Law Council
OF AUSTRALIA

Tranche Two AML Legislation

Law Council Comments on the Draft Tables of Designated Services to be inserted into the AML/CTF Act

Attorney-General's Department

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GPO Box 1989, Canberra,
ACT 2601, DX 5719 Canberra

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

19 Torrens St Braddon ACT 2612
www.lawcouncil.asn.au

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Executive Summary

The following submission has been prepared by the Law Council of Australia's anti-money laundering working group in response to the draft designated services tables released by the Attorney- General's Department for comment in June.

The primary concern expressed in the submission is that the designated services included in the draft tables extend beyond the activities covered by the Financial Action Task Force (FATF) Recommendations.

Specifically, the Law Council is concerned by the following matters:

- The failure to narrow the phrase "carrying on a business" so as to exclude ancillary service providers and services provided by an employee, partner or owner of a business to the business itself;
- The inclusion of advice work, particularly in circumstances where there is no required nexus between the provision of the advice and any relevant transaction and where the definition provided for "tailored advice" is broad enough to cover advice of a generic nature;
- The potential application of the AML/CTF Act to in-house and government lawyers in a manner inconsistent with the coverage intended by FATF;
- The fact that the draft tables refer to the provision of services to "persons" etc rather than "clients"; and
- The need to clearly exempt certain legal services.

The Law Council is also concerned that a number of terms used in the draft tables lack precision and need to be explained or given some definition.

The Law Council's specific comments on the draft tables are prefaced with a number of general comments which set out the Law Council's understanding of precisely what the Law Council has been asked to comment upon and the Law Council's expectations regarding the ongoing consultation process. Specifically, the Law Council makes the following comments:

- Pursuant to an undertaking provided by the Minister and the Department, the Law Council understands that the Government is not at this stage considering which, if any, services provided by the legal profession will attract anti-money laundering obligations relating to suspicious transaction reporting (STR).
- Pursuant to an undertaking provided by the Minister and the Department, the Law Council understands that the content of tranche one reforms will not be automatically applied, unchanged, to the legal profession simply by the addition of further tables of designated services to the existing AML/CTF Act. On the contrary, once the tranche two designated services have been settled, extensive consultation will follow on the nature and content of any obligations which will attach to the provision of those services.
- The Law Council believes that in order to be meaningful, tranche two consultations must go beyond discussing whether any proposed legislation accurately reflects the FATF Recommendations to a more substantial discussion about whether the proposed legislation represents the most

effective and practical way of addressing the purported facilitation of money laundering by the legal profession. This necessarily requires more information, including country specific information, about money laundering typologies and in particular about the manner in which lawyers have apparently been unwittingly used in the process.

- The legal profession in Australia is already subject to extensive regulation. The Law Council believes that an issue which must be addressed in future consultation is whether AML focused regulation of the profession should properly occur within this existing regulatory framework, which already includes complaint, auditing and investigative mechanisms.

Attached to the Law Council's submissions is a preliminary list of some of the issues which members of the legal profession have indicated will arise and will need to be addressed if the current AML regulatory regime is expanded to cover the provision of a wide range of legal services. In particular, the potential compliance costs of any imposed AML regime, is an issue of great concern to the legal profession, particular sole practitioners and those who work in small firms. The purpose of including the list of issues is to flag the matters for future consultation.

GENERAL COMMENTS ON THE CONSULTATION PROCESS

The purpose of these general comments is to set out:

- the Law Council's understanding of what it is the legal profession is being asked to comment upon; and
- The Law Council's expectations regarding the consultation process.

Suspicious Transaction Reporting

It is the Law Council's understanding, based on an undertaking provided by the Minister, that the services currently under consideration are those which will attract anti-money laundering obligations relating to customer identification, customer verification, record keeping and AML/CTF programs.

The Law Council understands that the Government is not at this stage considering which, if any, services provided by the legal profession will attract anti-money laundering obligations relating to suspicious transaction reporting (STR).

Provided they are consistent with existing professional obligations and not unduly onerous, the Law Council does not object to reforms which are aimed at reducing the risk that legal practitioners might be unwittingly used to facilitate money laundering.

However, the Law Council opposes in principle reforms which go further and require legal practitioners to secretly inform on their clients to regulatory agencies.

The Law Council believes that if an STR obligation was imposed on legal practitioners, it would infringe upon client confidentiality and damage the important relationship of trust between lawyer and client. This relationship of trust, and the free flow of information it facilitates, is central to the effective administration of justice.

The Law Council has already made detailed representations to Government setting out the basis for its opposition to an STR obligation for legal practitioners. The Law Council vigorously maintains that opposition.

However, in the event that STR obligations are imposed on legal practitioners over the opposition of the legal profession, then the Law Council would wish to make separate submissions about the scope of the services that ought to attract those obligations.

The FATF Recommendations, which provide the basis for Australia's AML/CTF legislation, differentiate between the types of legal services which should attract STR obligations and the types of legal services which should attract other types of AML obligations.

Specifically, FATF Recommendation 16 only requires STR obligations to be imposed on legal practitioners in circumstances where the legal practitioner ***engages in*** *a financial transaction on behalf of or for a client in relation to one of the activities described in FATF Recommendation 12(d).*

The draft list of designated services released for comment clearly goes far beyond circumstances where legal practitioners act as financial intermediaries. Therefore, if the current draft list were to be used to dictate when STR obligations applied to legal practitioners, it would impose a broader, more onerous obligation on legal practitioners than that envisaged by FATF.

Blanket application of the existing AML/CTF Act and Rules

While, as noted, the Law Council does not object in principle to the imposition of customer due diligence, record keeping and AML training obligations on legal practitioners who provide certain relevant services, the Law Council believes that these obligations must be framed to take account of the particular circumstances of the legal profession. This includes taking account of:

- the different ways in which legal practices are structured;
- the manner in which legal practices refer clients to each other and to members of the Bar,
- the manner and degree to which the legal profession in Australia is already regulated;
- the nature of the lawyer client relationship and its attendant obligations;
- the point at which a formal client relationship is formed with someone who approaches a legal practice for assistance,
- the implications for 'access to justice' if persons with high risk profiles are effectively unable to obtain legal services or unable to obtain legal services at a reasonable cost; and
- the fact that for legal practitioners the indicia of risk in relation to a particular client or transaction may be different than for other sectors and professions.

For that reason, even excluding STR from the equation, the Law Council objects to the blanket imposition of the existing Anti-Money Laundering and Counter Terrorism Financing Act 2006 (the AML Act) and related AML Rules to the legal profession.

Both the Attorney-General's Department and the Minister assured the Law Council in early May that the content of tranche one reforms would not be automatically applied, unchanged, to the legal profession simply by the addition of a further table or tables of designated services to the existing AML Act.

It was explained to the Law Council that, while the content of tranche one reforms would provide a guide and starting point for consultation, the existing tranche one provisions need not dictate the content, substance and scope of the obligations imposed by the tranche two reforms.

In short, the Law Council was assured that everything of substance was open for discussion.

The Law Council felt it necessary to seek these assurances for two reasons.

Firstly, the Law Council was not closely involved in negotiating the important details of the tranche one regulatory framework. In effect, the Law Council was informed that the legal profession was not intended to be captured by that framework in any significant way and would therefore be dealt with (and meaningfully consulted with) at a later point.

Secondly, as observed above, the Law Council believes that the circumstances of the legal profession are very different from those of businesses within the financial sector which were intended to be captured by the first Act and supporting Rules. As a result, the Law Council believes that to simply impose on the legal profession the same obligations, in the same form, would in many cases be unduly burdensome, or unnecessary or impractical.

Despite the assurances the Law Council received, the manner in which the draft list of designated services has been released, that is simply as an amendment to section six of the existing AML Act, suggests that the only live issue to be determined in the context of tranche two is: “in what circumstances will legal practitioners be subject to AML obligations?” and not the further question “what will the content of those obligation be?”

If the Department has altered its position, then the Law Council seeks the opportunity to make detailed submissions on those aspects of the existing AML Act and Rules which ought not be applied to the legal profession in their current form.

In the interim, some preliminary comments on aspects of the existing regulatory regime which pose particular problems for the legal profession are outlined in attachment "A".

The importance of information on AML typologies

Ideally, the legal profession would evaluate the draft list of designated services from three perspectives:

- Do they accurately capture the legal services required to be covered by FATF's Recommendations or do they, inadvertently or otherwise, go further than required?
- Are they expressed with sufficient clarity such that it will be possible for a legal practitioner to know with reasonable certainty when he or she is or is not subject to the Act?
- Putting to one side whether or not they accurately give effect to the FATF Recommendations, do the designated services, *in fact*, only target those activities which present a meaningful money laundering risk? Or, on the contrary, do they unnecessarily target a broad range of activities and actors such that they are likely to result in the imposition of burdensome obligations for no material benefit?

Unfortunately it is difficult for the legal profession to conduct a review of the draft list of designated services from this important third perspective. This is because little detailed information is available both in Australia and internationally about money laundering and terrorism financing typologies, and in particular about the manner in which lawyers have apparently been unwittingly used in the process.

Although the global AML reform process, driven by FATF, is premised on the assumption that legal practitioners are unwittingly used by criminals to launder money, requests from the international legal profession for empirical data to support that claim have produced little in response.

The absence of this type of information makes it very difficult for the legal profession to ensure that AML regulation directed towards its members is appropriately targeted and proportionate to the end sought to be achieved.

The Law Council can not effectively participate in a productive dialogue with Government about the suitability of proposed AML/CTF measures without properly understanding the problem sought to be addressed.

The fact that the FATF Recommendations have yet to be translated in Australia into comprehensive, subject specific, domestic legislation which applies to lawyers, should not be viewed as the problem sought to be addressed.

The FATF Recommendations are simply a means to an end, not an end in themselves.

The Law Council believes that in order to be meaningful, tranche two consultations must go beyond discussing whether any proposed legislation accurately reflects the FATF Recommendations to a more substantial discussion about whether the proposed legislation represents the most effective and practical way of addressing the purported facilitation of money laundering by the legal profession.

This necessarily requires more information, including country specific information, about money laundering typologies and the role of legal practitioners.

Existing Regulation of the Legal Profession

The legal profession in Australia is already subject to extensive regulation. Each state and territory jurisdiction has an Act, Regulations and Conduct Rules governing the profession. These have been progressively amended to reflect model provisions agreed nationally through the SCAG process.

Neither the Australian Government, nor FATF in its evaluation of Australia's AML regime, have given due consideration to the existing regulation of the legal profession in Australia. There has been no attempt to particularize whether and how the current rules and regulations governing the conduct of the profession, or the manner of their enforcement, are inadequate.

For example, the Model Legal Profession Act already includes provisions which make it an offence for a Law Practice to knowingly receive money or record receipt of money in the practice's trust records under a false name. The Model Act also provides for the appointment of persons to investigate the 'affairs' of a law practice, which includes the records of the practice and any transaction in which the practice was involved either as a party or on behalf of a client. While the principal purposes of such an investigation are to ascertain whether the law practice has complied with or is complying with the requirements of the Legal Profession Act and Regulations and to detect and prevent fraud or defalcation, the Model Act does not limit the scope of the investigation or the powers of the investigator. Significantly, the Model Act also allows for information obtained in course of an investigation, examination or audit to be provided to relevant State and Commonwealth agencies.

In addition, Model Regulations for the legal profession already include provisions covering the creation, retention and audit of records generated in relation to trust accounts, controlled monies and transit monies and require a certain degree of customer identification.

Further, conduct rules for the legal profession already include provisions which prohibit legal practitioners from facilitating illegality, misleading the court and other parties to litigation and interfering with the efficient administration of justice.

On that basis, it is clear that the existing regulatory framework for the legal profession is amendable to the inclusion of AML obligations and best practice guidelines.

Therefore, the Law Council believes that an issue which must be addressed in future consultations is whether any AML focused regulation of the profession should properly occur within this framework, which includes existing complaint, auditing and investigative mechanisms.

COMMENTS RELATING TO ALL DRAFT TABLES

The draft tables extend beyond the activities required to be covered by the FATF Recommendations.

The FATF Recommendations are not concerned with regulating the provision of legal services *per se*. The FATF Recommendations are concerned with regulating the provision of services which are preparatory to or give effect to transactions via which money may be laundered.

Specifically, FATF Recommendation 12(d) - (e) require that the customer due diligence and record-keeping requirements set out in FATF Recommendations 5, 6, and 8 to 11 apply to designated non-financial professions in the following situations:

d) *Lawyers, notaries, other independent legal professionals and accountants when they prepare for or carry out transactions for their client concerning the following activities:*
   - *buying and selling of real estate;*
   - *managing of client money, securities or other assets;*
   - *management of bank, savings or securities accounts;*
   - *organisation of contributions for the creation, operation or management of companies;*

- *creation, operation or management of legal persons or arrangements,*
- *and buying and selling of business entities.*

e) *Trust and company service providers when they prepare for or carry out transactions for a client concerning the activities listed in the definition in the Glossary.*

It is explained in the Glossary that Trust and Company Service Providers refers to all persons or businesses that are not covered elsewhere under the Recommendations, and which as a business, provide any of the following services to third parties:

- *acting as a formation agent of legal persons;*
- *acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;*
- *providing a registered office; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;*
- *acting as (or arranging for another person to act as) a trustee of an express trust;*
- *acting as (or arranging for another person to act as) a nominee shareholder for another person.*

With that in mind, the Law Council is concerned with the breadth of the description of the designated services included in the draft tables which extend beyond what is contemplated by FATF and will result in members of the legal profession and others being covered by the Act in unexpected circumstances.

Specifically, the Law Council raises the following matters:

- The failure to narrow the phrase "carrying on a business" so as to exclude ancillary service providers and services provided by an employee, partner or owner of a business to the business itself;
- The inclusion of advice work, particularly in circumstances where there is no required nexus between the provision of the advice and any relevant transaction and where the definition provided for "tailored advice" is broad enough to cover advice of a generic nature;
- The potential application of the AML/CTF Act to in-house and government lawyers in a manner inconsistent with the coverage intended by FATF;
- Reference to the provision of services to "persons" etc rather than "clients"; and
- The need to clearly exempt certain legal services.

Problems with the phrase "carrying on a business"

The reach of the FATF Recommendations is determined by reference to two factors, that is, the nature of the service provided and who it is provided by.

In contrast, the draft tables will define the reach of Australia's tranche two AML legislation only by reference to services provided and not by reference to who those services are provided by. The only limiting factor is that they must be provided "***in the course of carrying on a business***".

This has the potential to significantly expand the potential application of the legislation.

The Law Council's concerns with the expression "carrying on a business" are twofold.

First, unless the phrase "carrying on a business" is defined with more precision, the draft tables of designated services will capture a number of businesses which provide services that are only ancillary to the activity sought to be targeted.

Further, as currently drafted the phrase will also include in-house professional services provided by the owners, partners or employees of a business to the business itself or a related entity.

For example, items 1B and 2 of draft table 5 cover:

> "*making arrangements or preparations, on behalf of the promoters of a new company, in connection with the formation of the new company, where the service is provided in the course of carrying on a business*"

And

> "*making arrangements or preparations, on behalf of the promoters of a new company, in connection with equity finance or debt finance for the new company, where the service is provided in the course of carrying on a business*."

As currently drafted, these items either separately or together could include a very broad range of services which are not contemplated directly or indirectly in the FATF Recommendations. For example, services provided by:

- businesses providing company search services;

- employees within a corporate group when a new company is incorporated for any reason (such as a new group structure or as a result of an acquisition or a sale); or
- a printing or PR company in preparing promotional material or a prospectus. .

Item 6 of draft table 5 covers:

> "*carrying out, on behalf of a partnership, company or trust, any of the management activities, or the day-to-day operations, of the company, partnership or trust, where the service is provided in the course of carrying on a business"*

As currently drafted, this would include any outsourced service provider to the company, including those which assist in the day to day running of its business, such as providers of IT services, recruitment services, security services or administrative support services.

The abovementioned difficulty is compounded by the fact that the definition of "business" in section 5 is very broadly defined to include:

"*a venture or concern in trade or commerce, whether or not conducted on a regular, repetitive or continuous basis".*

Further the Explanatory Memorandum to the AML Act makes it clear that this definition is meant to have a broad interpretation (see EM at page 29).

For these reasons the Law Council believes that many of the draft designated services need to be more narrowly defined.

The Law Council submits that the preferable way to address some of the issues raised may be to include a definition of "carrying on a business" using a formulation of words similar to the following:

'carrying on a business' means conducting a commercial enterprise for profit where the

provision of the designated service is a core activity of the business.

For the avoidance of doubt, it may also be necessary to include a further clause which clarifies that where a service is*:*

(i) provided by a partner of a partnership to the partnership itself or an entity related to the partnership; or

(ii) provided by a director, owner or employee of a business to the business itself or an entity related to the business,

it is not a designated service, except in the unusual case where it falls within the ambit of FATF Recommendation 12(e).

It is important to note that professional services firms are likely to have related entities that include a combination of partnerships, trusts and companies, both onshore and offshore. A definition of related entities that is confined to related bodies corporate would be of limited assistance to professional services firms.

The second alternative may be to amend each designated service so as to require not just that the service is provided "in the course of carrying on a business" but that it is provided in the course of carrying on a business of a certain kind.

For example, each item in draft table six may be amended to require that the designated service is provided *in the course of carrying on a business of providing company and trust services to third parties,* where company and trust services is defines as:

- acting as a formation agent of legal persons;
- acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;
- providing a registered office; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;
- acting as (or arranging for another person to act as) a trustee of an express trust;
- acting as (or arranging for another person to act as) a nominee shareholder for another person.

Problems with including the provision of advice as a designated service

Unlike the FATF Recommendations, the designated services listed in the draft tables do not require any nexus with an actual or anticipated transaction.

This is particularly relevant in the case of item 4A of table 4 and items 1AA, 1BA, 2A, 4, 5A and 7 of table 5 which refer to giving or directing tailored advice of different kinds.

The provision of advice is not covered by the FATF Recommendation unless it specifically forms part of the preparation for or carrying out of a relevant transaction.

A great deal of advice provided by legal practitioners would not fall within this category. For example, advice would not be captured where it is quite generic in nature, is provided at a very preliminary stage in a planning process or is provided after a transaction has been completed and become the subject of investigation or dispute.

For that reason the Law Council submits that the designated services which relate to the "giving or directing of tailored advice" should be removed from the draft tables.

If they are not removed then at the very least the following issues should be addressed:

- Those designated services which refer to the giving or directing of tailored advice must be amended to clarify that such advice is only captured when it is provided ***in anticipation of and in preparation for a transaction concerning a relevant activity***.

- The proposed definition of "tailored advice" remains too broad.
  Lawyers are frequently called upon to provide legal advice to a client that is of a generic nature. For example, this might include providing a summary of AML requirements in Australia. This advice will nonetheless be tailored to the client's situation to some extent because it will take account of the obvious known features of the client, for example, whether the client is an ADI. Such advice could be captured by item 7 of table 5.

  Further lawyers are sometimes called upon to provide a copy of an advice prepared for one client to a third party - for example, a vendor's due diligence report prepared for the client vendor but with a copy given to a purchaser allowing limited reliance on the report.

  Lawyers are also called upon from time to time to merely witness the execution of documents or to certify documents.

The Law Council wants to ensure that lawyers are free to provide these limited services without needing to comply with the requirements of the AML Act.

- It is also unclear what the distinction is intended to be between "giving" and "directing" tailored advice. The Law Council is particularly concerned with the reference to "directing" tailored advice given that it would appear to cover any form of communication to the relevant person (or client) including communications in any form of media (radio, television, newspaper, internet) and communication through a third party.

The application of the Act to in-house and government lawyers

As noted above, the reach of the FATF Recommendations is determined by reference to two factors, that is, the nature of the service provided and who it is provided by.

The definition of "designated non-financial businesses and professions" in the Glossary to the FATF Recommendations clarifies that the FATF Recommendations are not intended to apply to "internal" (in-house) professionals or professionals working for government agencies.

Specifically the relevant definition provides:

*"Lawyers, notaries, other independent legal professionals and accountants - this refers to sole practitioners, partners or employed professionals within professional firms**. It is not meant to refer to "internal" professionals that are employees of other types of businesses, nor to professionals working for government agencies**, who may already be subject to measures that would combat money laundering**". (emphasis added).***

This exclusion is not reflected in the draft tables. While addressing the problems with the phrase "carrying on a business" may achieve the same end, the Law Council believes that a specific exclusion for "internal" professionals should also be included to ensure consistency with the FATF recommendations.

Reference to "clients" rather than "persons" etc

The FATF Recommendations require that AML obligations apply to lawyers when they prepare for, carry out or engage in certain transactions on behalf of *their clients.*

The draft designated services do not refer to clients at all.

The items covered in the draft tables capture services which are provided, depending on the service, to ***a person*** or to ***the promoters of a new company*** or to ***a company, partnership or trust***.

As noted, to be captured the services must also be provided in the course of carrying on a business.

The Law Council is concerned that the reference to "a person" etc may be somewhat wider than a reference to "a client", a term which assumes a direct and ongoing relationship.

The Law Council would like further information from the Department about the policy and intention behind the decision to depart from the terminology favoured by FATF. In particular, is the intention to broaden the scope of the legislation?

The need to clearly exempt certain legal services

A unifying feature of the types of transactions targeted by the FATF Recommendations is that they involve:

- dealing with or transferring physical assets including currency; or
- the creation of companies and other entities to deal with assets.

These transactions are targeted because they have the potential to facilitate the laundering of money.

There are many other legal services that lawyers provide to clients which do not involve dealing with or transferring physical assets or currency in a manner which introduces a money laundering risk.

Examples include:

- patent and trademark applications, oppositions and litigation;
- dispute resolution including formal litigation before a court or an administrative tribunal and alternative dispute resolution processes such as mediation and arbitration;

- regulatory advice work other than financial or corporate/business structure advice work, such as, advising on the Privacy Act or environmental or planning laws;
- family law advice work arising from separation or divorce;
- probate work; and
- employment law work, in particular advice on employment contracts, termination of employment, disciplining staff, statutory entitlements, occupational health and safety requirements.

The use of general and imprecise language in the proposed list of designated services, means that each of the above legal services may attract the operation of the AML Act even though it does not introduce a money laundering risk.

Accepting that the language used to describe the designated services covered by the AML Act will, even after consultation and refinement, still lack precision and inevitably capture unintended services, the Law Council submits that each of the areas above should be expressly excluded from the proposed list of designated services.

From an access to justice perspective, which seeks to ensure that people are not discouraged or impeded from obtaining legal advice when required, the Law Council also submits that it would be appropriate for an initial consultation with a legal practitioner to be specifically exempt under the AML Act from AML obligations.

The Law Council submits that lawyers should be allowed to engage in an initial meeting with an existing or potential client for the purposes of ascertaining the nature of the client's needs, providing preliminary advice of a general nature and disclosing fees and terms and conditions, free from all identifying, recording or reporting obligations under the AML Act.

SPECIFIC COMMENTS ON DRAFT TABLE 4

Preference for use of the word “real estate”

Draft table four is headed “Real Estate” but the designated services included in that table refer to land.

The word “land” is not defined in the AML Act, although it is defined in the *Acts Interpretation Act* as follows:

Land *shall include messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein*.

The Law Council believes that “real estate” or “real property” should be used instead of “land”.

Item 4A is unnecessary, in view of item 5

For the reasons noted above, the Law Council objects to the manner in which item 4A is worded because it may include the provision of general legal advice which is sought before any particular transaction is contemplated (and therefore can not be regarded as “preparing for or carrying out a transaction”).

As currently worded it could even include the provision of a building and pest inspection report or body corporate search provided the customer who commissioned the report asked for specific issues to be addressed and thus transformed the subsequent report from generic advice to tailored advice.

A person who provides a conveyancing service will already be covered by the Act as a result of item 5. The Law Council submits that this is already sufficient to capture the relevant service encompassed by the FATF phrase “Preparing for or carrying out a transactions for a client concerning the buying and selling of real estate”.

Definition of Conveyancing Service

The proposed definition of 'conveyancing service' includes any services that under the regulations is taken to be 'incidental to a conveyancing service'. Potentially this could catch any advice given or document prepared in relation to mortgages, financing or other financial transactions incidental to a conveyance. It could also include legal advice that is not directly related to conveyancing, such as structuring or succession advice.

The Law Council submits that the definition of 'conveyancing service' should reflect common usage. If preparation of mortgage documents, financing and other work incidental to a conveyance needs to be subject to the AML/CTF Act, it should be expressly covered by separate designated services.

SPECIFIC COMMENTS ON DRAFT TABLE 5

The Law Council submits that the following terms in Table 5 require clarification:

"*equity finance*" - What is expected to be covered by this definition?

"*debt finance*" - How is this term different to the broad definition of a 'loan ' already included in the AML Act?

"*making arrangements or preparations*" – This is a very broad expression. It could, for example, include merely providing incidental services such as lodging documents with ASIC on a change of directors. What is the policy and intention behind the use of this term?

"*promoters of the new company*" - Who or what will qualify as the promoters of the new company? On the basis of what relationship with the proposed venture?

SPECIFIC COMMENTS ON DRAFT TABLE 6

Consistent with the remarks above, the Law Council reiterates that its primary concern with draft table 6 is that the drafting of item 1, table 6 makes all partners of a partnership reporting entities in their own right.

If this is intended, and the Law Council assumes it is not, the consequences are staggering. For example, each partner would need to identify and verify all the other partners on a regular basis and each partner would need to have their own AML/CTF program.

As submitted above, clarification of the term "carrying on a business" is required to ensure that each partner of a partnership is not a reporting entity in his or her own right.

Attachment A: Aspects of the existing AML regulatory regime which pose particular problems for the legal profession

Below is a preliminary list of some of the issues members of the legal profession have indicated will arise and will need to be addressed if the current AML regulatory regime is expanded to cover the provision of a wide range of legal services. The list is far from exhaustive. Its purpose is simply to flag some matters for future consultation.

1. Compliance Cost

A great number of legal practitioners who have reviewed the current AML Act and the AML Rules which have been registered to date, have expressed great alarm about the likely compliance burden the current regime would place on legal practitioners. The majority of the legal profession practice as sole practitioners or in small firms, often with limited administrative support. Legal practitioners are already subject to an onerous regulatory regime, particular in relation to the administration of their trust accounts. If customer verification, record keeping and reporting obligations, which were primarily designed to be implemented by large financial institutions, are imposed on the legal profession, it will result in high levels of non-compliance or render the cost of legal practice by sole practitioners or small firms, prohibitively expensive. Therefore, members of the legal profession are concerned to ensure that any AML obligations attaching to the provision of legal services, take account of the circumstances of the profession as a whole.

2 Definition of 'property' - s5

The existing definition is very broad and includes rights under a contract, choses in action and intellectual property .

As a result of the broad definition of 'property', a number of services provided by law firms, such as patent and trademark work, come within the scope of the proposed expanded list of designated services.

To avoid this consequence, we submit that the existing definition of 'property' be expanded along the following lines :

property means any legal or equitable estate or interest in real or personal property, including a *contingent or prospective one, but does not include money, intellectual property or rights under* a *contract or other choses in action.*

3 Designated Business Group *(DBG)*

Membership of a DBG is currently restricted to corporates who are related entities pursuant to s50 of the *Corporations Act 2001* and who are also reporting entities - see Rule 2.1.2 (4) of the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No.1).

Whilst providing a single face to the market, professional services firms often have parts of their business operating through different business vehicles, both domestic and foreign, including partnerships, trusts, joint ventures, incorporated legal practices, multidisciplinary partnerships, and companies.

For example, it is commonplace for professional service partnerships to employ professional staff and for an associated service company to employ support and ancillary staff.

The Law Council submits that professional services business groups, however constituted, should be able to form a designated business group. To achieve this, we submit three options. The first option is to simply remove Rule 2.1.2(4). The second option is to recast Rule 2.1.2(4) to expand it to non-corporates. The third option is to recast Rule 2.1.2(4) to expand it to non-corporates *and* to delete the requirement that the DBG member must be a reporting entity.

4 Identification procedures

(a) Circumstances where lawyers don't need to identify before commencing to provide a designated service

The Law Council submits that for the purposes of s33 of the AML Act lawyers should be allowed to commence providing a designated service without first identifying the client in certain situations where time is of the essence including where:

- the expiration of a time limit for an application whether to a court , tribunal or government department/agency is imminent;
- an individual is in custody or detention and is requiring legal advice prior to being charged with an offence; and
- a search warrant is to be executed immediately.

(b) First consultation free from AML obligations

The Law Council submits that lawyers should be allowed to engage in an initial meeting with an existing or potential client for the purposes of ascertaining the nature of the client's needs, providing preliminary advice of a general nature and disclosing fees and terms and conditions, free from all identifying, recording or reporting obligations. This matter is also addressed above.

(c) Reliance on identification carried out by third parties

The Law Council submits that a lawyer (the 2nd lawyer) should be able to rely on customer identification procedures (or in the case of overseas lawyers comparable procedures) that have been carried out on a client by another lawyer (the 1st lawyer) in certain circumstances.

These are:

- when the 1st lawyer is an Australian reporting entity; or
- when the 1st lawyer is a lawyer from a jurisdiction which has comparable AML legislation and customer identification/verification procedures and the 1st lawyer is:
    - subject to and supervised for compliance with that AML legislation; and
    - subject to mandatory professional regulation recognized by law

  and when the 2nd lawyer has determined that it is appropriate to do so having regard to the relevant AML/CTF risk and, under an agreement with the 1st lawyer, has access to the record of the customer identification procedures (or comparable procedure) carried out by the 1st lawyer.

This reliance on identification/verification procedures already carried out by comparable legal firms is permitted in other jurisdictions such as the UK and the EU (section 17 of the UK ML Regulations 2007 is an example).

The Law Council submits that practical Rules which allow for reliance between reporting entities generally, and which avoid unnecessary duplication of procedures, will be of central importance to the efficiency of any AML regime. (It is noted that such Rules are anticipated under section 38 of the current Act.)

5 Legal Professional Privilege

Reporting Obligations under the AML Act may require a lawyer to disclose privileged communications. The Law Council notes that s242 states that the Act '*..does not affect the law relating to legal professional privilege*.'

The Anti Money Laundering and Counter-Terrorism Financing Bill 2006 Explanatory Memorandum, clause 242 reads as follows :

This clause confirms that the law relating to legal professional privilege (in the Commonwealth, State and Territory jurisdictions) is not affected by the Bill. This clause is consistent with the second paragraph of FATF Recommendation 16 (Lawyers. notaries, other independent legal professionals and accountants acting as independent legal professionals, are not required to report their suspicions if the relevant information

was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.").

The Law Council submits that s242 does not make it clear that lawyers do not need to disclose to AUSTRAC communications that are subject to legal professional privilege or information that is gleaned during the course of providing advice that is subject to legal professional privilege.

Before the Law Council can, however, propose any draft clauses in relation to legal professional privilege there is a threshold question to be answered and that is, *who in relation* to a *partnership is the reporting entity?* Is it the specific partner providing the designated service or is it the partnership?

6 AUSTRAC search and seizure powers

AUSTRAC has powers of search and seizure as set out in Part 13. To ensure that such powers do not jeopardise legal profession privilege, the Law Council submits that consideration be given to incorporating the procedures set out in the Law Council's document "General Guidelines between the Australian Federal Police and the Law Council of Australia as to the execution of search warrants on lawyers' premises, law society and like institutions in circumstances where a claim for legal professional privilege is made" into Australia's AML regime.

Attachment B

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:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

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.

GPO Box 1989, Canberra, ACT 2601, DX 5719 Canberra | Telephone **+61 2 6246 3788** Facsimile +61 2 6248 0639 | 19 Torrens St Braddon ACT 2612 www.lawcouncil.asn.au