



Law Council
OF AUSTRALIA

Anti-Money Laundering and Counter-Terrorism Financing Bill 2006

Senate Legal and Constitutional Affairs Committee

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Introduction

1. The Law Council of Australia (Law Council) understands that the Senate Standing Committee's current inquiry into the Anti-Money Laundering and Counter Terror Financing Bill (the AML/CTF Bill) will concentrate on issues which arise from changes made to the Bill since the initial Exposure Draft, which was reviewed and reported on by the Standing Committee in April 2006.
2. The Law Council has previously made submissions to the Attorney-General's Department on the Exposure Draft and the Revised Exposure Draft which preceded the current AML/CTF Bill. Copies of those submissions are attached. Many of the concerns raised in those submissions with respect to the general operation of the Bill remain relevant. However, given the limited timeframe and scope of the current inquiry, this submission is concerned only with the application of the Bill to legal practitioners.
3. As reiterated in the Explanatory Memorandum, the AML/CTF Bill is intended to apply to the financial sector, gambling sector and bullion dealers. It is not intended to apply to legal practitioners, except to the extent that they provide services in direct competition with the financial sector.
4. Although changes have been made to the AML/CTF Bill, which either narrow its application directly or allow for certain exemptions to be made under the Rules to achieve the same purpose, the potential for the AML/CTF Bill to impact on legal practitioners providing legal services remains.
5. The Law Council is fundamentally opposed to the imposition of reporting obligations on legal practitioners which undermine the independence of the profession and which are at odds with legal practitioners' well established duties to their clients, the court and the public.
6. The concern with the current AML/CTF Bill is that, unlike further foreshadowed AML/CTF legislative reforms, although it is not even intended to impact on legal practitioners providing legal services, there is a reluctance on the part of the legislative drafters to clearly exempt them from its operation. It is not clear whether that reluctance is born of an unwillingness to acknowledge the potential of the AML/CTF Bill to impact on legal practitioners, despite contrary intentions, or whether it is born of an unwillingness to acknowledge that it is not appropriate for the AML/CTF Bill to impact on legal practitioners.
7. In either case, the Law Council believes that a specific exclusion should be included in the Bill that exempts legal practitioners providing legal services, and services incidental thereto, from any obligation under the Bill.
8. The Law Council believes that any AML/CTF reforms affecting the legal profession should be dealt with separately from the regulation of other business relationships. This is appropriate both because of the special nature of the lawyer-client relationship and because the Australian legal profession is already subject to extensive specialist regulation.

How does the AML/CTF Bill capture legal practitioners?

9. The AML/CTF Bill places a series of mandatory obligations upon "reporting entities". Reporting entities are defined not by reference to the nature or type of the entity but

by reference to the services the entity provides. Specifically, a reporting entity is defined as any person who provides a “designated service.” In turn, a “designated service” is defined as any one of a list of services set out in Clause 6 of the Bill. The majority of designated services fall under the banner of financial services and are listed in table 1 of Clause 6.

10. A number of the submissions made on earlier drafts of the AML/CTF Bill were concerned with how the designated services set out in Clause 6 were described. This is an issue of fundamental importance given that it will determine the entities on which the Bill operates. If the listed designated services are described too broadly then, despite the intention of the Bill to only operate on specific sectors, it may inadvertently impact on a much wider group of businesses.
11. In response to these submissions, the descriptions given to several designated services listed in table 1 of Clause 6 were refined so as to only capture a narrower class of actors. As an indicative example, item 6 of table 1 was initially described as “making a loan, where the loan is made in the course of carrying on a business”. The same item is now described as “making a loan, where the loan is made in the course of carrying on a loans business”.
12. This refinement process, which ultimately and necessarily has involved distinguishing between businesses by type rather activity, has largely but not completely removed legal practitioners from the operation of the Bill. In the absence of an express exclusion, legal practitioners may still be impacted.
13. For example, items 31 and 32 of table 1 list the following services as “designated services”:

“31. Accepting money or property from a transferor entity to be transferred under a designated remittance arrangement.

32. Making money or property available to an ultimate transferee entity as a result of a transfer under a designated remittance arrangement.”

The term “designated remittance arrangement” is explained in Clause 10 of the Bill as follows:

“10 Designated remittance arrangements etc.

(1) A reference in this Act to a designated remittance arrangement is a reference to a remittance arrangement, where:

(a) the person who accepts money or property from a transferor entity to be transferred under the remittance arrangement is not:

(i) an ADI; or

(ii) a bank; or

(iii) a building society; or

(iv) a credit union; or

(v) a person specified in the AML/CTF Rules; and

(b) the person who makes money or property available to an ultimate transferee entity as a result of a transfer under the remittance arrangement is not:

(i) an ADI; or

(ii) a bank; or

(iii) a building society; or

*(iv) a credit union; or
(v) a person specified in the AML/CTF Rules; and*

(c) the remittance arrangement satisfies such other conditions (if any) as are specified in the AML/CTF Rules.

Remittance arrangement

(2) A reference in this Act to a remittance arrangement is a reference to an arrangement that is for the transfer of money or property, and includes a reference to an arrangement that, under the regulations, is taken to be a remittance arrangement for the purposes of this Act.

Transferor entity and ultimate transferee entity

*(3) For the purposes of the application of this Act to a remittance arrangement:
(a) the transferor entity is the person from whom money or property is accepted so as to enable its transfer under the arrangement; and
(b) the ultimate transferee entity is the person to whom money or property is ultimately transferred under the arrangement.*

14. Legal practitioners are often involved in remittance arrangements as defined. Their involvement is generally incidental to, or part and parcel of, very standard legal work such as property settlements. It does not entail them entering into competition with financial service providers. By virtue of items 31 and 32 of Table 1, many legal practitioners would be deemed to provide a “designated service” and therefore would become a “reporting entity” under the Bill, with all the obligations that attracts.
15. Legal practitioners could apply to be “a person specified in the AML/CTF Rules” for the purposes of Clause 10(1)(a)(v) and (1)(b)(v). These sub-paragraphs have both been included since the initial Exposure Draft, presumably with the intention of overcoming the types of problem raised here. However, there is no guarantee that an exemption in this form will be granted to legal practitioners, nor that it is even possible to grant such an exemption to a class of persons. The definition of “person” in Clause 5 includes an individual, a company, a trust, a partnership, a corporation sole and a body politic, but it does not extend to a class of persons.
16. An application could also be made to have the AML/CTF Rules specify conditions, pursuant to Clause 10(1)(c), which exclude the activities of legal practitioners from the definition of “designated remittance agreement”. Again there is no guarantee that an exemption in this form will be forthcoming, nor that an appropriately exhaustive exemption could be formulated under this paragraph.
17. Items 46 and 47 of table 1 refer to providing a custodial or depository service in the course of carrying on a business of that kind and providing a safe deposit box in the course of carrying on a business of that kind. These items also potentially describe services provided by legal practitioners, however, they are both defined so as to expressly exclude “an exempt legal practitioner service”. That term is defined in Clause 5 of the Bill as “a service that under the AML/CTF Rules is taken to be an exempt legal practitioner service for the purpose of this Act”. The result is again that, in order to for any exemption from items 46 and 47 to be effective, application must be made for exemption under the AML/CTF Rules.

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18. There are other items in table 1 of Clause 6 which potentially describe and capture the work of legal practitioners. Unlike items 31 and 32, in most cases the work of legal practitioners is not directly captured under the definition of the “designated service” in table 1. However, legal practitioners could be specified under AML/CTF Rules in such a way as to bring their work within the relevant definition.
19. For example, item 4 of table 1, describes as a designated service:
- “4. accepting money on deposit (otherwise than by way of a deposit to an account), where the deposit-taker is:*
- (a) and ADI; or*
- (b) a bank; or*
- (c) a building society; or*
- (d) a credit union; or*
- (e) a person specified in the AML/CTF Rules.”*
20. This item has the potential to capture the routine trust account activities of legal practitioners if legal practitioners are specified for relevant purposes as a deposit-taker under the AML/CTF Rules. While there is no indication at present that they will be so specified - no guarantee can be given that they will not be, and there is nothing in the AML/CTF Bill to prohibit that from occurring. A similar situation exists with respect to items 29 and 30. (Of course, it must be noted that the same limitation on naming *a class of persons* for the purposes of excluding them from item 31 and 32, may apply here to prevent naming *a class of persons* for the purposes of including them under a particular item.)
21. In addition to the designated services already listed in table 1 which may bring legal practitioners under the Bill’s regulatory regime, table 4 of Clause 6 allows *any service* to be specified in the regulations as a “designated service”. Without an express exemption in the Bill for legal practitioners, any number of legal services could be listed as “designated services” under the regulations. Notwithstanding that regulations must be tabled before Parliament and may be disallowed, the fact remains that table 4 of Clause 6 provides an avenue through which the classes of persons regulated by the Bill may be expanded without limit.

Exemption under the Rules

22. Clause 247 of the AML/CTF Bill enables the Australian Transaction Reports and Analysis Centre (“AUSTRAC”) to make AML/CTF Rules which provide exemptions from all or part of the Act for:
- a) a designated service of a kind specified in the Rules; or
- b) a designated service that is provided in circumstances specified in the Rules.
- (See also Clause 39, 42 and 44).
23. AUSTRAC may also, by written instrument, exempt a specific person conditionally or unconditionally from all or part of the Act. This is a provision which has been added to the Bill since earlier Exposure Drafts, possibly in response to submissions drawing comparisons between ASIC’s broad exemption powers under the

Corporations Act and AUSTRAC's more limited exemption powers under previous drafts of the current Bill.

24. Despite this revision, however, the AML/CTF Bill still does not enable Rules to be made which exempt a class of persons (for example legal practitioners) from all or part of the Act.
25. The result is that in order for legal practitioners to be exempted from the operation of the Act, representations must be made to AUSTRAC so that separate Rules can be made with respect to any current or future listed designated services which legal practitioners potentially provide.

Legal Professional Privilege

26. The Bill specifically states that it does not affect the law relating to legal professional privilege. This is an important protection. However, the Law Council strongly believes that merely protecting client legal privilege is inadequate. The Law Council believes that it is essential for client confidentiality beyond legal professional privilege to be maintained and the independence of the legal profession to be protected in order to safeguard the administration of justice.
27. The preservation of legal professional privilege impacts on *how* rather than *whether* the Bill regulates any legal practitioners which are captured by it. Although legal professional privilege may severely circumscribe the reporting obligations of legal practitioners under the Bill, it does not alter the fundamental, underlying premise of the Bill that it is appropriate for legal practitioners to monitor and report on their clients on behalf of the Executive.

Financial Action Task Force on Money Laundering (FATF) Consultation with the International Legal Profession in Amsterdam, 7 - 8 November 2006

28. According to the Explanatory Memorandum one of the primary purposes of the AML/CTF Bill is *"to implement Australia's international obligations including a commitment to bring our AML/CTF regime in line with the international standards as set out by the Financial Action Taskforce on Money Laundering (FATF)."*
29. On 7 – 8 November 2006, Mr Ross Ray QC, President Elect of the Law Council of Australia, attended the FATF consultation with the private sector in Amsterdam, the Netherlands on behalf of the Law Council of Australia. Those consulted by FATF at that meeting included lawyers, notaries, accountants and trust and company service providers.
30. The meeting was chaired by Mr Richard Chalmers, Vice Chair of the FATF working group on evaluations and implementations – WGEI. The agenda covered issues such as customer due diligence, suspicious transaction reporting obligations, identification of beneficial owners, identification of PEPs, the risk based approach which underpins the implementation of the FATF 40 standards, the tension between suspicious transaction reporting and legal professional privilege and regulation and oversight, specifically the role of Self Regulatory Organisations and Financial Intelligence Units and regulatory sanctions.

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31. The meeting heard from regulators around the world and also from lawyers from America, Australia, Canada, France, Hong Kong, Italy, Japan, Netherlands, the United Kingdom, Spain, Switzerland and a number of other countries.
 32. The consultative process generated significant discussion in relation to the problems that exist within existing legislative regimes which are designed to address money laundering and terrorism financing around the world. This information would greatly assist those in Australia who have drafted and intend to implement similar legislation. The discussion revealed that Australia may be about to embark on a legislative course of action that does not accurately reflect, and in fact potentially goes beyond, the proper intention of the FATF's 40 Recommendations.
 33. The consultation identified eight topics that reflected issues of concern to regulators and industry alike. Of those eight, three are likely to be referred to a plenary session of the FATF for further research. Interestingly, two of three relate directly to when, how and to what extent legal professionals should be subject to AML/CTF regulation. This represents an acknowledgement of the special position of legal practitioners, the unique and important nature of their client relationship and their broad existing professional duties.
 34. While these issues are still subject to consideration and debate at the international level, legal practitioners should be explicitly exempted from the AML/CTF Bill.

Summary and Recommendations

35. The Law Council supports the Federal Government in its commitment to address money laundering and counter terrorism financing. The Law Council acknowledges the need to strengthen current laws and introduce reforms to improve Australia's intelligence gathering capability. However, such reforms should not be at the expense of Australia's system of justice.
36. The Law Council believes that the duties of legal practitioners, which are central to the administration of justice, must be safeguarded and protected.
37. As recommended in the Law Council's earlier submissions on this proposed legislation, the Law Council believes that legal practitioners should be explicitly exempted from the current AML/CTF Bill. Any future AML/CTF reforms affecting the legal profession should be dealt with in legislation which is specific to the profession, and which takes account of the particular duties and responsibilities of the profession.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- ACT Bar Association;
- Bar Association of Queensland;
- Law Institute of Victoria;
- Law Society of the ACT;
- Law Society of NSW;
- Law Society of the Northern Territory;
- Law Society of South Australia;
- Law Society of Tasmania;
- Law Society of Western Australia;
- New South Wales Bar Association;
- Northern Territory Bar Association;
- Queensland Law Society;
- The South Australian Bar Association;
- The Victorian Bar; and
- Western Australian Bar Association.

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.