Queensland Law Society

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Office of the President

22 May 2023

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

Dear Dr Popple

Tranche 2 Consultation – AML/CTF Regime

Thank you for this opportunity to provide comments on the consultation paper on reforms to simplify and modernise the AML/CTF regime and address risks in certain professions (the Paper).

Thank you also for the work of representatives of the Law Council of Australia who attended the recent roundtable with Government as part of the Tranche 2 consultation.

QLS is confident the Law Council will represent well the diversity of the legal profession in this important process. The potential impact of Tranche 2 regulation on the Queensland legal profession cannot be understated. We look to the Law Council to work toward an effective solution which does not jeopardise the fundamental tenets of the legal profession as officers of the court or make legal practice so unviable that solicitors are driven from its practice, particularly in rural, regional and remote places where access to justice can be the most acute.

Principled Concerns

QLS has always maintained a rejection of criminal conduct by solicitors and reckless or unwitting complicity in the criminal conduct of clients. As a co-regulator of the legal profession in Queensland, QLS is dedicated to protecting the public interest and enforcing the highest of ethical standards for the profession.

QLS has also maintained a position of significant concern at the imposition of any additional unnecessary regulation and compliance costs on the local legal profession since the inception of the AML/CTF scheme in 2006.

In our 2017 correspondence to Law Council of Australia, we distilled the fundamental concerns held by the Society as follows:

> ... 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.

History repeating

The AML/CTF regime was introduced to bring Australia into compliance with international standards published by the Financial Action Taskforce (FATF) to reduce the risk of Australian businesses being misused for money-laundering and the financing of terrorism. FATF was originally founded to deal with the laundering of proceeds of drug cartels in the 1980's.

The AML/CTF Act was passed in 2006 and was phased in over two years. Known as Tranche 1, the reforms commenced in 2008 and regulated the bullion, gambling, financial and remittance service industries where the conversion and transfer of physical and electronic forms of money were seen as vulnerable to money laundering and terrorism financing.

Obligations under Tranche 1 included:

- identification and verification: reporting entities must identify and verify the identity of customers before providing the customer with any service;
- AUSTRAC reporting: reporting entities must report all suspicious matters, certain transactions above a threshold amount and international funds transfer instructions to AUSTRAC. AUSTRAC is entitled to share information with domestic security and law enforcement agencies, and some international counterparts;
- AML/CTF Program: reporting entities must develop and implement AML/CTF programs that are designed to identify, mitigate and manage money laundering and terrorism financing; and
- Record keeping: reporting entities must make and retain records and certain client documents for seven years.

In 2007, 2012, 2016/17, and now again in 2023, the extension of AML/CTF obligations to lawyers, accountants, real estate agents and other so called 'gate keepers', known as Tranche 2, has been raised by Government.

We note that the various reviews and evaluations of the Australian AML/CTF regime to date have not clearly demonstrated the current settings of the schemes to be highly effective at stopping the laundering of money or lessen the potential of financing terrorism.

In previous occurrences of Tranche 2 consultations, the primary objective has appeared as meeting the expectations of law enforcement agencies and being seen to meet Australia's international obligations, rather than constructing an effective and workable scheme to deal with money laundering and terrorism financing risks in a proportionate way. The Paper does propose some reforms to the existing AML/CTF scheme to make it more effective following the outcomes of the latest review. While that is to be commended, it again appears the lens remains on smoothing roads to compliance rather than effectiveness in meeting the core rationale for the scheme.

A costly exercise with uncertain benefit

We note that raising consideration of cost and benefit in the Tranche 2 context has been described by some as a 'derailer'. Such a characterisation unfairly taints a legitimate and important aspect of an evidence-based policy discussion about what form Tranche 2 should or could take.

We note that we are still awaiting the release of the cost/benefit analysis of AML/CTF regulation of the Australian legal profession undertaken in 2017 to which the QLS and Law

Council of Australia contributed. The failure to make this information publicly available or conduct an equivalent contemporary analysis is a significant failing in the current consultation process.

In New Zealand, the Ministry of Justice estimated that compliance costs with their equivalent of Tranche 2 – called Phase 2 – was around a NZ$100M a year[1]. The Deloitte Report of Business Impacts of Phase 2[2] provided the following estimate for lawyers and conveyancers in 2016 NZ$:

Lawyers and Conveyancers	Establishment cost (Year 1)		Ongoing costs (per annum)		Average cost per client (based on high end cost)[2]	Estimated number of business within the Sector[3]	Estimated number of reporting entities[4]
	low	high	low	high			
	$16.1 m	$80.9 m	$14.3 m	$59.6 m	$37.76	1,919	1,572

On these figures, a median establishment and ongoing cost to the profession of Phase 2 could be said to be NZ$85.45M, which grossed up for inflation to 2023 comes to NZ$106.33M. We know the legal profession in Australia is roughly eight times the size of the New Zealand profession, equating to an equivalent implementation cost of around A$800M for the year on the NZ analysis. That figure is double the entire Commonwealth funding nationally for the legal assistance sector under the National Legal Assistance Sector Partnership[3].

There can be no sensible discussion of appropriate and proportionate implementation of Tranche 2 without an independent and legitimate exploration of the benefits and costs of further regulation.

The Paper

The Paper is a high level document making a number of presumptions without evidence. The following are a selection of the issues that have been identified.

The case studies supplied relating to lawyers largely evidence intentional action by a few isolated individuals compared to a substantive law abiding legal profession of 90,000 solicitors[4]. The conduct of those individuals would already fall within the sanctions in Division 400 of the Commonwealth Criminal Code. No attempt is made in the Paper to demonstrate how the intentional conduct evidenced in the case studies would have been any different with an AML/CTF compliance regime. As it has been demonstrated on numerous occasions, regulating a small but intentional, rogue section of any profession or industry will not prevent them from acting inappropriately – there will always be flawed individuals.

It is not possible to discern from the Paper how the potential designated services would actually apply in legal practice and which types of matters are intended to be caught. The list includes the creation of trusts, but is deficient on whether that might extend to testamentary trusts in a will, for example, or the management of estate administration as an executor. The

[1] https://www.justice.govt.nz/justice-sector-policy/key-initiatives/aml-cft/costs-and-benefits/analysis/
[2] https://www.justice.govt.nz/assets/aml-phase-2-business-compliance-impacts.pdf
[3] https://federalfinancialrelations.gov.au/sites/federalfinancialrelations.gov.au/files/2023-04/National%20Legal%20Assistance%20Partnership%20-%20Multilateral%20Signed.pdf
[4] https://www.lawsociety.com.au/sites/default/files/2023-05/2022%20National%20Profile%20of%20Solicitors%20-%20Final.pdf

approach to designated services in the Paper seems to be to replicate FATF Recommendation 22(e).

The exploration of legal professional privilege in the Paper is highly academic and simply applied. The QLS has a fundamental objection to the obligation to make suspicious matter reports, as it is inconsistent with the fundamental role that lawyers play in our system of justice. The Paper appears to assert that a simplistic saving provision for legal professional privilege will remedy this fundamental conflict of duties and role. We note the experience from New Zealand that such an approach is of very little utility in navigating the shoals of reporting obligations in the complexity of modern day legal practice.

The way forward

QLS is concerned that there needs to be an evidence based policy approach to the issue of Tranche 2, including a demonstrated willingness to craft a regime which is effective and proportionate given the unique issues of legal practice and role of legal practitioners.

Any serious consideration of Tranche 2 must be thoroughly informed by the practical experience of legal practice to ensure any potential regime is effective and workable. Some aspects which should be very closely considered include:

- Clarification that the conduct of civil litigation, family law litigation, occupational discipline litigation, administrative appeals, criminal litigation and other quasi-judicial litigious processes, such as patent and trade mark appeals, and tribunal processes are exempt from the regime. The Paper merely refers to 'litigation',
- Clarification that funds held in a solicitor's trust account on account of fair and reasonable legal fees, disbursements and counsel fees are to be excluded for consideration of whether a designated service is being provided that triggers compliance obligations,
- Clarification of what the high level designated services topics might mean in a day to day practice sense, ie clarifying what elements of succession law and estate administration are, or should, fall within the gambit of the designated services and why. If a designated services approach is to be adopted, bright lines will need to be identified to provide certainty for lawyers in various practice areas,
- Alignment, as much as is possible, of the basic KYC obligations with the existing VOI requirements for e-conveyancing, including both a general 'reasonable steps' framework for identification and a safe harbour construction for small to medium sized firms. The safe harbour is a very important element for smaller and less well-resourced practices to assist them in reaching any compliance requirement,
- Clarification that the issues associated with SMRs relate to duties of confidence and also duties of privilege. A better approach may be to identify circumstances where privilege and confidentiality obligations are enlivened as a way of carving out SMR obligations,
- Seek better alignment between any potential AML/CTF program with the existing requirement for a law practice to implement appropriate management systems, ie avoid the potential for duplicate and potentially conflicting obligations,
- Question whether the proposed proliferation funding assessment is properly or reasonably applicable to the legal profession,
- Clarification that law firms will often come to transactions following the participation of other actors in the AML/CTF regime, real estate agents, accountants and financial institutions. Measures should be undertaken to facilitate reliance on other regulated entities rather than duplication of action, without the requirement to conduct due diligence and risk assessment on the other regulated entity,

- Create a mechanism for sanctioned guidance to be provided by legal professional associations and regulators that can be used by regulated entities as proof of meeting obligations, and
- The better outcomes that could be achieved by co-regulation with existing regulators in the legal profession.

We would be willing to engage to a greater extent with the Law Council and Government as this process of immense importance to the legal profession continues.

Yours faithfully

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Chloé Kopilović
President