Compliant
19	Partially Compliant (21)	Partially Compliant	Largely Compliant
20	Largely Compliant (13) & PC (SRVI)	Compliant	Compliant
21	Compliant (14)	Compliant	Compliant
22	Non-Compliant (12)	Non-Compliant	Non-Compliant
23	Non-Compliant (16)	Non-Compliant	Non-Compliant
24	Largely Compliant (33)	Partially Compliant	Partially Compliant
25	Partially Compliant (34)	Non-Compliant	Non-Compliant
26	Partially Compliant (23)	Partially Compliant	Partially Compliant
27	Partially Compliant (29)	Partially Compliant	Partially Compliant
28	Partially Compliant (24)	Non-Compliant	Non-Compliant
29	Compliant (26)	Compliant	Compliant
30	Largely Compliant (27)	Largely Compliant	Compliant
31	Compliant (28)	Largely Compliant	Largely Compliant
32	Partially Compliant (SRIX)	Largely Compliant	Compliant
33	Largely Compliant (33)	Largely Compliant	Largely Compliant
34	Partially Compliant (25)	Largely Compliant	Largely Compliant
35	Partially Compliant (17)	Partially Compliant	Partially Compliant
36	Largely Compliant (35) & (SRI)	Largely Compliant	Compliant
37	Compliant (36) & LC (V)	Compliant	Compliant
38	Compliant (38)	Compliant	Compliant
39	Compliant (39)	Compliant	Compliant
40	Compliant (40)	Compliant	Compliant

⁴⁰ MER 2005 (n 24).

⁴¹ MER 2015 (n 27).

⁴² MER 2018 (n 3).

⁴³ Assessing risks and applying a risk-based approach.

⁴⁴ Targeted financial sanctions related to proliferation.