Queensland Law Society

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Office of the President

24 May 2024

Our ref: [LP:MC]

Dr James Popple
Chief Executive Officer
Law Council of Australia
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By email: [redacted]

Dear Dr Popple

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

Queensland Law Society (**the Society**) refers to the Law Council of Australia's (**LCA**) Memorandum dated 3 May 2024. The Society welcomes, and thanks the LCA, for the opportunity to provide comments in relation to the second phase of consultation regarding the reform of Australia's anti-money laundering and counter-terrorism financing (**AML/CTF**) regime.

This response has been prepared with the assistance of several of the Society's legal policy committees, including the Banking & Financial Services Law Committee, Property & Development Law Committee and Water & Agribusiness Law Committee.

By way of preliminary comments, the Society's objective is to be realistic and reasonable in our views. There are many stakeholders, all of whom are very strong advocates for their respective positions. In this submission, the Society has sought to advance the interests of our members and diverse and disparate nature of the wider legal community in Queensland.

There is no doubt that Australia needs a strong and effective AML/CTF statutory regime. However, for the reasons previously stated and that follow, the Society is unpersuaded that the matters referred to in Consultation Paper 2 (**Paper 2**), either individually or in combination, warrant legislative reform to include services provided by legal practitioners as designated services in the form outlined in Paper 2.

The comments contained in this submission should be read in conjunction with previous submissions, some of which are cited throughout.

General comments

In response to Paper 2, the Society makes the following initial comments.

- Extensive safeguards against legal practitioners unwittingly assisting with AML/CTF already exist within the current legal professional regulatory regimes which mitigate strongly against the legal profession being included in the second tranche of AML/CTF

reforms. This position was made clear in the Law Council of Australia's own vulnerabilities analysis, published in September 2023.

- The proposal to bring legal practitioners into the AML/CTF regime will raise significant barriers for Queenslanders to gain access to justice, given the significant compliance costs for practices and the impact on the viability of legal firms. The proposed regime is also in conflict with longstanding legal principles including in respect of legal professional privilege and confidentiality.

- The obligations of suspicious matter reporting to AUSTRAC incumbent on reporting entities makes those entities agents of the executive government. This is heightened when the reporting entity cannot reveal the fact of a report being made to their client upon pain of criminal sanction. For legal practitioners, this strikes at the heart of the fiduciary relationship between solicitor and client and directly undermines the integrity and independence of the legal profession.

- The regulation of law practices is best achieved through existing legal profession regulatory structures and professional obligations, the provision of typology information, guidance and continual professional development, rather than by introducing an additional layer of statutory regulation.

- Should legal practitioners be included in the second tranche of AML/CTF reforms, it is in the interests of the Government, AUSTRAC and legal practitioners that a clear and informed set of regulations be adopted. This should take the form of regulations under the enabling legislation which are developed and managed by the Attorney-General's Department (**AGD**). This approach is consistent with the financial services regulatory model administered by the Treasury where key exceptions and scheme boundaries are set out in this way. In our view, it is not appropriate for the conduct regulator AUSTRAC to be responsible for determining the scope of the regulatory regime. This role is best placed with AGD. It is also critical that the regulations are legislative instruments under section 10 of the *Legislation Act 2003* (Cth) and subject to disallowance by Parliament.

- There is a lack of empirical or typological evidence of systemic involvement or risk of involvement of legal practitioners in facilitating (unwittingly or otherwise) money laundering or terrorism financing. We recommend AUSTRAC undertake a sector specific risk assessment to identify and apply a risk rating to specific activities. This needs to be coupled with a cost/benefit analysis to assess whether the compliance costs to be incurred by PSPs will result in any reduction of AML/CTF activity in the Australian economy or will simply add to the cost of providing legal services to the community.

- The drafting of the proposed designated services needs to be further considered and amended alongside meaningful consultation with legal stakeholders. A suite of clearly drafted exemptions is also required to ensure that low risk transactions are not unnecessarily caught by the regime.

- If these reforms are introduced, legal practices will need to substantially redesign their business and compliance systems. The Society recommends a minimum two year lead-in period before any second tranche reforms commence. It will also essential that the legal profession is given the opportunity, and adequate time, to comment on an exposure draft and the proposed implementation timeframe.

1. Retention of status quo for legal practitioners

In essence, the second tranche of reforms is said to focus on addressing vulnerabilities in sectors providing certain high-risk services. Amongst a number of other service providers, legal professionals have been identified as a high risk service group that are purported to be particularly vulnerable to AML/CTF activities.

The Society and its members strongly oppose the characterisation of legal practitioners and the legal profession in this way. This characterisation is not consistent with the findings of the Law Council of Australia's vulnerabilities analysis.

The proposed recasting of Professional Service Providers (**PSPs**) to include legal practitioners fails to recognise the particular and bespoke role of this profession in the legal system and thus, the abrogation of professional duties of legal professional privilege and confidentiality that follows, strikes at the heart of their role within this system.

A sufficient basis has not been made out to justify the inclusion of legal practitioners in the definition of PSPs beyond examples of intentional conduct already caught by the existing law and the weight of international obligations. It can be inferred by this disconnect that there needs to be a better appreciation of the risks said to exist in the legal professional service sector. This could be bridged by better government and industry engagement and education. The lack of information and clarity surrounding the reasons for expanding the scope of PSPs to include legal practitioners increases the difficulty in identifying and fixing any relevant issues.

The Society believes that the following reasons demonstrate a compelling argument that the current regulatory framework designed for legal practitioners and law practices is the appropriate mechanism to address any suspected AML/CTF risks or activities.

The Australian Solicitors' Conduct Rules (**ASCR**) contain a number of duties including:

- the solicitor's duty to the court and the administration of justice;
- the duty to avoid any compromise to his or her integrity and professional independence;
- the duty to not engage in conduct that would demonstrate the solicitor is not a fit and proper person to practise law;
- the duty to follow (only) a client's lawful, proper and competent instructions;
- the duty to deliver legal services competently, diligently and to avoid any compromise to his or her integrity and professional independence;
- the right to terminate the engagement for just cause and on reasonable notice; and
- the duty to exercise reasonable supervision over solicitors and all other employees engaged in the provision of legal services for a matter.

Breaching these rules may constitute *unsatisfactory professional conduct* or *professional misconduct.*

Across Australian jurisdictions, the legal professional is required to treat client money as trust money. The receipt and use of trust money is also heavily regulated. There are obligations to report irregularities of a lawyer's trust account.

2. Compliance costs

The Society has previously submitted that the costs of implementing an AML/CTF regulatory regime will be significant and risk impinging upon law firms' profitability and sustainability. The costs burden will be greater for rural, regional and remote law firms that are already experiencing financial and resourcing constraints.

Paper 2 does not provide any analysis of the cost on the new sectors that will be affected the second tranche reforms. Nor does it consider whether the benefits outweigh the costs.

Accordingly, we **enclose** a copy of the Society's detailed analysis of its survey results of the costs implications if the AML/CTF regime is extended to legal practitioners.[1]

QLS is particularly concerned that some rural, regional and remote firms will close as a result of imposing AML/CTF regulation in its current form, due to the cost of compliance in conveyancing and other commercial matters. Compliance costs will either need to be borne by the firm or passed onto the client, leading to an increase in cost of providing legal services generally and in the conveyancing context specifically, it will increase the cost of purchasing a home.

In many regional centres, the local firm is the only Legal Aid preferred supplier for their community. A closure will have devastating impacts for locals and increase the cost of obtaining legal assistance from a distant firm or community legal centre.

3. Future AML scheme for the legal profession

If proceeded with, the Society advocates for the implementation of an AML/CTF regulatory scheme that is adequately guided by the needs of the affected practitioners.

In this regard, we observe some inherent difficulties with the proposals in Paper 2 which we outline below.

(a) Client due diligence requirements including ongoing requirements

Our members hold significant concerns about the proposed additional requirements to carry out enhanced client due diligence as proposed on pages 18 and 19 of Paper 2.

Legal practitioners are already subject to significant ethical and legal obligations to verify their client's identity before and during a retainer. We recognise that the proposals in Paper 2 are intended to identify high risk transactions and clients. However, QLS highlights that

[1] Letter from Queensland Law Society to Law Council of Australia dated 27 January 2017, regarding 'Cost and concern with AML/CTF Compliance'

inconsistency in regulation must be avoided. Otherwise, legal practitioners could be placed in the impossible position of complying with inconsistent obligations.

We recommend that any client due diligence obligations are aligned with the other client verification requirements that are already utilised within the legal industry.

Guidance materials for the profession should be developed based on profession specific language and be sector-specific providing worked examples illustrating when additional client due diligence is required.

We strongly recommend that any guidance proposed by AGD is co-designed in consultation with the legal profession, to ensure that the materials achieve the regulator's objectives but are also aligned with the profession's ethical obligations. This approach will also ensure any additional compliance burden is commensurate with the risk of the relevant transaction or relationship.

We also recommend that client due diligence requirements recognise alternative identification processes which enable a legal practitioner to take reasonable steps to undertake VOI. For example, the VOI processes in the Model Participation Rules published by the Australian Registrars National Electronic Conveyancing Council provide for a 'safe harbour' VOI process, but expressly permit a practitioner to otherwise take reasonable steps to verify identity.

It is critical that in addition to any prescriptive process, legal practitioners are permitted to exercise their professional judgment about reasonable and appropriate steps for client verification, as is recognised in other regulatory contexts.

We consider this particularly important in the Queensland context, to ensure access to justice for remote communities, given the challenges of undertaking verification processes in a decentralised State.

Any proposed enhancements to the client due diligence requirements also need to be modern and flexible to accommodate the rapid and ongoing developments in digital identification, including for example identification options provided by the Government i.e. MyGovID.

(b) Suspicious matter reporting

The proposed suspicious matter reporting obligations should not apply to legal practitioners.

One of the most serious concerns held by members is the requirement for suspicious matter reporting. If extended to lawyers this would catastrophically affect the client-lawyer relationship, client confidentiality and client legal privilege. The reason for the existence of a special relationship between solicitor and client is not for the protection of the solicitor or to hide the misdeeds of the criminally minded. The rationale for maintenance of the independent role of solicitor is the maintenance of the rule of law.

As stated above, the Society sustains its long-standing objection to the obligation to make suspicious matter reports, as it is inconsistent with the fundamental role of legal practitioners in our justice system.

If legal practitioners are to be included as PSPs, it will be critical to amend the Australian Solicitor Conduct Rules (**ASCR**) to allow for a solicitor to decline to act further should they form a

preliminary view that their prospective client may be involved in AML/CTF activities, with no obligation to provide an AML report.

To this end, our members propose a new Rule 5A is inserted in the ASCRs along the following lines:

> *A solicitor must not:*
>
> *(a) knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct;*
>
> *(b) do or omit to do anything that the solicitor knows assists in, encourages or facilitates any dishonesty, fraud, crime of illegal conduct by a client of any other persons.*

Rule 13 will also need to be amended to allow for a solicitor to withdraw from acting for a client, if the client's instructions require the solicitor to act contrary to the Rules (including new Rule 5A) or the law. This could be added as a new Rule 13.1.5 to the ASCR.

QLS also queries the potential civil liability consequences of suspicious matter reporting. Paper 2 has considered the issues relating to client legal privilege and confidentiality (which we discuss further below), but practitioners may also be exposed to civil liability risks as a result of suspicious matter reporting.

Is there a risk to the legal practitioner for cost or loss in the following circumstances?

- The practitioner makes a report and the client is investigated by AUSTRAC;
- Ultimately, there is no finding of risk;
- The client suffers reputational damage or commercial loss in the meantime, including, at a minimum, the costs of responding to the AUSTRAC investigation.

(c) Financial thresholds

QLS also recommends consideration be given to setting a sensible financial threshold over which transactions are subject to the proposed regime.

For example, we note that in New Zealand, an exemption is available[2] to a 'relevant service' provided by a designation profession in respect of the payment of money received from a customer, to enable the designated profession to make a payment to another person who carries out business within New Zealand that relates solely to business carried out within New Zealand if:

(a) The payment is wholly ancillary to the provision of a service that is not a relevant service by the designated non-financial business or profession; or

(b) The total value of the transaction or series of related transactions is below $1,000.

QLS suggests a threshold dollar value of $5,000 would be sensible for many of the transactions proposed below.

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[2] Regulation 24AB: inserted, on 9 July 2021, by regulation 12 of the Anti-Money Laundering and Countering Financing of Terrorism (Exemptions) Amendment Regulations 2021 (LI 2021/146)

(d) Exemptions to designated services

Drafting approach to be clarified - designated services vs PSPs

Paper 2 sets out eight designated service proposals. The distinction between the designated services and PSPs is not clear. We observe that in Paper 2 it is proposed that certain high-risk services (provided by PSPs) will be added to the list of designated services within the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (**the Act**). This distinction will require further consideration and clarification at the drafting stage.

Nevertheless, on page 7 of Paper 2, it states that 'the proposed services apply to all PSPs, when they carry out specified activities for customers, but do not capture all activities carried out by these businesses.'

A number of examples are then provided of services that are not proposed designated services including conducting an audit of financial statements and representing a client in a legal proceeding.

The drafting of the designated services is broad and encapsulates the most common forms of client based services that legal practitioners provide. The descriptions effectively describe standard transactional legal work, so any matter with a transaction will likely fall into scope based on the proposed wording of the designated services set out in Paper 2.

This approach is fraught with unintended consequences.

It is imperative the solicitor based services that are intended to fall within the scope of the second tranche reforms, are clear and adequately particularised. A broad brush approach will be unworkable and costly.

Recommend additional exemptions by reference to nature of party

As a starting point, the Society holds the strong view that if any of the following entities are involved in transactional legal work they should be exempt.

(a) Commonwealth departments and agencies.
(b) State departments and agencies.
(c) Licensed insurer.
(d) Registered liquidator.
(e) An entity on the Reporting Entities Roll.

Additionally, our members recommend that the exemptions in New Zealand Anti-Money Laundering and Countering Financing of Terrorism (Exemptions) Regulations 2011 are adopted. In particular, we recommend regulations 24, 24AB, 24AD be adopted with a view to limiting the scope of the designated services.

We also suggest an exemption for related party / inter-group transactions, including a transfer between an individual an entities that they control. A typical example arises with transfers of property from an SMSF to the individual or their family trusts as benefit payments. These are not 'nil' consideration transactions but they involve money or property moving from one entity to the other but within the same family.

Recommend additional exemptions by reference to low risk transactions

We also recommend the following exemptions are adopted in respect of conveyancing transactions.

- Pursuant to an order of a court where it gives effect to a transfer of property between litigant parties, i.e. a property division in family law
- Where the purchaser of the property is a regulated entity for AML/CTF, i.e. bank or financial services licensee
- Where the purchaser of the property is the Commonwealth, State or local government
- Where the transfer is proceeding as a gift or for $0 consideration
- Where the purchase is 100% funded by a licensed financial institution or settlement funds are solely coming from within the Australian banking system

We also suggest further consideration is required to determining the timing and scope for undertaking AMF/CTF due diligence for conveyancing transactions where:

- A client seeks legal advice in advance of a potential property sale, well before any counter party is identified or a contract is even drawn up. It may be the case that the transaction does not proceed.
- Urgent advice is sought in the context of an auction of a property, where the auction is due to occur within hours of the practitioner's engagement.

Our members have also commented that anecdotally, they have received feedback that it is becoming extremely difficult if not impossible for existing regulated entities to comply with certain AML obligations.

An example was provided that when dealing with unit trusts, a bank must hold a certified copy of the trust deed and a certified copy of the deed for each unit trust holder so that it can determine the ultimate beneficiaries. Our members are concerned that if this were to be imposed on professional services firms, it will also be difficult to meet the requirement.

It has been suggested that with most real property settlements settling electronically, the purchase moneys will already have passed through the financial services system and therefore through a regulated entity. In this case, it has been queried whether the regime should allow for a legal practitioner to rely on completing the transaction in an electronic conveyancing platform in circumstances where the bank has already discharged its AML standard.

4. Regulatory model

It seems clear that the primary legislation establishing the AML/CTF regime will be supplemented by regulations of some kind.

QLS strongly recommends that any supporting statutory instruments take the form of regulations under the enabling legislation which are developed and managed by the Attorney-General's Department (**AGD**).

This approach is consistent with the financial services regulatory model administered by the Treasury where significant exemptions and the scope of the applicability of the regulatory scheme is set appropriately in regulations. This is also consistent with the work being undertaken by the Australian Law Reform Commission in reviewing the *Corporations Act 2001* (Cth) to achieve better adherence to fundamental legislative principles. It is axiomatic that key boundaries for regulation should be a function of the legislature rather than the executive branch of Government.

In our view, it is not appropriate for the conduct regulator AUSTRAC to be responsible for determining the scope of the regulatory regime and that this role is best placed with AGD. Otherwise, there is a risk of conflicts arising between the role of regulator and the role of policy maker.

It is also critical that the regulations are legislative instruments under section 10 of the *Legislation Act 2003* (Cth) and subject to disallowance by Parliament.

5. Legal professional privilege and confidentiality

Legal professional privilege

It is important to acknowledge again, the underpinning principles of legal professional privilege in our justice system. These are:

- The authority is derived from statute and common law;
- It is a privilege that lies with the client and the legal adviser observes the privilege for the client's benefit;
- Privilege can only be waived by the client and not the legal adviser; and
- It is attached to communications and what falls within that privilege is a question of fact.

As Gleeson CJ, Gaudron and Gummow JJ highlighted in *Esso Australia Resources v Commissioner of Taxation* [1999] HCA 67:

> *The [legal professional] privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers.*

In that case it was noted that legal professional privilege:

1. Exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers; and
2. A person should be entitled to seek and obtain legal advice for the purposes of the conduct of actual or anticipated litigation, without the apprehension of being prejudiced by subsequent disclosure of the communication.

While section 242 of the Act states that the law relating to legal professional privilege is not affected by the Act, if legal practitioners become "reporting entities" then this principle is clearly in danger.

Our view is that legal profession privilege is essentially eroded by the reporting obligations under section 41 of the Act. As stated, it is not for the legal practitioner to waive this privilege. He or she has no discretion. The requirement to report based on a "reasonable suspicion" is far too low a test to break privilege. Further, section 41 is wide and does not extend solely to existing clients. It appears that leaving a message on a reporting entity's voicemail or sending an email to a reporting entity inquiring about fees for service would suffice in engaging section 41.

As noted by the LCA in its recent submission, "client legal privilege cannot be used to cloak illegality and impropriety and does not apply when advice is sought to further or facilitate fraud, a crime or unlawful purpose."

Confidentiality

The requirement of a legal practitioner to keep information received from a client is also critical. The obligation to keep communications with a client confidential assists in the promotion of clients making full and frank disclosure to their solicitor or barrister. It is based on the secure knowledge that their legal representative will not disclose to a third party discussions or documents.

It is similar to the fundamental characteristics of legal professional privilege with the distinct difference being that the duty of confidentiality applies to all communications regardless of whether it is for the purpose of legal advice or advice in anticipation of or in the course of litigation.

It is also important to note that section 242 referred to above relates to legal professional privilege but does not express a protection for matters which are to be kept confidential.

Further, and again as noted in our recent submission, the fact that a legal practitioner cannot reveal to the client the fact of a report having been made upon pain of criminal sanction strikes directly at the heart of the fiduciary relationship between solicitor and client.

This undermines the integrity and independence of the legal profession by making the solicitor the agent of the executive government against the interests of the client.

Ultimately, if a legal practitioner fails to report, there may be penalties under the Act. However, if they report under section 41 but the communication was subject to client legal privilege, then they may be exposed to disciplinary processes through their respective professional associations. This can occur if they have made a wrong judgment and reported a matter that was later determined to be privileged.

6. Implementation and timelines

The Society holds the strong view that the Australian Government needs to be circumspect in its approach to setting the timeframes for the implementation of the second tranche of reforms.

The design and drafting of the regulations and legislative amendments is the most complex and time consuming part of the second tranche reform package. The timeframes must recognise and allow for the size of this task.

Furthermore, the Society would expect this to occur in consultation with industry, during the drafting process, and prior to public consultation, as this would ensure that many of the technical issues are addressed in advance.

The bottom line is that legal practices will be required to substantially redesign their business systems as well as their compliance systems which will take time. Its effective implementation will require a dramatic increase in the scale of resources available to legal practitioners and AUSTRAC.

The Society recommends a minimum two year lead-in period before any second tranche reforms begin to take effect.

Lastly, it is essential that the legal profession is given the opportunity, and adequate time, to comment on an exposure draft and the proposed implementation timeframe.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted]

Yours faithfully

[redacted]

Rebecca Fogerty
President

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Office of the President

27 January 2017

Ms Carole Caple
Senior Lawyer
Law Council of Australia
by email: [redacted]

Your ref AML taskforce

Our ref CS:MD

Dear Ms Caple

Cost and concern with AML/CTF compliance

Queensland Law Society is pleased to be able to offer the following drafting for the Law Council submission in response to the Attorney-General's Department's Consultation paper titled *Legal practitioners and conveyancers: a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime.*

As you are aware the Queensland Law Society has maintained vigilance and opposition to the imposition of additional compliance burdens on Queensland solicitors. Particularly we see the impact of anti-money laundering / counter terrorism financing (AML/CTF) regulation upon our members and their clients as far-reaching, imposing unprecedented obligations on solicitors to report on their clients' activities. Quite apart from imposing a burdensome compliance regime, it strikes at the heart of the sanctity of the solicitor/client relationship.

QLS intends to write in support of the Law Council's submission when it is available and looks forward to further contributing to the drafting. Our contribution on the topics of the cost impact on solicitors based on our preliminary survey results and the existing regulation around the foreign purchasers of real estate follow.

Risk overstated for foreign buyers of real estate

The Financial Action Taskforce (FATF) has identified the purchase of real estate as a key money laundering / terrorism financing method that commonly uses or requires the services of a legal practitioner. In some Australian jurisdictions this also requires the involvement of a real estate agent in the formation of the purchase transaction[1].

[1] In Queensland, real estate agents form the contracts of sale between purchaser and seller and have a specific exclusion from legal professional regulation legislation to permit them to do so.

In the Australian context the risks of this method are somewhat reduced as there exists already obligations for the identification of parties to a transaction as a part of the title transfer process. Additionally, and not to be understated, foreign purchasers of real estate in Australia must obtain a prior approval for their transaction from the Foreign Investment Review Board (FIRB). The FIRB website provides the following assistance to would-be foreign purchasers:

"Foreign persons must have received foreign investment approval **before** they acquire an interest in residential real estate."[2]

The relevant fee for obtaining such an approval is between $5,000 and $91,300, for properties up to $10 million. The FIRB process establishes an initial de facto risk assessment of foreign real property transactions from the perspective that "Foreign investment is important to help grow our economy and provide jobs.[3]"

In Australia, foreign purchasers of real estate must pose a lower risk of ML/TF than in other jurisdictions given such purchasers have already received Government approval for their transactions prior to settlement occurring.

Additional compliance costs on legal practices

In December 2016 and January 2017 Queensland Law Society conducted a survey of law firms to assess likely implementation costs of an AML/CTF regime akin to the existing Australian scheme being extended to legal practitioners. The survey approached the imposition of a scheme by considering the impact of each of its component parts on a law firm, with special consideration of different sizes and locations. Firms reported whether they undertook transactions of the following kind and the approximate number undertaken in any year:

- Transfer of real estate (including conveyancing, administration of estates, family law matters);
- Management of client money, securities or other assets;
- Management of bank, savings, or securities accounts (including interest-bearing trust accounts, money held under direction);
- Organisation of contributions for the creation, operation or management of companies, trusts and other structures; and
- Creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

At the time of writing preliminary data from the survey was available and it is intended to provide supplementary analysis when the survey reaches fuller maturity.

The dynamics of law firms is significantly affected by the size of their operations both in terms of the number of transactions engaged in and the types of matters undertaken. For this reason, compliance costs are presented for three broad categories of law firms:

[2] FIRB, Residential real estate – overview [GN1], at https://firb.gov.au/resources/guidance/gn01/
[3] http://firb.gov.au/files/2015/09/FIRB_fact_sheet_residential.pdf

- Larger firms (comprising 19 or more solicitors);
- Medium sized firms (comprising 6 to 19 solicitors); and
- Small firms (comprising sole practitioner firms and firms up to 5 solicitors).

Headline results indicate that set up and annual compliance costs for the AML/CTF regime for legal practices are:

- For larger firms around $748,000 million per year;
- For medium sized firms around $523,000 per year; and
- For smaller firms around $119,000 per year.

Given that there are approximately 10,000 law firms in Australia and that around 5% would be classified as larger firms and 15% as medium firms on our definitions, the approximate national cost on a linear extrapolation would be:

- $374 million for larger firms;
- $784.5 million for medium sized firms;
- $952 million for smaller firms; and
- **$2.11 billion for all firms nationally.**

The 2016 IbisWorld Industry Report for the legal sector cites that the revenue of the legal services industry nationally is $23.1 billion and total profit is $3.3 billion. It seems disproportionate that the potential national cost of set up and compliance should amount to about 10% of the entire revenue of the legal profession.

While early figures, the QLS survey showing the annual cost of AML/CTF compliance for the legal profession at around $2 billion will prove to be a significant burden on the Australian economy. On the IbisWorld numbers it will not be possible for these costs to be absorbed by the legal profession and legal costs will have to rise.

This will have a negative impact on access to justice and particularly in the case of smaller and regional practices may see those places lose their local law firms. In many cases the gross revenue of small firms is between $300,000 and $600,000 a year and an additional compliance burden of around $120,000 is not sustainable for communities which can not support significant and sustained rises in legal fees. As is the experience in the United Kingdom, the closure of smaller and regional firms will not only have a deleterious effect on access to justice but will also remove from smaller communities an integral and important pillar in local community infrastructure.

Larger firms

Large firms were described as being solely metropolitan and comprised of 19 or more solicitors. In summary, they reported:

Measure	Survey average cost	Total
Implement client due diligence for every client of the firm, on-going client re-	$80,000 annually	$80,000

identification and verification using reliable, independent source documents, data or information		
Identify the beneficial owner in a transaction or in the case of legal person arrangements take reasonable measures to understand the ownership and control structure	$50.00 per transaction or up to $275,000.00 annually	$ 355,000
Obtain information on the purpose and intended nature of each client matter	$50.00 per transaction or up to $275,000.00 annually	$630,000
Implement a risk management system to determine whether a client is a politically exposed person, obtaining senior management approval for establishing a business relationship with such a client, take reasonable steps to establish source of wealth of the person and source of funds. Conducting enhanced ongoing monitoring of the business relationship.	$17,100 annually	$647,100
Conduct risk ratings of clients to determine whether a client is a higher risk of being involved in money laundering	$21,250.00 annually	$668,350
Implement ongoing AML/CTF financing programmes including: Risk-rating clients Development of internal policies, procedures and controls including compliance management arrangements, employee screening and on-going training, audit function	$80,000 annually	$748,350

and testing of the programmes.		

Medium sized firms

Medium sized firms were described as being predominantly based in regional cities or in metropolitan areas and comprised of between 5 and 19 solicitors. In summary, they reported:

Measure	Survey average cost	Total
Implement client due diligence for every client of the firm, on-going client re-identification and verification using reliable, independent source documents, data or information	$100,000 annually	$100,000
Identify the beneficial owner in a transaction or in the case of legal person arrangements take reasonable measures to understand the ownership and control structure	$122.33 per transaction or up to $148,875.60 annually	$248,875.60
Obtain information on the purpose and intended nature of each client matter	$123.66 per transaction or up to $150,494.22 annually	$399,369.82
Implement a risk management system to determine whether a client is a politically exposed person, obtaining senior management approval for establishing a business relationship with such a client, take reasonable steps to establish source of wealth of the person and source of funds. Conducting enhanced ongoing monitoring of the business relationship.	$35,000 annually	$434,369.82
Conduct risk ratings of clients to determine whether a client is a higher risk of	$18928.65 annually	$453,298.47

being involved in money laundering		
Implement ongoing AML/CTF financing programmes including: Risk-rating clients Development of internal policies, procedures and controls including compliance management arrangements, employee screening and on-going training, audit function and testing of the programmes.	$70,000 annually	$523,298.47

Smaller firms

Smaller firms were described as being across the categories of metropolitan, suburban, regional city and rural/remote. This classification includes both sole practitioner firms and micro firms of between 2 and 5 solicitors. In summary, they reported:

Measure	Survey average cost	Total
Implement client due diligence for every client of the firm, on-going client re-identification and verification using reliable, independent source documents, data or information	$30,000 annually	$30,000
Identify the beneficial owner in a transaction or in the case of legal person arrangements take reasonable measures to understand the ownership and control structure	$65.53 per transaction or up to $14,803.00 annually	$44,803.00
Obtain information on the purpose and intended nature of each client matter	$76.80 per transaction or up to $16,588.80 annually	$61,391.8
Implement a risk management system to determine whether a client is a politically exposed person, obtaining senior	$7,687.59 annually	$69,079.39

management approval for establishing a business relationship with such a client, take reasonable steps to establish source of wealth of the person and source of funds. Conducting enhanced ongoing monitoring of the business relationship.		
Conduct risk ratings of clients to determine whether a client is a higher risk of being involved in money laundering	$9,218.78 annually	$78,298.17
Implement ongoing AML/CTF financing programmes including: Risk-rating clients Development of internal policies, procedures and controls including compliance management arrangements, employee screening and on-going training, audit function and testing of the programmes.	$41,000 annually	$119,298.17

Integrity and Independence of the legal profession

The imposition of suspicious matter reporting requirements to solicitors strikes at the heart of the sanctity of the solicitor/client relationship. The role of the solicitor is to be an independent advisor and advocate for their client.

The reason for the existence of a special relationship between solicitor and client is not for the protection of the solicitor or to hide the misdeeds of the criminally minded. The rationale for the maintenance of the independent role of solicitor is the maintenance of the rule of law. The rule of law is undermined if the independence of the principal actors of the third arm of Government, the judiciary and lawyers as officers of the court, do not possess a sufficient degree of integrity and independence.

When judicial integrity and independence is compromised by being made the agent of the executive branch of government was considered by the High Court in the decision of *State of South Australia* v. *Totani & Anor* [2010] HCA 39. In that decision Chief Justice French said:

> "82. Section 14(1) represents a substantial recruitment of the judicial function of the Magistrates Court to an essentially executive process. It gives the neutral colour of a judicial decision to what will be, for the most part in most cases, the result of executive

> action. That executive action involves findings about a number of factual matters including the commission of criminal offences. None of those matters is required by the SOCC Act to be disclosed to the Court, nor is the evidence upon which such findings were based. In some cases, the evidence, if properly classified as "criminal intelligence", would not be disclosable. Section 14(1) impairs the decisional independence of the Magistrates Court from the executive in substance and in appearance in areas going to personal liberty and the liability to criminal sanctions which lie at the heart of the judicial function. ...
>
> 83. In the exercise of the function conferred on it by s 14(1), the Magistrates Court loses one of its essential characteristics as a court, namely, the appearance of independence and impartiality. In my opinion, s 14(1) is invalid."

In a similar way, solicitors as officers of the court, must retain a degree of independence from the executive government.

The obligations of suspicious matter reporting to AUSTRAC incumbent on reporting entities make those entities agents of the executive government. This is heightened when the reporting entity can not reveal the fact of a report being made to their client upon pain of criminal sanction. This strikes directly at the heart of the fiduciary relationship between solicitor and client and directly undermines the integrity and independence of the legal profession by making the solicitor the agent of the executive government against the interests of the client.

It is a well understood professional obligation of solicitors that they must not act for a client and be a party to fraud or illegal activity. The Queensland Law Society survey of December 2016 and January 2017 canvassed this issue and found that 75% of respondents advised they had declined to act for a client or ceased acting for a client due to concern the client's instructions were inconsistent with their legal professional ethical obligations.

The fact lawyers have ceased acting for clients is not unexpected or remarkable given the high value placed on professional obligations by the profession, but it is cogent evidence that the existing professional structures are working as they should.

Thank you for this opportunity and we look forward to providing more input to the LCA's submissions on this most important topic for our members.

Yours faithfully

Christine Smyth
President