PAST PROMISES AND FUTURE DIRECTIONS: ANTI-MONEY LAUNDERING REGULATION AND THE LEGAL PROFESSION

DAVID A CHAIKIN*

Australia has finally implemented international anti-money laundering ('AML') norms for the legal profession after a 20-year delay. This article examines the justification for AML regulation and its extension to lawyers, highlighting a significant knowledge gap regarding how and to what extent legal services are exploited for money laundering. The discussion focuses on two key AML measures – suspicious transaction reporting and customer due diligence – to test whether the system is achieving its objectives. The reforms selectively apply AML rules, targeting lawyers involved in high-risk activities such as financial and real estate transactions while exempting those in criminal and civil litigation. A major point of contention is the effectiveness of suspicious transaction reporting and how legal professional privilege is regulated within AML frameworks. This article critically analyses the scope and limitations of AML regulation for lawyers and provides recommendations for policymakers and regulators to address the challenges of law reform implementation.

I INTRODUCTION

Australia has been in a time warp, having failed until very recently to apply international anti-money laundering ('AML') norms to the legal profession after promising to do so nearly 20 years ago. The fact that the Australian Government has not extended its AML system to legal practitioners starkly contrasts with its

* PhD in Law (Cambridge University); LLM (Yale Law School); LLB/BCom (Accounting, Finance and Systems) (With Merit) University of New South Wales. Barrister of the Supreme Court of New South Wales and High Court of Australia. Associate Professor, Discipline of Accounting, Governance and Regulation, The University of Sydney Business School.

otherwise high-level compliance[1] with the Financial Action Task Force ('FATF') Recommendations ('*FATF Standards*'),[2] the global benchmark for AML.

This failure undermines Australia's reputation as a founding member of the FATF and a global leader of AML regulation. According to the FATF, Australia is one of five countries which have not regulated the legal profession under AML laws, including most noticeably the United States ('US').[3]

Several reasons may be proposed to explain the delay, such as domestic political considerations,[4] the lobbying and resistance by the legal profession,[5] and the absence of external pressure by the FATF.[6] While debate on these issues has been bogged down in Australia, focused on a binary choice of accepting or rejecting all global AML norms, other jurisdictions have applied the *FATF Standards* to lawyers. Notable jurisdictions that regulate legal practitioners under AML laws include the European Union ('EU'), the United Kingdom ('UK'), Hong Kong, Singapore and, more recently, New Zealand ('NZ').

This article has several aims. It critiques the history and evolution of Australia's AML system and examines the justification for and against the inclusion of the legal profession under AML regulation. It explores the policy, practical and ethical impact of applying AML rules to lawyers by examining two core AML measures: suspicious transaction reporting and customer due diligence ('CDD'). A discussion of the impact of these AML measures is inextricably linked to the justification of the regulatory regime. This article employs theoretical arguments and comparative insights from jurisdictions where legal professionals are already under an AML

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1 Australia has complied with the majority of the 40 recommendations of the Financial Action Task Force ('FATF') but has failed to comply entirely with three of the FATF's recommendations: correspondent banking (recommendation 13), and Designated Non-financial Businesses and Professions ('DNFBPs') which includes lawyers (recommendations 22 and 23). Macquarie University Financial Integrity Hub, Submission to Attorney-General's Department (Cth), *Modernising Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime: Part 2, Questions 26 and 27* (15 June 2023) 22–3 <https://www.mq.edu.au/__data/assets/pdf_file/0009/1265418/Financial-Integrity-Hub_Submission.pdf>.

2 Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (November 2023) <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html> ('*FATF Standards*').

3 The jurisdictions are Australia, China, Haiti, Madagascar and the United States: Attorney-General's Department (Cth), *Modernising Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime* (Consultation Paper, April 2023) 3 <https://consultations.ag.gov.au/crime/aml-ctf/>. This list is incomplete in that it ignores the fact that Canada does not require lawyers to report suspicious transactions, a core international anti-money laundering ('AML') norm.

4 Governments under both the Labor Party and the Liberal–National Coalition have had opportunities to apply AML laws to DNFBPs but have failed to do so. A significant issue in the policy debate is the huge compliance costs faced by small businesses in complying with the AML regime.

5 Since 2006, the Law Council of Australia ('LCA'), which is the peak national body of the legal profession, has vehemently opposed the application of a statutory AML regime to the profession. The LCA has asserted that the case for AML regulation of the legal profession has not been made out in part because there is no evidence of lawyers' participation in money laundering ('ML'). See further discussion at text corresponding with and at nn 90–2.

6 The FATF's pressure on jurisdictions for non-compliance with the *FATF Standards* (n 2) has been confined to developing and transient economies, or small offshore financial centres.

mandate, offering a deeper understanding of the global landscape and Australia's unique position.

II AML REGULATION IN AUSTRALIA: HISTORICAL EVOLUTION AND CONTEXT

A Early History of AML Regulation

Australia was one of the first countries in the world to criminalise money laundering ('ML'),[7] confiscate the proceeds of crime[8] and regulate private sector actors[9] – initially financial institutions whose facilities were abused by organised crime. The legislative measures were enacted in the late 1980s in response to several recommendations from the Costigan, Stewart and Williams Royal Commissions, which found widespread evidence of laundering of drug cash and tax fraud by criminal organisations.[10] Two of the strategies – the criminalisation of ML and the confiscation of illicit assets – have been subject to reform; however, it is AML regulation – the focus of this article – that has seen the most radical developments.

AML regulation was originally conceived as a modest initiative to use intelligence from cash dealers[11] to enforce tax laws and other laws of the Commonwealth and territories. The *Cash Transaction Reports Act 1988* (Cth)[12] aimed to detect large-scale tax evasion by monitoring businesses dealing in significant volumes of cash and supplying intelligence to authorities to combat ML and other criminal activities.[13] The regulatory instruments were the reporting of significant cash transactions and suspect transactions to a government agency (initially called the Cash Transaction Reports Agency) and record keeping by cash dealers who were likely to have intelligence about crimes such as tax evasion,

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7 *Proceeds of Crime Act 1987* (Cth) ss 81–2 ('*POC Act 1987*'). See now *Criminal Code Act 1995* (Cth) ss 400.3–400.9 ('*Criminal Code Act*').

8 *POC Act 1987* (n 7) pt II div 1. See now *Proceeds of Crime Act 2002* (Cth) ch 2. For the justification of the proceeds of crime legislation, see Jordan English, Sam Hickey and Simon Bronitt, *Federal Proceeds of Crime Law* (Thomson Reuters, 2024) 11–12 [1.260].

9 *Cash Transaction Reports Act 1988* (Cth) ('*CTR Act*'). See now *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ('*AML/CTF Act*').

10 John Hewett and Francis G Kalyk, *Understanding the Cash Transaction Reports Act* (CCH Australia, 1990) 2–12 [100]–[120].

11 'Cash dealers' were defined in section 3 of the *CTR Act* (n 9) and included banks and finance companies, insurers and insurance companies, securities dealers and futures brokers, trustees or managers of a unit trust, bullion dealers, bookmakers and totalisator agency boards, operators of gambling houses and casinos. A deliberate decision was taken to exclude solicitors as cash dealers: ibid 56 [506].

12 The name of the legislation was subsequently changed to the *Financial Transaction Reports Act 1988* (Cth) ('*FTR Act*').

13 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Checking the Cash: A Report on the Effectiveness of the Financial Transaction Reports Act 1988* (Report, November 1993) 7–8, 85–7 ('*Checking the Cash Report*'). See also ibid s 4.

drug trafficking and ML.[14] The regulation of AML through prevention, which is the hallmark of modern AML rules, was nearly entirely absent.[15]

In the early 1990s, there was a debate in Australia about whether lawyers should follow the same rules as banks and other businesses that handle a lot of cash.[16] Lawyers often deal with large sums of money in trust accounts, which can be used for ML.[17] In 1997, a compromise was reached, making solicitors subject to reporting cash transactions at or above $10,000[18] but not required to report suspect transactions.[19] Concerns about client confidentiality and legal professional privilege ('LPP') were pivotal in this decision.[20] Reporting by solicitors of significant cash transactions was acceptable because trust accounts did not raise issues of LPP, except in the 'most unusual circumstances'.[21] After legislative amendments took effect on 15 May 1997, there was resistance by the legal profession, with one survey showing that lawyers were unaware of their new AML obligations, a problem which was exacerbated by an absence of any AML training.[22]

Australia's early efforts to regulate against ML were mostly focused on its own domestic issues, even though it recognised ML as a global problem. However, with the establishment of the FATF in 1989 and the issue of *FATF Standards*[23] in 1990, Australia began to align its regulations with international standards. The FATF guidelines have since become the global benchmark for AML and counter-terrorism financing ('CTF'),[24] leading to significant AML reforms in Australia in 2006.

An important part of the background to the enactment of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ('*AML/CTF Act*') was a 2005 FATF review which found that Australia was not compliant with 25% of the *FATF Standards*.[25] The FATF report identified major weaknesses in Australia's

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14 There was an additional reporting requirement: all persons, including financial institutions, were required to report currency transfers of $5,000 or more in and out of Australia to a customs official, the police or the director of the Cash Transaction Reports Agency: *CTR Act* (n 9) s 15.

15 See, however, sections 18–24 of the *CTR Act* (n 9) where cash dealers were required to obtain identification documents from customers when opening bank accounts.

16 The policy debate was triggered by a report of the National Crime Authority that cited numerous examples of the use of solicitors in ML schemes: National Crime Authority (Cth), *Taken to the Cleaners: Money Laundering in Australia* (Australian Government Publishing Service, 1992) vol 1, 37–9. The actual examples were not disclosed in volume 1 but were in a confidential volume 2 of the report.

17 *Checking the Cash Report* (n 13) 129–40.

18 *Financial Transaction Reports Amendment Act 1997* (Cth) ss 22–3.

19 John Cotton, 'Australia: Lawyers Should Be Treated like Banks, Bookmakers, and Bullion Dealers' (2007) 1(3) *Journal of Money Laundering Control* 255, 255 <https://doi.org/10.1108/eb027147>.

20 *Checking the Cash Report* (n 13) 134–6.

21 Cotton (n 19) 256.

22 Jackie Johnson, 'Australia: Attitudes to Extending the Scope of Anti-Money Laundering Legislation' (2001) 5(1) *Journal of Money Laundering Control* 16, 21 <https://doi.org/10.1108/eb027290>.

23 *FATF Standards* (n 2).

24 The *FATF Standards* (n 2) have been accepted by more than 200 jurisdictions and endorsed by the United Nations Security Council, International Monetary Fund and the World Bank. Financial Action Task Force, *Report on the State of Effectiveness and Compliance with the FATF Standards* (Report, April 2022) 3, 9, 42 <https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Report-on-the-State-of-Effectiveness-Compliance-with-FATF-Standards.pdf>.

25 The FATF review also found that Australia was partially compliant with 14 other recommendations: Stuart Ross and Michelle Hannan, 'Australia's New Anti-Money Laundering Strategy' (2007) 19(2) *Current Issues*

AML regulatory system, including the failure of its legislative framework to cover a range of financial institutions and to specify their obligations on the basis of risk.[26] The Australian Transaction Reports and Analysis Centre ('AUSTRAC') was criticised for not adequately implementing the risk-based model of regulation,[27] which in 2003 had replaced the rules-based model under the *FATF Standards*. This new model of regulation created a different paradigm for both the regulator and the regulated in addressing how country regulators and regulated entities would understand ML risk and apply it as a matter of national policy and organisational arrangements.[28]

B Overview of Australia's Modern AML Regulation

In 2006, Australia enacted the *AML/CTF Act*[29] with the purpose of modernising the law and implementing the *FATF Standards* and other international obligations.[30] The objectives of the legislation are ambitious and include the detection, deterrence and disruption of ML and financial crimes, the facilitation of investigations and prosecution of ML, the improvement of international cooperation and the promotion of public confidence in Australia's financial system.[31] The *AML/CTF Act* sets out several strategies to meet these objectives: enrolment of private sector intermediaries which have intelligence on ML and financial crimes; mandatory imposition of client identification and CDD standards, record keeping and reporting obligations; and creating AUSTRAC, an agency to receive reports, and to oversee administration and compliance with the legislation and rules.

The *AML/CTF Act* comprehensively reforms the nature and scope of AML regulation in Australia and expands the number of businesses subject to the rules.[32] The *AML/CTF Act* imposes enrolment requirements on any person who provides

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in Criminal Justice 135, 141 <https://doi.org/10.1080/10345329.2007.12036422>. See also Financial Action Task Force, *Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: Australia* (Report, 14 October 2005) ('*Third Mutual Evaluation Report*').

26 Ross and Hannan (n 25) 141–2.

27 Financial Action Task Force, *Third Mutual Evaluation Report* (n 25) 5, 7, 12–13, 15.

28 Under a risk-based approach, risk, risk assessment and risk management are the key elements of regulation: Ross and Hannan (n 25) 142–3.

29 This article does not examine counter-terrorism financing ('CTF'), which is also an essential part of the international norms and Australia's legislation. CTF is closely related to AML but has different objectives, processes and challenges which require separate examination.

30 This is a reference to Australia's international obligations in respect of ML, serious financial crimes such as transnational organised crime and corruption under various international treaties, as well as compliance with the United Nations Security Council's financial sanctions regime.

31 The objects of the *AML/CTF Act* (n 9) are set out in section 3. The multitude of aims of the *AML/CTF Act* (n 9) make it difficult to assess the effectiveness and efficiency of the legislation, see David Chaikin, 'A Critical Analysis of the Effectiveness of Anti-Money Laundering Measures with Reference to Australia' in Colin King, Clive Walker and Jimmy Gurule (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan, 2018) 293, 294–7 <https://doi.org/10.1007/978-3-319-64498-1>.

32 Prior to the enactment of the *AML/CTF Act* (n 9) about 3,000 businesses were subject to regulation; these numbers increased to about 15,000 by 2014: Financial Action Task Force and Asia Pacific Group on Money Laundering, *Anti-Money Laundering and Counter-Terrorist Financing Measures: Australia* (Mutual Evaluation Report, April 2015) 84 ('*2015 Mutual Evaluation Report*').

a designated service, which includes 54 types of financial services.[33] Businesses are required to make an assessment as to whether they provide a designated service and whether they must enrol with AUSTRAC. Lawyers who engage in business activities outside the ordinary course of legal services, such as holding an Australian financial services license, must enrol with AUSTRAC because this is a designated service.[34] After lobbying from the Law Council of Australia ('LCA'), various services provided by legal practitioners which potentially were captured by the list of designated services, such as trust account activities and custodial and/or depository services, were exempted.[35]

The obligations placed on reporting entities under the *AML/CTF Act* and rules are lengthy,[36] complex and costly to implement. The obligations may be categorised by their ostensible purpose. To prevent the services of a reporting entity from being used by money launderers and to deter illicit transactions, CDD obligations are imposed at the commencement of the reporting entity/customer relationship. Several obligations[37] are designed so that customers are subject to 'continuous financial surveillance', such as the obligation to keep an up-to-date customer profile and to carry out ongoing CDD by monitoring customers' transactions. Reporting entities are also required to proactively assist law enforcement by submitting threshold transaction reports, suspicious matter reports ('SMRs') and international funds transfer instruction reports to AUSTRAC.[38] The reports aim to provide intelligence which may trigger a new investigation or further an ongoing enquiry; this may lead to prosecution, confiscation of illicit assets or a tax assessment. The record keeping requirements and the audit, investigatory and enforcement powers are intended to 'create a paper trail' which deters illicit transactions by making it more difficult and costly for criminals to launder the proceeds of crime.

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33 Designated services are defined in detail in section 6 of the *AML/CTF Act* (n 9). The scope of businesses covered by the legislation has been expanded to include registration of the remittance sector (part 6) and digital currency exchanges (part 6A).

34 Section 6(2) item 54 of *AML/CTF Act* (n 9), which is directed at a person who holds an Australian financial services licence and arranges for another person to receive a designated service outside item 54.

35 See section 5 of the *AML/CTF Act* (n 9) for the definition of 'exempt legal practitioner service'. See also Law Council of Australia, *Anti-Money Laundering Guide for Legal Practitioners* (Guide, December 2009) 7–11 <https://lawcouncil.au/resources/policies-and-guidelines/anti-money-laundering-guide-for-legal-practitioners-2009>. The Law Council of Australia's guide cites chapters 23 (trust accounts) and 40 (custodial services) of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007* (Cth) ('*AML/CTF Rules*').

36 It is estimated that the current AML/CTF regime is more than 3,000 pages in length, including the *AML/CTF Act* (n 9) (380 pages), the *AML/CTF Rules* (n 35) (374 pages), the *FTR Act* (n 12) (130 pages), as well as the guidance in relation to 12 industries. For example, there are five guidelines in relation to solicitors that provide designated services.

37 There are many other obligations imposed on reporting entities under the *AML/CTF Act* (n 9) and rules such as identifying, managing and mitigating ML risks as part of the maintenance of an AML compliance program, designating a person at managerial level as the AML/CTF Compliance Officer, screening prospective employees and creating an AML/CTF risk awareness training program for employees.

38 *AML/CTF Act* (n 9) ss 41–2 (suspicious matter reports), ss 43–4 (threshold transaction reports), ss 45–6 (international funds transfer instruction reports).

A significant feature of the *AML/CTF Act* is the introduction of a new risk-based approach ('RBA') in both supervision and compliance with AML obligations. The aim of the RBA is to improve the efficiency and effectiveness of AML regulation.[39] All reporting entities are required to develop and implement an AML program which emphasises risk as the operational requirement to meet the obligations under the *AML/CTF Act.* Under the RBA, reporting entities must identify, assess and mitigate higher risk clients and services, and higher risk countries, especially in relation to CDD and through monitoring of customers' transactions. The FATF has given extensive guidance as to how to apply RBA to various sectors and industries, and this has often been mirrored by similar guidance at the national level.[40]

C AML Regulation and the Legal Profession

It was part and parcel of the consultations leading up to the enactment of the *AML/CTF Act* that the legal profession would be covered by the *AML/CTF Act*, given that the *FATF Standards* had been updated in 2003 to extend AML rules to lawyers and that in 2005 Australia had been criticised by the FATF for not complying with the revised *FATF Standards*.[41] The legislation was to be implemented in two stages (called 'tranches'),[42] with Tranche 1 applied to financial institutions and other entities already regulated under the *Financial Transaction Reports Act 1988* (Cth), and Tranche 2 applied to Designated Non-financial Businesses and Professions ('DNFBPs') such as lawyers, notaries and other independent legal professionals, accountants, trust and company service providers, and real estate agents.[43]

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39 Paulo Costanzo, 'The Risk-Based Approach to Anti-Money Laundering and Counter-Terrorist Financing in International and EU Standards: What it Means, What it Entails' in Brigitte Unger and Daan van der Linde (eds), *Research Handbook on Money Laundering* (Edward Elgar, 2013) 349, 356 <https://doi.org/10.4337/9780857934000.00038>.

40 See, eg, Financial Action Task Force, *Guidance for a Risk-Based Approach: Legal Professionals* (Guidance, June 2019) <https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/Risk-Based-Approach-Legal-Professionals.pdf.coredownload.inline.pdf>. At the national level, see Law Council of Australia, *National Legal Profession Anti-Money Laundering and Counter-Terrorism Financing Guidance* (Guidance, 28 June 2024) <https://lawcouncil.au/files/pdf/policy-guideline/AML/AML-CTF%20Guidance%20Final%20%20Collated%20Version.pdf>.

41 The FATF assessed Australia as non-compliant (major shortcomings) or partially compliant (moderate shortcomings) with the *FATF Standards* (n 2) concerning DNFBPs, including lawyers. Major shortcomings and moderate shortcomings are both equivalent to a fail grade. A pass mark means that a jurisdiction's measures are compliant (no shortcomings) or largely compliant (minor shortcomings). For deficiencies in respect of the legal profession, see Financial Action Task Force, *Third Mutual Evaluation Report* (n 25) 26.

42 Michael Newbury, 'Designated Non-financial Businesses and Professions: The Weak Link in Australia's AML/CTF Regime' (2017) 20(3) *Journal of Money Laundering Control* 247, 250 <https://doi.org/10.1108/JMLC-08-2016-0038>.

43 Casinos and bullion dealers are the only categories of DNFBPs currently subject to AML regulation.

Although the Australian Government promised[44] that Tranche 2 would be implemented by 2008, this has not happened until recently.[45] Over nearly two decades there has been a series of attempts to implement Tranche 2, especially after 2015 when the FATF again criticised Australia for failing to apply the *FATF Standards* to DNFBPs.[46] In 2016, the Commonwealth Attorney-General's Department carried out a statutory review of the *AML/CTF Act*,[47] and issued a regulatory model for legal practitioners,[48] but this was not followed up with any substantive action. Following a 2022 parliamentary report which recommended an accelerated industry consultation on expanding the regime to Tranche 2 entities,[49] the Attorney-General's Department issued a consultation paper in 2023 which stated that Tranche 2 was necessary because Australia 'risks significant economic consequences' if it continues to breach the global Standards.[50] On 2 May 2024, the Attorney-General's Department issued an information paper stating how it proposed to extend the *AML/CTF Act* to the legal profession.[51] This was followed by the Australian Government budgeting in May 2024 to spend $166.4 million to educate the professions, including lawyers, to understand their AML obligations under Tranche 2, as well as to expand AUSTRAC's capabilities.[52]

In September 2024, amending legislation to incorporate Tranche 2 into Australia's *AML/CTF Act* was introduced to Parliament, and after a short period of consultation and review, was passed in December 2024.[53] Under the AML/CTF

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44 Doron Goldbarsht, 'Reverse Engineering Legal Professional Privilege in a Globalising World: The Australian Case' (2020) 23(3) *Journal of Money Laundering Control* 677, 678 <https://doi.org/10.1108/JMLC-02-2020-0011>.

45 *Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Amendment Act 2024* (Cth) ('*AML/CTF Amendment Act 2024*') sch 3 pts 1 (real estate), 3 (professional services).

46 FATF criticisms include that Australia has not brought lawyers within the scope of the AML/CTF regime, and that lawyers who do not understand AML/CTF risks are not subject to AML/CTF obligations and controls and are not required to report suspicious transactions: Financial Action Task Force, *2015 Mutual Evaluation Report* (n 32) 6, 11, 18, 33, 41, 45, 85–7, 91, 103, 167–8.

47 Attorney-General's Department (Cth), *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* (Report, April 2016).

48 Attorney-General's Department (Cth), *Legal Practitioners and Conveyancers: A Model for Regulation under Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime* (Consultation Paper, November 2016) ('*Legal Practitioners and Conveyancers: A Model for Regulation*').

49 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (Report, March 2022) 70 [4.28].

50 Attorney-General's Department (Cth), *Modernising Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime: Consultation Paper on Reforms to Simplify and Modernise the Regime and Address Risks in Certain Professions* (Consultation Paper, April 2023) 17–21 ('*Modernising Australia's AML/CTF Regime: Consultation Paper*').

51 Attorney-General's Department (Cth), *Reforming Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime: Further Information for Professional Service Providers* (Consultation Paper No 2, May 2024) ('*Reforming Australia's AML/CTF Regime*').

52 Mark Dreyfus, 'Boosting Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime' (Media Release, 6 May 2024) <https://ministers.ag.gov.au/media-centre/boosting-australias-anti-money-laundering-and-counter-terrorism-financing-regime-06-05-2024>. See also Commonwealth of Australia, *Budget 2024–25: Budget Measures* (Budget Paper No 2, 14 May 2024) 45.

53 *AML/CTF Amendment Act 2024* (n 45) sch 3 (regulating additional high-risk services).

regime in Australia, the legal profession will be supervised by AUSTRAC, which will have a huge administrative task regulating the DNFBP population that may be up to four times the current number of reporting entities.[54]

III THE JUSTIFICATION OF AML REGULATION OF THE LEGAL PROFESSION

This Part describes the nature and scale of the organised crime/ML problem because this is a prerequisite for any discussion of the appropriate response. It examines the evidence of systemic misuse of legal services by money launderers and other financial criminals. It shows that the official policy perspective has shifted so that the justification for AML regulation emphasises that lawyers offer high-risk services which are attractive to and exploited by organised crime and money launderers, rather than a justification that relies on establishing significant involvement of lawyers in ML.

A What Is the Nature and Scale of the Organised Crime/Money Laundering Problem?

In 1998, the Managing Director of the International Monetary Fund ('IMF') in an address to the Plenary Meeting of the FATF stated:

> [T]he estimates of the present scale of money laundering transactions are almost beyond imagination – 2 to 5 percent of global GDP would probably be a consensus range. This scale poses two sorts of risks: one prudential, the other macroeconomic. Markets and even smaller economies can be corrupted and destabilized. We have seen evidence of this in countries and regions which have harbored large-scale criminal organizations. In the beginning, good and bad monies intermingle, and the country or region appears to prosper, but in the end Gresham's law operates, and there is a tremendous risk that only the corrupt financiers remain.[55]

Scholars have not been able to substantiate the basis for the IMF estimate, but this does not mean that the estimate is irrational and unreasonable. The IMF estimate has been widely cited, disseminated and popularised in government policy documents and academic literature. The IMF speech was an important catalyst[56]

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54 This is a very rough estimate based on the number of potential DNFBPs. There are 16,000 law firms in Australia and 90,000 practising solicitors organised in small business practices averaging about four persons: 'Number of Solicitors in Australia 2011 to 2022', *Statista Research Department* (Web Page, 3 April 2024) <https://www.statista.com/statistics/975432/australia-number-of-solicitors/>. See also Urbis, *2022 National Profile of Solicitors* (Final Report, 26 April 2023) 6, 29 <https://www.lawsociety.com.au/sites/default/files/2023-05/2022%20National%20Profile%20of%20Solicitors%20-%20Final.pdf>.

55 Michel Camdessus, 'Money Laundering: The Importance of International Countermeasures' (Speech, Plenary Meeting of the Financial Action Task Force on Money Laundering, 10 February 1998) <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp021098>.

56 This is not a claim that econometric studies of financial crimes commenced after 1998 (which is not the case), but that the International Monetary Fund ('IMF') speech legitimised the importance and value of econometrics and statistical studies to measure the size of financial crimes.

for academic studies measuring ML,[57] both globally and country specific, as well as calculating the size of the shadow economy, illicit financial flows and predicate crimes[58] such as drug trafficking, corruption and tax evasion.[59] Several studies have documented the negative impact of illicit financial flows[60] on economic growth, sustainable development and public finances. The studies also document the social and political consequences when financial crimes are ignored by nation states.[61] Applying Gresham's Law, which is one of the most famous doctrines in economics,[62] the penultimate consequence of unchecked ML is that legitimate business and finance will be driven out of the economy, leaving only the corrupt in power. This is because legal business cannot compete with organised crime which has access to 'interest free' cash and uses bribery, intimidation and violence to achieve their illicit objectives.[63] Although organised crime is a serious problem in

57 See, eg, John Walker and Brigitte Unger, 'Measuring Global Money Laundering: The Walker Gravity Model' in Brigitte Unger and Daan van der Linde (eds), *Research Handbook on Money Laundering* (Edward Elgar, 2013) 159 <https://doi.org/10.4337/9780857934000.00023>.

58 A predicate crime is a serious offence, for example drug trafficking, corruption and fraud, that generates proceeds for ML. It is a component of a larger crime such as ML, albeit that countries have different laws as to whether a predicate crime must be proved as a necessary element in the ML offence: *FATF Standards* (n 2) 38–9 (Interpretive Note to recommendation 3 outlines the definition of ML offence).

59 See, eg, the wide-ranging studies by the Austrian economist Friedrich Schneider: Mai Hassan and Friedrich Schneider, *Size and Development of the Shadow Economies of 157 Countries Worldwide: Updated and New Measures from 1999 to 2013* (Discussion Paper No 10281, Institute of Labor Economics, 2016) <https://doi.org/10.2139/ssrn.2861026>. See also Schneider's econometric studies on human trafficking, corruption, tax evasion and financial flows of terrorist and organised crime organisations: 'Friedrich Schneider', *IZA Institute of Labor Economics* (Web Page) <https://www.iza.org/person/206/friedrich-schneider>.

60 See, eg, the Global Financial Integrity studies on illicit financial flows involving developing countries, corruption, illicit trade and ML: 'Research/Analysis', *Global Financial Integrity* (Web Page) <https://gfintegrity.org/reports/>.

61 Illicit financial flows undermine economic, political and social stability, reduce public resources available for development, and increase levels of poverty and inequality: David Chaikin, 'International Informal Capital Flows and Sustainable Finance: China's Regulatory Approach' in Michel Dion (ed), *Sustainable Finance and Financial Crime* (Springer, 2023) 63, 63–5 <https://doi.org/10.1007/978-3-031-28752-7_4>. See also United Nations Office on Drugs and Crime studies on illicit financial flows: 'Illicit Financial Flows (IFFs)', *United Nations Office on Drugs and Crime* (Web Page) <https://www.unodc.org/unodc/en/data-and-analysis/iff.html>.

62 Under Gresham's Law there is a 'tendency for bad money to drive good money out of circulation': George Selgin, 'Gresham's Law' in Stefano Battilossi, Youssef Cassis and Kazuhiko Yago (eds) *Handbook of the History of Money and Currency* (Springer, 2020) 199, 200 <https://doi.org/10.1007/978-981-13-0596-2_9>. The application of Gresham's Law to lawyers in the context of AML is a topic which cannot be dealt with adequately in this article. The conventional and simplistic view that criminals invariably seek to use legal practices that are weak in AML is contested in that sophisticated organised crime will probably prefer to use reputable law firms so as to take advantage of their respectability. They do this through deception which is the essence of ML. See the discussion of a hypothetical problem: David Chaikin and Joy Geary, 'Hypothetical: Legal, Ethical and Compliance Dimensions' in David Chaikin (ed), *Money Laundering, Tax Evasion and Tax Havens* (Australian Scholarly Publishing, 2009) 109, 118–20. That is why it is so difficult to combat ML, and one of the reasons that AML regulation is inherently weak. There is no evidence that Gresham's Law operates, for example, in the United Kingdom ('UK') where lawyers have been subject to AML regulation for over 20 years.

63 Michele Riccardi and Giulia Berlusconi, 'Measuring Organised Crime Infiltration in Legal Businesses' in Ernesto U Savona, Michele Riccardi and Giulia Berlusconi (eds), *Organised Crime in European Businesses* (Routledge, 2016) 16, 16–32 <https://doi.org/10.4324/9781315640617>.

Australia,[64] there is no evidence that Australian law firms have been penetrated by organised crime.[65] This does not mean that the legal profession should ignore its responsibility to combat the exploitation of legal services by criminals. The legal profession has an important role in combating corruption and ML which threatens the legal system. This idea is consistent with a fundamental public duty of lawyers as 'officer[s] of the court' to protect the 'public administration of justice'.[66]

In 2022, the Australian Institute of Criminology ('AIC') estimated that the cost of serious and organised crime in Australia was up to $60.1 billion, with net proceeds derived from all types of serious crimes (and available for ML) for 2020–21 totalling a staggering $53.74 billion.[67] This was a significant increase from earlier studies by the AIC using the same methodology.[68] Although determining the extent of ML is inherently problematic because of the associated secrecy, measurement approaches have improved and provide reasonable estimates of the size of the problem. In the words of a Canadian Government inquiry into ML: 'it would be foolish to wait, doing nothing in the vain hope that someday a formula will yield a precise calculation and hoping things are not as serious as they appear to be'.[69]

In Australia and worldwide, the threat of ML and predicate crimes, such as drug trafficking, cyber fraud and human trafficking, has increased over the past decade.[70] This is due to the globalisation of organised crime, the ubiquity and

64 Julie Ayling, 'Combating Organized Crime Aussie-Style: From Law Enforcement to Prevention' in Hans Nelen and Dina Siegel (eds), *Contemporary Organized Crime: Development, Challenges and Responses* (Springer, 2017) 189, 189–205 <https://doi.org/10.1007/978-3-319-55973-5_12>.

65 Victorian Law Reform Commission, *Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries* (Report, February 2016) 36–8.

66 Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30(1) *Monash University Law Review* 49, 51, 56, 60–2.

67 Russell G Smith and Amelia Hickman, *Estimating the Costs of Serious and Organised Crime in Australia, 2020–21* (Statistical Report No 38, Australian Institute of Criminology, 2022) 1, 32–3 <https://doi.org/10.52922/sr78429>. The cost estimate included 'direct and consequential costs of serious and organised crime and the costs associated with preventing and responding to serious and organised crime by government entities, businesses and individuals or households'. The report also estimated that the costs of commissions for ML ranged from $436.7 million (low) to $829.6 million (high).

68 For the year 2016–17, the estimated cost of serious and organised crime was up to $47.4 billion: Russell G Smith, *Estimating the Costs of Serious and Organised Crime in Australia 2016–17* (Statistical Report No 9, Australian Institute of Criminology, 2018) 1 <https://doi.org/10.52922/sr227327>. In an earlier report, the Australian Institute of Criminology cited an Australian Crime Commission 2011 study estimating the annual cost of organised crime at $10–15 billion, and John Stamp and John Walker's 2007 study estimating that the total proceeds of crime in Australia for year 2004 was $3.8 billion, with fraud (around $2.3 billion) being the largest component: Russell G Smith et al, *Counting the Costs of Crime in Australia: A 2011 Estimate* (Research and Public Policy Series No 129, Australian Institute of Criminology, 2014) 55 <https://www.aic.gov.au/publications/rpp/rpp129>. The early estimates must be treated with some caution because the methodology of measuring organised crime and ML was at its infancy.

69 Austin F Cullen, *Commission of Inquiry into Money Laundering in British Columbia* (Final Report, Province of British Columbia, June 2022) 145. The Commission discussed the quantification methods in the literature, its own efforts at measurement and how to improve estimates of ML: at 120–50.

70 Andrew Wong and Nadine Chua, 'Interpol Chief Warns Organised Crime Groups at Risk of Spreading Globally like an Epidemic', *Singapore Straights Time*s (online, 27 March 2024) <https://www.straitstimes.com/singapore/courts-crime/interpol-chief-warns-organised-crime-groups-at-risk-of-spreading-globally-like-epidemic>.

interconnectedness of communications systems that facilitate online anonymity, and the apparent inability of legal and political systems to effectively combat ML.[71]

B What Is the Evidence of Systemic Misuse of Legal Services by Money Launderers?

In 2003, the Canadian Department of Justice conducted a global investigation to determine if lawyers played significant roles in financial crime and ML networks.[72] The Attorney-General of Canada had just lost a series of constitutional cases[73] where the courts had imposed injunctions exempting legal counsel from STR obligations. Twelve years later, the Supreme Court of Canada held that a new attempt to regulate the legal profession under AML laws[74] was unconstitutional,[75] ruling that government regulation was a disproportionate response to the AML problem.[76] The Supreme Court found that self-regulation by the provincial law societies was a sufficiently robust alternative and less intrusive method of regulation.[77] The lack of evidence of systemic misuse of legal services was an underlying factor leading the court to reject the need for criminal sanctions to enforce AML obligations.

Interestingly, in countries like Belgium, France and Jamaica, where AML regulation of the legal profession faced constitutional challenges, governments did not rely on evidence of ML by lawyers. However, analysing current evidence of legal service misuse is crucial for policy debates in jurisdictions which have not applied international AML norms to lawyers.

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71 The small number of criminal prosecutions of ML and the tiny percentage of illicit assets that are traced and confiscated (a rough estimate is 2–3%) are cited as evidence of the scale of the problem and that the AML/CTF system is not working. For a study that shows there is a positive correlation – albeit not necessarily a causal relationship – between compliance and AML systems/asset recovery performance, see Roman Samuel Brummer, 'The Impact of Anti-Money Laundering Regulations on Asset Recovery Performance: A Study of Underlying Reasons for Countries' Asset Recovery Efforts' (MSc Thesis, Norwegian School of Economics, 18 December 2020) <https://openaccess.nhh.no/nhh-xmlui/bitstream/handle/11250/2735687/masterthesis.pdf?sequence=1>.

72 This narrative is based on the author's professional experience in 2002–04 dealing with the Canadian Department of Justice and discussions that took place in Ottawa, Canada on an unrelated matter.

73 See, eg, *Federation of Law Societies of Canada v Canada (Attorney-General)* (2002) 57 OR (3d) 383 (Ontario Superior Court of Justice); *Federation of Law Societies of Canada v Canada (Attorney-General)* (2002) 203 NSR (2d) 53 (Nova Scotia Supreme Court). See Michelle Gallant, 'Uncertainties Collide: Lawyers and Money Laundering, Terrorist Finance Regulation' (2009) 16(3) *Journal of Financial Crime* 210, 211 <https://doi.org/10.1108/13590790910971766>. See also Cullen (n 69) 1144–6.

74 The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000 and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* SOR/2002-184 required lawyers to gather information on their clients, including verifying the identity of those on whose behalf they pay or receive money, and keeping records of transactions, which would be available to law enforcement through search and seizure powers. Contrary to several academic articles, the 2002 legislation and regulations did not require lawyers to report suspect transactions, so the issue of suspicious transaction reporting was not considered by the Supreme Court of Canada in 2015.

75 Cullen (n 69) 1147–51.

76 Alexandra Mogyoros, 'Federation of Law Societies: Towards a Deeper Understanding of the Principles of Fundamental Justice' (2017) *Supreme Court Law Review* 451, 460–1, 465 <https://doi.org/10.2139/ssrn.3299640>.

77 *Canada (Attorney-General) v Federation of Law Societies of Canada* [2015] 1 SCR 401, 423–8 [42]–[57] (Cromwell J) ('*Law Societies Supreme Court Decision*').

Various empirical methods have been employed by academics and governments to explore the nature and risk of professionals' involvement in serious criminal activities. These methods include examining court records, conducting surveys and interviews, and analysing leaked documents. These studies aim to address questions about systemic misuse of professional services, though none offer conclusive answers.

Professor JC Sharman's experiential methodology, particularly applied to corporate and trust service providers, has been instrumental in understanding ML practices, highlighting how money launderers exploit professional services and lax law enforcement.[78] Quantitative and qualitative assessments, including analyses of leaked documents like the Panama and Paradise Papers, have revealed the significant role played by law firms in illegal or unethical behaviour, such as facilitating tax avoidance for multinational companies and high-net-worth individuals.[79] These revelations have amplified public perception that elite law firms are prepared to act illegally, if not unethically, for powerful clients who seek their services to minimise taxes.

Several studies focusing on criminal prosecutions of lawyers and their involvement in confiscated illicit assets shed light on the significance of the AML problem and the likelihood that the legal profession is deliberately participating in ML schemes. These studies, based on cases from the UK, US and NZ, reveal insights relevant to Australia. They are largely based on court files and do not include interviews with lawyers who were convicted of ML.

Dr Katie Benson's empirical study of 20 solicitors convicted of ML in the UK found that in most cases lawyers did not deliberately participate in the facilitation of ML or act dishonestly. Dr Benson noted that in some cases convictions were based on the 'assumption of *suspicion* rather than actual knowledge' while other cases were grounded on the technical offence of failing to report suspicions of ML.[80] Although Dr Benson's study is based on a small sample, it suggests that the legal profession in the UK rarely orchestrates ML scams and that typically lawyers are deceived by money launderers. Dr Benson's study also demonstrates the wide range of behaviour that may be categorised as facilitation of ML and the sheer breadth of ML offences under UK law.

The US has a greater number of criminal prosecutions of lawyers for ML than any other country, even taking into account its population size. However,

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78 See, eg, Michael G Findley, Daniel L Nielson and JC Sharman, *Global Shell Games: Experiments in Transnational Relations, Crimes and Terrorism* (Cambridge University Press, 2014) 3 <https://doi.org/10.1017/CBO9781107337848>. The study relied on evidence from 7,400 email solicitations to nearly 3,800 corporate service providers that make and sell 'shell companies' (companies with little or no assets) in 181 countries.

79 See, eg, BBC Panorama, 'Paradise Papers: Apple's Secret Tax Bolthole Revealed', *BBC New*s (online, 7 November 2017) <https://www.bbc.com/news/world-us-canada-41889787>. The precise role of law firms and the extent of their complicity in the scandals is a highly contentious matter.

80 Katie Benson, 'Money Laundering and Anti-Money Laundering and the Legal Profession', in Colin King, Clive Walker and Jimmy Gurulé (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan, 2018) 109, 125–6 (emphasis in original) <https://doi.org/10.1007/978-3-319-64498-1_6>.

ML prosecutions against lawyers are infrequent compared to bankers, real estate agents and operators of cryptocurrency exchanges.[81] Lawton Cummings and Paul Stepnowsky's perceptive study of ML prosecutions in 2009 in the US Second Circuit found that in 10 of the sample of 40 cases lawyers had some 'involvement', but they were only prosecuted in four instances. In each prosecution, the lawyer participated in a fraudulent scheme and then laundered the proceeds of their own crime (called self-money laundering).[82] Cummings and Stepnowsky's study suggests that it is unusual for attorneys in the US to arrange ML schemes for their clients, and that typically lawyers if they are involved in criminality will participate in the predicate offence and self-money laundering.

Dr Ronald Pol's 2016 research employed a different approach to examine 173 professional facilitators (lawyers, accountants and real estate agents) in NZ 'involved' in real estate ML.[83] Instead of focusing solely on criminal prosecutions, Dr Pol scrutinised the behaviour of professionals in ML cases, many of which were not prosecuted, under-investigated or over-investigated. Dr Pol rejected a simplistic binary view that professionals are either 'knowing facilitators' or 'innocent enablers' of ML. Instead, he devised a categorisation of professional facilitation spanning along the following continuum:[84] 'innocent' (no known red flags),[85] 'unwitting' (one to three red flags), 'wilfully blind' (four or more red flags), 'corrupt' (six red flag indicators) and 'complicit' (actual knowledge of criminal activity). Dr Pol's case study concluded that professionals in NZ were more likely to be unwitting or wilfully blind facilitators of crime, rather than corrupt or complicit actors. This finding is broadly similar to Benson, and Cummings and Stepnowsky's regarding whether lawyers knowingly facilitate ML.

Benson, Cummings, Stepnowsky and Pol's studies suggest that legal practitioners are not major players in facilitating ML by career criminals or

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81 Kan M Nawaday et al, 'Recent Trends in US Money Laundering Prosecutions', *Global Investigations Review* (Web Page, 21 June 2024) <https://globalinvestigationsreview.com/guide/the-guide-anti-money-laundering/second-edition/article/recent-trends-in-us-money-laundering-prosecutions>.

82 Cummings and Stepnowsky found that the 40 prosecutions involved charges of ML and predicate offences, such as drug trafficking, corruption or illegal gambling: Lawton P Cummings and Paul T Stepnowsky, 'My Brother's Keeper: An Empirical Study of Attorney Facilitation of Money-Laundering through Commercial Transactions' (Research Paper No 2010-32, University of Maryland, 2010) 35 <http://dx.doi.org/10.2139/ssrn.1658604>.

83 Ronald F Pol's empirical study relied on primary material drawn from New Zealand court judgments and confidential case files relating to criminal forfeiture of real estate for the period 1992–2016: Ronald F Pol, 'Effective Sentinels or Unwitting Money Launders: The Policy Effectiveness of Combating Illicit Financial Flows through Professional Facilitators (Lawyers, Accountants and Real Estate Agents)' (PhD Thesis, University of Griffith, 2017) 16, 33.

84 Dr Pol's categorisation of the behaviour (or more accurately the factual circumstances facing) professional facilitators was designed as a 'method to identify, access and analyse a wider range of unexamined and underexamined data involving known cases': ibid 16, 33–4, 52–9.

85 The term 'red flag' refers to indicators or warning signs that something is unusual, in the behaviour of persons or in financial transactions, that could suggest illegal activities such as ML. The concept is essential in the prevention of ML by guiding compliance officers to investigate further to prevent illegal activities. See, eg, Barry Peterson, 'Red Flags and Black Markets: Trends in Financial Crimes and the Global Banking Response' (2013) 6(3) *Journal of Strategic Security* 298, 299, 302 <https://doi.org/10.5038/1944-0472.6.3S.28>.

organised crime organisations.[86] This contrasts with Australian government enquiries which claim that legal services are often targeted by organised crime[87] because they are highly attractive.[88] There is a gap between academic studies and official statements because we lack information on the extent to which and how the legal profession aids ML.[89] It may be questioned whether there is any evidentiary basis to support the official FATF narrative that lawyers play a crucial role in ML.[90] The lack of proof of widespread dishonest involvement by lawyers in ML[91] has been used by professional bodies in Australia as justification for not extending AML regulation to the legal profession.[92]

Although it is important to gather evidence of lawyers' knowing participation in ML, the focus has shifted to discussing the vulnerabilities of the legal profession to ML. This is a logical development in so far as the RBA to regulation requires

86 This view is also supported by a study of six disciplinary cases in the UK, where it was found that in the 'majority of cases lawyers are not complicitly facilitating ML or acting dishonestly, but are reckless in their conduct or are making errors of judgment': Joanne Carol Cracknell, 'Understanding the Role of the Lawyer in the Cause and Effect of Money Laundering within the Legal Profession' (PhD Thesis, University of Portsmouth, 2021) 113.

87 See, eg, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Commission of Inquiry Pursuant to Orders in Council* (Report, 3 July 1989) 166–7 <https://www.ccc.qld.gov.au/publications/fitzgerald-inquiry-report>. See also Tom Sherman, 'Professional Business Advisors and Organised Crime' (1995) 48 *Platypus Magazine* 31 <https://www.austlii.edu.au/au/journals/AUFPPlatypus/1995/42.pdf>.

88 Legal services *may* be attractive to money launderers because of their specialist knowledge and skills in applying company law, trust law and tax law, high status and reputation creating an appearance of legitimacy, and misuse of legal professional privilege ('LPP') as a shield of secrecy: David Chaikin, 'Financial Crime Risks and the Professions' in David Chaikin (ed), *Financial Crime Risks, Globalisation and the Professions* (Australian Scholarly Publishing, 2013) 1, 2–6.

89 Michael Levi, Peter Reuter and Terrence Halliday, 'Can the AML/CTF System Be Evaluated Without Better Data?' (2018) 69(2) *Crime, Law and Social Change* 307, 307 <https://doi.org/10.1007/s10611-017-9757-4>.

90 There is a lack of hard evidence of lawyers consciously engaging in ML and whether stricter AML regulation of lawyers has had any impact on ML: Michael Levi, 'Lawyers as Money Enablers? An Evolving and Contentious Relationship' (2022) 23(2) *Global Crime* 126, 134, 138 <https://doi.org/10.1080/17440572.2022.2089122>.

91 Victorian Law Reform Commission (n 65) 31–42.

92 See, eg, Law Council of Australia, Submission to Attorney-General's Department (Cth), *Response to Consultation Paper: Legal Practitioners and Conveyancers* (7 February 2017) 35 ('Law Council Submission'). The LCA's 2017 assertion that there was an absence of evidence in Australia of lawyer involvement in ML needs to be updated because there are several recent cases where solicitors have been found guilty of serious ML offences: see, eg, *Chalabian v The King* [2024] NSWCCA 47 (solicitor sentenced to 12 years' imprisonment for knowingly dealing in proceeds of crime in circumstances where he allowed the firm's trust account to be used to transfer $24 million of proceeds of a blackmail offence involving 53 separate deposits. There was strong circumstantial evidence of the solicitor's guilty knowledge including electronic intercepts of incriminating conversations and his role in drafting a sham arrangement to conceal the illicit source of the monies). See also *R v Dev Menon* [2023] NSWSC 768 (solicitor sentenced to 12 years' imprisonment for ML conspiracy in circumstances where he facilitated transfers of unremitted Pay As You Go ('PAYG') withholding amounts as part of a $105 million tax fraud on the Commonwealth and used the firm's trust account to channel illicit proceeds). These cases do not support the view that lawyers are critical to ML scams, but rather that they operate on the fringes of the profession.

an assessment of the threats and vulnerabilities of the use of legal services.[93] In Australia, policy makers and law enforcement agencies argue that certain legal services are at high risk of being misused by money launderers, justifying the need for stricter regulation.[94] In 2021, when queried by the Australian Senate as to what was the justification for extending the *AML/CTF Act* to the legal profession, AUSTRAC said the evidence was 'the evidentiary advice from law enforcement' and our own intelligence of the role of some lawyers.[95] The Department of Home Affairs also stated that the reason for regulating lawyers was not so much detecting 'bad actors', but the weight of 'collective international experience' and 'international typologies' which demonstrated the vulnerability of legal practitioners to ML.[96]

The official statements above imply that the raison d'être of AML regulation is not primarily to target lawyers who knowingly aid money launderers because they are unlikely to follow any rules. Instead, it is more realistic to focus on AML for lawyers who might not realise they are involved, those who are 'unwitting', 'innocent' or are 'wilfully blind' to suspicious transactions (Dr Pol's categories). Thus, the justification for AML rules is that they will increase the awareness of ML and change the behaviour of the above category of lawyers, thereby reducing the misuse of legal services.[97] The argument is that without the imposition of mandatory AML rules, there is little incentive for the legal profession to change its behaviour and so the vulnerabilities to ML will continue.

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93 See Financial Action Task Force, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (Report, June 2013) <https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf> ('*ML/TF Vulnerabilities of Legal Professionals*'). For the argument that a principles-based system of regulation (which is analogous to a risk-based approach) is inadequate, and that lawyers need clear and unambiguous rules to be ethical, see Paulo Baron and Lillian Corbin, 'The Unprofessional Professional: Do Lawyers Need Rules?' (2017) 20(2) *Legal Ethics* 155, 167 <https://doi.org/10.1080/1460728x.2017.1397402>.

94 In Australia, the National Risk Assessment considers that lawyers pose a 'high and stable money laundering vulnerability' because they 'provide access to a range of critical products, services and structures desired by money launderers and criminals alike': Australian Transaction Reports and Analysis Centre, *Money Laundering in Australia: National Risk Assessment* (Risk Assessment, 2024) 82 <https://www.austrac.gov.au/business/how-comply-guidance-and-resources/guidance-resources/money-laundering-australia-national-risk-assessment-2024>. Similarly, the UK regards the risk of ML as high because of the type of services offered by the legal profession (eg, conveyancing, trust and company services, and trust accounts) is attractive to criminals: Her Majesty's Treasury and Home Office, *National Risk Assessment of Money Laundering and Terrorist Financing 2020* (Report, December 2020) 88–9 <https://www.gov.uk/government/publications/national-risk-assessment-of-money-laundering-and-terrorist-financing-2020>.

95 Evidence to the Legal and Constitutional Affairs References Committee, Parliament of Australia, Canberra, 10 November 2021, 63–4 (Bradley Brown, National Manager, Education, Capability and Communications, Australian Transaction Reports and Analysis Centre).

96 Ibid 64 (Daniel Mossop, Assistant Secretary Transnational Crime Policy and Transnational, Serious Organised Crime, Department of Home Affairs).

97 There is evidence that the legal profession is grossly ignorant of financial crimes, including ML: see, eg, International Bar Association, Organisation for Economic Co-operation and Development and United Nations Office on Drugs and Crime, *Risks and Threats of Corruption and the Legal Profession* (Survey, 2010) <https://www.ibanet.org/MediaHandler?id=AE4B6ED2-4871-487B-B653-31424494D97B>. See also Russ + Associates, *Vulnerabilities Analysis: Money Laundering and Terrorism Financing* (Report, 28 September 2023).

If the rationale of AML regulation is to change the behaviour of 'non-bad' businesses, then this should take into consideration the burden of compliance and its heavy costs.[98] The financial impact of AML rules often outweighs the benefits for both the public and private sectors.[99] Recent surveys[100] indicate that compliance costs for fighting financial crime are higher than expected, especially for smaller businesses, like typical law firms in Australia, which cannot benefit from economies of scale or advanced technology like large financial institutions.[101]

C Is There a Significant Geopolitical Risk that Australia Will Be Placed on the FATF's Grey List?

One of the strongest reasons to extend AML regulation to lawyers is to protect Australia's international reputation, financial institutions and economy. In 2023, the Attorney-General's Department[102] warned that without significant AML/CTF reforms, including Tranche 2, Australia might receive low ratings in the 2025–27 evaluation by the FATF and could be put on its Grey List. Being on the Grey List means increased monitoring by the FATF and a requirement to address strategic deficiencies.[103] While Grey Listing does not automatically lead to more scrutiny of a jurisdiction's financial institutions or transactions, it often does, resulting in severe economic consequences.[104] Placing Australia on the FATF's Grey List would be unprecedented, as no member of the FATF has ever been Grey-Listed before. Historically, Grey-Listed jurisdictions have been emerging and developing countries or small offshore financial centres.[105]

Until recently, Australia seemed to downplay the risk of being Grey-Listed by delaying Tranche 2 and not implementing the complementary FATF Standard

98 For a comparative and empirical study of the costs of AML regulation, see Joras Ferwerda, 'The Effectiveness of Anti-Money Laundering Policy: A Cost-Benefit Perspective' in Colin King, Clive Walker and Jimmy Gurule (eds), *The Palgrave Handbook on Criminal and Terrorism Financing Law* (Palgrave Macmillan, 2018) 317 <https://doi.org/10.1007/978-3-319-64498-1_14>.

99 JC Sharman and Percy S Mistry, *Considering the Consequences: The Development Implications of Initiatives on Taxation, Anti-Money Laundering and Combating the Financing of Terrorism* (Commonwealth Secretariat, 2008) xi, 29–35 (Barbados), 69–93 (Mauritius), 145–53 (Vanuatu) <https://doi.org/10.14217/9781848590090-en>.

100 In Australia, $3.5 billion was spent by financial institutions on financial crime compliance in 2022: Forrester Consulting, *True Cost of Financial Crime Compliance Study: Asia Pacific* (Study, 2023) 5.

101 See Louis de Koker and Doron Goldbarsht, 'Financial Technologies and Financial Crime: Key Developments and Areas for Future Research' in Doron Goldbarsht and Louis de Koker (eds), *Financial Technology and the Law* (Springer, 2023) 303 <https://doi.org/10.1007/978-3-030-88036-1_13>.

102 Attorney-General's Department (Cth), *Modernising Australia's AML/CTF Regime: Consultation Paper* (n 50) 19.

103 '"Black and Grey" Lists', *Financial Action Task Force* (Web Page, 23 February 2024) <https://www.fatf-gafi.org/en/countries/black-and-grey-lists.html>.

104 Mizuho Kida and Simon Paetzold, 'The Impact of Gray-Listing on Capital Flows: An Analysis Using Machine Learning' (Working Paper No 2021/153, International Monetary Fund, May 2021) 1, 31–2 <https://doi.org/10.5089/9781513582436.001>. The IMF quantitative machine-led study claimed that capital flows decline on average by 7.6% if a jurisdiction is Grey Listed: at 18–19. See also Louis de Koker, John Howell, and Nicholas Morris, 'Economic Consequences of Greylisting by the Financial Action Task Force' (2023) 11(5) *Risks* 81:1–32. <https://doi.org/10.3390/risks11050081>.

105 In the 84 instances of Grey Listing since 2000, not one jurisdiction has been a developed country, with the exception of offshore financial centres: Kida and Paetzold (n 104) 31–2.

which requires the creation of a beneficial ownership register for companies.[106] However, the possibility is becoming more realistic. What has not been noticed is that while Australia has been a laggard in bringing lawyers under AML rules, countries like the US[107] and Canada[108] have enacted extensive self-regulatory AML measures for the legal profession, although they do not require the reporting of suspicious transactions.

IV POLICY, PRACTICAL AND ETHICAL IMPACT OF AML REGULATION

This Part will examine how the *FATF Standards* have addressed the unique role of lawyers in the justice system. This will determine if all lawyers or just certain types of lawyers need to follow the AML rules, and which types of services are regulated. There will be a discussion of how global AML norms handle LPP and why this is significant. There will be separate consideration of CDD processes and STR rules, with the latter raising profound ethical issues, such as the adverse impact on the duty of confidentiality and LPP. The policy, practical and ethical impact of AML rules in jurisdictions such as the UK which regulate lawyers will be assessed. This will provide insights as to how lawyers in Australia may be affected when Tranche 2 is implemented.

A What Is the Jurisdictional Scope of AML Regulation of Legal Professionals and Legal Services?

Before the *FATF Standards* were extended to DNFBPs in 2003, there was a debate about whether this extension was justified for the legal profession and whether all legal services should be regulated. Some argued that the *FATF Standards* should not compromise the 'unique role' of independent professional

106 *FATF Standards* (n 2) 20–2 (recommendations 23 and 24). In 2022, the Treasury issued a consultation paper on this topic: Treasury (Cth), *Multinational Tax Integrity: Public Beneficial Ownership Register* (Consultation Paper, November 2022) <https://treasury.gov.au/consultation/c2022-322265>. In 2024, the government issued an exposure draft: Treasury Laws Amendment Bill 2024: Enhanced Disclosure of Ownership of Listed Entities (Cth) <https://treasury.gov.au/sites/default/files/2024-11/c2024-569081-ed.pdf>.

107 See, eg, Society of Trust and Estate Practitioners, 'US Lawyers Revise Professional Conduct Rule to Combat Money Laundering', *Industry News* (online, 21 August 2023) <https://www.step.org/industry-news/us-lawyers-revise-professional-cnduct-rule-combat-money-laundering>. See also American Bar Association, *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* (Guidance, 23 April 2010).

108 See, eg, the Federation of Law Societies of Canada model rules on 'No Cash' and 'Client Identification and Verification': Cullen (n 69) 1151–212. For a critical assessment that the law societies do not have the expertise or resources to regulate lawyers under self-regulatory AML rules, see Rebecca Bromwich, '(Where Is) The Tipping Point for Governmental Regulation of Canadian Lawyers? Perhaps It Is in Paradise: Critically Assessing Regulation of Lawyer Involvement with Money Laundering after *Canada (Attorney-General) v Federation of Law Societies of Canada*' (2018) 41(4) *Manitoba Law Review* 1 <https://doi.org/10.29173/mlj1023>.

lawyers as 'suppliers and guarantors of genuine access to law and justice'.[109] A political compromise led to a decision that the AML norms would not apply to all lawyers or to all the professional services of lawyers, especially those linked to legal or judicial proceedings. AML regulation would apply only to 'independent legal professionals' and high-risk services where the lawyer is participating in activities of a financial or real estate nature.

According to the FATF, the term 'independent legal professionals' means 'sole practitioners, partners or employed professionals within professional [law] firms', and excludes corporate lawyers employed in other types of businesses or lawyers who are employed by the government.[110] The idea of an 'independent legal professional' is derived from European case law concerning LPP.[111] It includes lawyers regulated under national bar associations and professionals 'providing legal services who are not employed or are not independent of their client'. It was thought that there was no utility in imposing AML obligations on lawyers who were employees of their client because they could not exercise independent judgment.[112]

Under the *FATF Standards*, CDD, record keeping requirements and suspicious transaction reporting obligations must be applied by independent legal professionals when they 'prepare for or carry out transactions for the clients' concerning specified professional activities. The list of six activities which are considered highly vulnerable to ML under FATF recommendation 22(d) are:

- Service 1: Buying and selling of real estate;
- Service 2: Managing of client money, securities or other assets;
- Service 3: Managing bank, savings or securities accounts;
- Service 4: Organising of contributions for the creation, operation and management of companies;
- Service 5: Creating or operating the management of legal persons (eg, companies) or arrangements (eg, trusts); or
- Service 6: Buying, selling and transferring business entities.

Under the FATF Gatekeeper Initiative,[113] six areas of legal practice are subject to the global AML norms. The justification for this extension is that lawyers

109 European Bars Federation and Fédération Suisse des Avocats, Submission to the Financial Action Task Force, *Review of the FATF Forty Recommendations: Paper on the Application of the Measures Contained in Recommendations 10–21 and 26–29 to Independent Lawyers* (28 November 2002) 2 [3], 3 [9].

110 *FATF Standards* (n 2) 126.

111 Patricia Shaughnessy, 'The New EU Money-Laundering Directive: Lawyers as Gate-Keepers and Whistle-Blowers' (2002) 34(1) *Law and Policy in International Business* 25, 36.

112 Extending this idea, independent legal professionals may be so financially dependent on a client that they are practically incapable of exercising independent judgment and unlikely to properly comply with their AML obligations: see Ronit Dinovitzer, Hugh Gunz and Sally Gunz, 'Unpacking Client Capture: Evidence from Corporate Law Firms' (2014) 1(2) *Journal of Professions and Organization* 99 <https://doi.org/10.1093/jpo/jou003>. For a contrary view that the global AML standards should be extended to corporate legal officers so that they would be empowered to protect the company and mitigate financial crime risks, see Doron Goldbarsht, 'Am I My Corporate's Keeper? Anti-Money Laundering Gatekeeping Opportunities of the Corporate Legal Officer' (2022) 29(3) *International Journal of the Legal Profession* 261, 274 <https://doi.org/10.1080/09695958.2020.1761369>.

113 The FATF's Gatekeeper Initiative was designed to impose new AML responsibilities on lawyers since they furnish access to the financial system and have the capacity to prevent criminals exploiting their services, such as advising clients on the movement and concealment of illicit proceeds: see Kevin

providing similar services to other businesses should be considered mere 'service providers' and not exempt from AML regulation.[114] However, when lawyers act in their traditional roles as advisors or advocates, they should not be subject to AML rules because this would undermine fundamental rights and the administration of justice. Thus, the FATF recognised that some legal services do not fall within recommendation 22(d), for example, advising clients in divorce and custody litigation, or representing clients in disputes and mediations.[115] The distinction between the work of transactional lawyers and the services of litigation lawyers may seem artificial but it provides a sensible and reasonable solution to the conflict between the need to combat financial crime and the protection of essential features of the legal system.[116]

Why did the FATF select the six specified activities under recommendation 22(d) and not regulate other transactional services provided by lawyers? The short answer is that the FATF regards the six areas of legal practice as high ML risk based on case studies/typologies,[117] suspicious transaction reports ('STRs') and the academic literature.[118] This does not mean that legal services which are not captured by recommendation 22(d) cannot be misused[119] or that a jurisdiction's AML regime cannot have a role in detecting such illicit conduct.

Most jurisdictions have simply copied the language of recommendation 22(d) into their laws without properly considering the real ML risks faced by their own lawyers. The EU's 4th AML directive[120] and the UK[121] have expanded the scope of AML regulation to include professionals 'participating in financial or corporate

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L Shepherd, 'Guardians at the Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers' (2009) 43(4) *Real Property Trust and Estate Law Journal* 607.

114 Laurel S Terry, 'The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers"' (2008) *Journal of the Professional Lawyer* 189, 198–9.

115 Financial Action Task Force, *Guidance for a Risk-Based Approach for Legal Professionals* (Guidance, June 2019) 13 [40] <https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/Risk-Based-Approach-Legal-Professionals.pdf.coredownload.inline.pdf>.

116 Ping He, 'Lawyers, Notaries, Accountants and Money Laundering' (2006) 9(1) *Journal of Money Laundering Control* 62, 69 <https://doi.org/10.1108/13685200610645229>.

117 See, eg, *ML/TF Vulnerabilities of Legal Professionals* (n 93) 1, 96–107. This FATF report documents 123 case studies of misuse of legal services, including seven cases from Australia involving misuse of client trust accounts, transferring funds without providing legal services, property purchases, managing client affairs and making introductions, and sham litigation.

118 See, eg, Stephen Schneider, *Money Laundering in Canada: An Analysis of RCMP Cases* (Study, March 2004) concerning lawyers' involvement in real estate ML.

119 For example, setting up and managing charities, providing insolvency services, and preparing powers of attorney are services which have been misused by money launderers: *ML/TF Vulnerabilities of Legal Professionals* (n 93) 83.

120 *Parliament and Council Directive EU/2015/849 of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing* [2015] OJ L 141/73, art 9. This directive amended Regulation EU/648/2012 of the European Parliament and of the Council, and repealed Directive 2005/60/EC of the European Parliament and the Council and Commission Directive 2006/70/EC.

121 'The Scope of the Money Laundering Regulations', *Solicitors Regulation Authority* (Web Page, 24 December 2021) <https://www.sra.org.uk/solicitors/resources/money-laundering/scope-money-laundering-regulations/>; Solicitors Regulation Authority, *Tax Adviser Guidance* (Guidance) <https://www.sra.org.uk/globalassets/documents/solicitors/tax-adviser-guidance.pdf?version=492a8e>.

transactions', including tax advice where there is a high risk of financial crime. The reason for this expansion in ML coverage is that the EU prioritises combating tax crimes which are frequently facilitated by tax advice with professionals, such as lawyers, aiding or abetting their clients' crimes.[122]

Initially Australia's reform proposals appear to have taken a different approach by treating recommendation 22(d) activities as *theoretically high risk* and then proposing to carve out of the six areas of legal practice, conduct which is associated with *low actual risk*.[123] However, the government has not adopted this approach in the *Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Amendment Act 2024* (Cth), which sets out the designated services of the legal profession which will be subject to AML regulation.[124] The new table 6 provides a description of AML regulated professional services, which is similar to the FATF high risk areas of legal practice, but is potentially broader in scope in that it includes any activity which '[assists] a person in the planning or execution' of a property or real estate transaction.[125]

B What Is the Policy and Practical Impact of Suspicious Transaction Reporting?

A core obligation under international AML norms is the requirement to report suspect transactions, called STRs in the US, SMRs in Australia and suspicious activity reports ('SARs') in the UK. It is a fundamental premise of the STR system that the private sector has valuable intelligence on ML which is needed by law enforcement. There is a strong belief among policy makers and law enforcement agencies that STRs when passed to the financial intelligence unit ('FIU') will be a springboard for important criminal and tax investigations.[126] This belief may be tested by exploring how effective the STR regime is in practice in meeting the aims of ML regulation – deterring, detecting and disrupting ML and other serious financial crimes.[127] An assessment of the STR regime is particularly important

122 Ian Roxan et al, Directorate General for Internal Policies, European Parliament, *Rules on Independence and Responsibility Regarding Auditing, Tax Advice, Accountancy, Account Certification Services and Legal Studies* (Study, European Parliament's Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion, April 2017) 11.

123 Attorney-General's Department (Cth), *Reforming Australia's AML/CTF Regime* (n 51) 7–15.

124 *AML/CTF Amendment Act 2024* (n 45) sch 3 pt 3 tbl 6.

125 See, eg, ibid tbl 6 items 1, 2, 4, 6. Contrary to expectations, the final list of designated services was not determined after consultation between the Attorney-General's Department and stakeholders, such as the LCA. However, the government carved out one low risk activity from the regulated professional services. Where barristers provide any service acting on instructions from solicitors, they are not to be taken as designated services: at sch 3 pt 3 item 10A.

126 There is mixed evidence as to whether and the extent to which suspicious transaction reports ('STRs') trigger investigations leading to prosecutions and convictions for serious offences, confiscation of assets and new tax assessments, with a wide variation between different jurisdictions: see, eg, David Chaikin, 'How Effective Are Suspicious Transaction Reporting Systems?' (2009) 12(3) *Journal of Money Laundering Control* 238 <https://doi.org/10.1108/13685200910973628>.

127 See, eg, Nicholas Gilmour and Tristram Hicks, *The War on Dirty Money* (Policy Press, 2023) ch 10 <https://doi.org/10.56687/9781447365143>. See especially at 187–8.

because of its potential adverse impact on the ethics of the legal profession as manifested in the duty of confidentiality and LPP.

Under section 41 of the *AML/CTF Act*, a reporting entity is obliged to file an SMR with AUSTRAC, a breach of which gives rise to a civil penalty. The obligation to file an SMR is broad in that it arises where there is a low threshold of suspicion. The test is whether a reasonable person after examining all available information, including information obtained through investigating red flags, would be suspicious.[128] The suspicion applies to a wide range of situations including where a reporting entity has information that *may be relevant* to the investigation or prosecution of a person for tax evasion or any offence against a law of the Commonwealth, state or territories, or *may be of assistanc*e in the enforcement of a proceeds of crime law. The SMR obligation is invoked at an early stage of the relationship between a reporting entity and a customer, indeed at 'the moment a person inquires or requests a service from a reporting entity'.[129] The reason that there is such a broad reach of the reporting obligation is that it was designed to deal with the circumstances of financial institutions, which are not comparable to how a lawyer–client relationship is formed.[130]

The SMR obligation is fortified by a criminal prohibition under section 123 of the *AML/CTF Act* to not 'tip-off' clients as to the existence of the SMR. A reporting entity must not disclose to anyone other than AUSTRAC that they have filed or are required to file an SMR. They are also prohibited from disclosing 'any information from which it could reasonably be inferred' that they have submitted or are required to submit an SMR. There are several exceptions to the tipping-off prohibition, such as disclosure for the purpose of dissuading a client from breaking the law, and disclosure for the purpose of obtaining legal advice.[131] The Australian provision has a wider application than other jurisdictions, such as the UK, where there is an additional prosecution requirement that the disclosure is likely to prejudice an investigation following a disclosure.[132] The tipping-off prohibition in Australia is draconian in that it stultifies any conversation with a client about the SMR and its surrounding circumstances. If applied to the legal profession, the tipping-off prohibition would lead lawyers to breach their fiduciary duties to clients. Lawyers owe a duty of 'undivided loyalty' to their clients and this includes

128 Australian Transaction Reports and Analysis Centre, *Suspicious Matter Reporting: Reference Guide* (Guide, 24 June 2021) 2–3.

129 Law Council of Australia, 'Law Council Submission' (n 92) 45.

130 For example, where a customer's approach to a bank is suspicious because they suddenly decide not to open an account and deposit over $10,000 cash when they learn that the bank may be required to file a threshold transaction report. This scenario would never apply in the formation of a solicitor/client relationship.

131 See *AML/CTF Act* (n 9) ss 123(4) (crime prevention exception), 123(5) (legal advice exception). The penalty for violating section 123, which is a strict liability offence, is 2 years' imprisonment or 120 penalty units, or both: at s 123(11). The exceptions to the tipping-off prohibition have been reformulated: see *AML/CTF Amendment Act 2024* (n 45) sch 5 pt 1 div 1 item 2.

132 *Proceeds of Crime Act 2002* (UK) s 333A(1)(b) ('*UK POCA*'). See now schedule 5 part 1 division 1 item 2 of the *AML/CTF Amendment Act 2024* (n 45), which has introduced a new requirement for prosecution for the tipping-off offence in Australia similar to the UK requirement.

a duty to disclose all material information to the client as part of the retainer.[133] If a legal practitioner was required to file an SMR in Australia, the client's right to the 'single minded loyalty' of their lawyer may be so broken that the lawyer may be obliged under ethics rules to terminate the relationship. That the tipping-off prohibition is problematical is demonstrated by the UK experience, where transactional lawyers have resorted to the absurd strategy of avoiding talking to clients so as minimise their chances of committing a crime.[134]

In Australia, SMRs have generated a huge amount of intelligence, the quality of which is debateable. Since the *AML/CTF Act* was enacted in 2006, the number of SMRs has dramatically grown, so that 317,401 SMRs were filed with AUSTRAC in 2022–23.[135] The rise in SMR numbers in Australia is part of a worldwide trend, and is explicable in part because the regulated population has increased,[136] reporting entities are more intensely aware of their obligations, and in recent years AUSTRAC has adopted a more rigorous enforcement approach.

The sheer number of SMRs in Australia is not necessarily an indication of massive criminality or wrongdoing,[137] but rather a recognition by reporting entities that it is prudent to over-report what is essentially a subjective intelligence opinion, rather than face the legal, financial and reputational costs of not reporting. There are several studies that support the view that financial institutions, which file the greatest number of SMRs in Australia and in foreign jurisdictions, engage in defensive reporting to avoid criminal, civil or regulatory liability.[138] This 'crying wolf' behaviour may explain why there are so many low-quality, tenuous or useless reports.[139] The problem of over-reporting raises questions as to the proportionality and effectiveness of the SMR system because of the significant cost and burden placed on reporting entities.[140] Further, independent academic researchers face immense difficulties in assessing the effectiveness of SMRs because of a lack of publicly available data and the inherent difficulty of tying an individual SMR or group of SMRs to a specific criminal prosecution or a confiscation case.

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133 Law Council of Australia, *Review of the Australian Solicitors' Conduct Rules* (Report, 1 February 2018) 53, 57.

134 Sarah Kebbell, *Anti-Money Laundering Compliance and the Legal Profession* (Routledge, 2021) 191 <https://doi.org/10.4324/9780429019906> ('*AML Compliance and the Legal Profession*').

135 Australian Transaction Reports and Analysis Centre, *Annual Report 2022–23* (Report, September 2023) 6. Other reports filed with AUSTRAC in 2022–23 generated a greater number of reports: 190,312,191 international funds transfers instruction reports (wire transfers in and out of Australia) and 2,087,732 threshold transactions reports (cash deposits and withdrawals at or above $10,000).

136 Ibid. The number of reporting entities has increased from less than 4,000 cash dealers under the *FTR Act* (n 12) in the late 1980s to 17,531 persons in 2023.

137 Gilmour and Hicks (n 127) 18.

138 See, eg, Előd Takáts, 'A Theory of "Crying Wolf": The Economics of Money Laundering Enforcement' (2011) 27(1) *Journal of Law, Economics, and Organization* 32 <https://doi.org/10.1093/jleo/ewp018>.

139 The Law Commission in England and Wales considered that so-called low-quality reports were a perception problem because what may appear to be useless may turn out to be useful intelligence: Law Commission, *Anti-Money Laundering: The SARs Regime* (Report No 384, June 2019) 75, 79 ('*SARs Regime Report*').

140 Sarah Kebbell, '"Everyone's Looking at Nothing": The Legal Profession and the Disproportionate Burden of the *Proceeds of Crime Act 2002*' [2017] (10) *Criminal Law Review* 741, 751.

1 An Examination of the British SARs Regime

A review of the UK SAR regime may be useful in gauging the likely impact of requiring lawyers in Australia to report suspect transactions. The UK has 20 years' practice in regulating lawyers under AML laws and there is an excellent body of academic and official literature on the topic. Although there are several important differences between the UK SAR regime and the Australian SMR system, general insights may be drawn from the UK experience. The UK SAR regime is more complex and nuanced than the Australian SMR system because of the breadth of its ML offences and its unique consent procedure under the *Proceeds of Crime Act 2002* (UK) ('*UK POCA*').

There are two types of disclosures in the UK under part 7 of the *UK POCA*.[141] First, there are 'required disclosures' by the regulated sector, which includes independent legal professionals (known as general SARs). Under this requirement, lawyers must submit a SAR where they know, or suspect, or have reasonable grounds for knowing or suspecting that a person is engaged in ML. If an independent legal professional fails to file a general SAR, they risk prosecution for failure to disclose offences under sections 330 and 331 of the *UK POCA*. This type of mandated disclosure is analogous to the Australian legal position under section 41 of the *AML/CTF Act*, although the requirement of suspicion is couched in different language, and a breach of the SMR obligation in Australia gives rise to a civil penalty and not a criminal offence, as is the case in the UK.

Secondly, any lawyer (not just independent legal professionals) may file an 'authorised disclosure' to protect themselves from committing an ML offence. The procedure is that lawyers voluntarily file an SAR and request the National Crime Agency's ('NCA') consent to go ahead with a transaction (known as Defence Against Money Laundering ('DAML') SARs).[142] This form of disclosure is not applicable to Australia because there is no similar provision allowing Australian reporting entities to obtain consent from AUSTRAC to proceed with a transaction. Further, it is unnecessary to have a consent procedure in Australia because ML offences under the *UK POCA* are broader[143] and apply differently from ML crimes under division 400 of the Australian *Criminal Code Act 1995* (Cth).[144]

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141 *SARs Regime Report* (n 139) 23–31, 118–22.

142 Where the National Crime Agency ('NCA') grants consent, the reporter is protected from criminal liability and may proceed with the transaction on behalf of the client: Andrew Campbell and Elise Campbell, 'Money Laundering and the Consent Regime in the United Kingdom: Time for Change?' in Barry Rider (ed), *Research Handbook on International Financial Crime* (Edward Elgar, 2015) 485, 491 <https://doi.org/10.4337/9781783475797.00053>.

143 It is a potential criminal offence under sections 327–9 of the *UK POCA* (n 132) to deal with or propose to deal with criminal property on behalf of a client where a legal practitioner has a suspicion that it is 'criminal property'. For an analysis of how the ML offences apply to legal practitioners in the UK, see Solicitors Regulation Authority, *Proceeds of Crime* (Guidance, 25 September 2023) <https://www.sra.org.uk/solicitors/guidance/proceeds-crime-guidance>.

144 In Australia, the fault element in the principal ML offences is artificially removed by the deeming provision in section 51 of the *AML/CTF Act* (n 9) when an SMR is filed. Where a person communicates or gives information under the SMR requirement, then that person is taken (ie, deemed) 'for the purposes of Division 400 and Chapter 5 of the *Criminal Code*, not to have been in possession of that information at any time'.

An important benefit of the consent regime in the UK is its capacity to disrupt criminal financing through the freezing of clients' accounts. For example, 74,431 DAML requests (including 1,592 from the legal sector) were filed in 2022–23, resulting in £272 million being 'denied to suspected criminals' as a result of those requests'.[145] This statistic illustrates the legal practice in the UK of reporting entities unilaterally freezing a client's account before filing a DAML SAR request to avoid committing an ML offence. If the NCA rejects the request, the reporting entity is obliged to continue freezing that account to avoid criminal liability. In contrast, reporting entities in Australia are not required to freeze accounts to avoid criminal liability, and their practice is not to do so, but instead to wait until law enforcement makes an application to the court to freeze the account.[146] This means that the SMR system in Australia is far less successful in disrupting criminals' finances than the UK SAR regime.

It is worthwhile assessing the performance of the legal sector in the UK in lodging general SARs because of the similarity to Australian SMR requirements. From 2022–23, the legal sector filed 2,526 general SARs, which was a tiny percentage of the total number of 859,905 reports.[147] This is consistent with a trend over the past 15 years where there has been a decline in the number of general SARs filed by the legal sector in the UK compared to a significant increase by other industry sectors such as banks. There has been a debate in the UK as to whether the number and quality of SARs filed by the legal profession is appropriate, and whether there should be legislative changes to improve the SARs regime. A common complaint by lawyers is that they are compelled to file too many 'trivial' SARs, for example, regulatory breaches of the criminal law.[148] The small number and low quality of SARs has led one leading academic to express the view that

> [b]oth those who submit and those who receive lawyers' Suspicious Activity Reports in the UK regard a large majority of these reports as a waste of everyone's time. The most commonly mentioned offences are asbestos in clients' buildings and failure to preserve trees.[149]

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145 United Kingdom Financial Intelligence Unit, *SARs Annual Statistical Report 2023* (Report, 2023) 4 <https://www.nationalcrimeagency.gov.uk/who-we-are/publications/710-sars-annual-statistical-report/file> ('*SARs Annual Report 2023*'). Detailed statistics are found in the annexes to that report: United Kingdom Financial Intelligence Unit, *SARS Annual Statistical Report: Annexes* (Report, 2023) <https://nationalcrimeagency.gov.uk/who-we-are/publications/711-sars-annual-statistical-report-2023-annexes/file>.

146 David Chaikin, 'A Critical Examination of How Contract Law Is Used by Financial Institutions Operating in Multiple Jurisdictions' (2010) 34(1) *Melbourne University Law Review* 34, 55–6.

147 United Kingdom Financial Intelligence Unit, *SARs Annual Report 2023* (n 145) 7.

148 *SARs Regime Report* (n 145) 72–3.

149 Jason Sharman, *Report to the Cullen Commission: Money Laundering and Foreign Corruption Proceeds in British Columbia* (Report) 11–12. See also Law Society of England and Wales, *The Costs and Benefits of Anti-Money Laundering Compliance for Solicitors: Response by the Law Society of England and Wales to the Call for Evidence in the Review of the Money Laundering Regulations 2007* (Report, December 2009) <https://web.archive.org/web/20171115031506/http://www.lawsociety.org.uk/support-services/risk-compliance/anti-money-laundering/documents/law-society-response-to-the-hm-treasury-money-laundering-review-2009/>. The majority of SARs from solicitors relate to 'minor tax evasion, small scale opportunistic mortgage fraud by individuals rather than criminal syndicates, or minor regulatory or environmental breaches uncovered during mergers and acquisitions': at 28.

This troubling observation is corroborated by the Law Commission of England and Wales, which found the combination of the broad definition of suspicion, the 'all crimes approach',[150] and the operation of the DAML consent regime has resulted in lawyers filing many SARs that concern minor offences.[151] Yet the conventional wisdom of the FATF, the NCA and the Solicitors Regulation Authority ('SRA') is that lawyers in the UK should be filing more and higher quality SARs.[152] This opinion assumes that because lawyers are 'closer' and more knowledgeable about the business and personal affairs of their clients, they are in a better position to know about or suspect criminal activity.[153] However, there are countervailing factors concerning the nature of the relationship between lawyers and clients which the proponents of AML regulation of the legal profession largely ignore. The relationship between lawyers and clients is different from other businesses and other professions in that there is a fundamental fiduciary duty to act in the best interests of the client.[154] Based on a trusted relationship with their clients founded on the duty of confidentiality, the legal profession will usually have a better understanding of the nature and purpose of the proposed transaction and a more holistic view of their clients' affairs. Armed with this confidential knowledge, which is based on trust, lawyers are expected by their clients to provide competent and lawful advice that will shepherd the transaction through regulatory challenges in compliance with relevant laws, domestic and foreign.[155] In these circumstances, lawyers are more likely to understand the commercial logic of proposed transactions

150 The broad definition of 'criminal property' in section 340 of the *UK POCA* (n 132) means that the ML offences 'apply to dealings with property derived from *any criminal offence*': *SARs Regime Report* (n 139) 70–85 (emphasis added).

151 Nevertheless, the Law Commission adopted the view of law enforcement that even trivial offences might provide 'critical intelligence' for an investigator: *SARs Regime Report* (n 139) 75, 81–2. The Law Commission's view would seem to suggest that everything however minor might be important to law enforcement, but this begs the question whether the huge compliance costs could be spent in an alternative and more efficient manner.

152 For the view that lawyers are under-reporting SARs, see Helen Taylor and Daniel Beizsley, *A Privileged Position? How the UK's Legal Sector Escapes Effective Supervision for Money Laundering* (Report, October 2022) 14.

153 Cracknell (n 86) 14, citing the Director of the NCA for the view that lawyers are 'closer' to the clients so that they must know more about their clients' suspicious activities.

154 I am thankful to the reviewer who has pointed out that this argument is based on a rather simplified 'bad apples' conception of professional wrongdoing. That is, it assumes that lawyers will nearly always do the 'right thing' in complying with their SAR obligations. The literature on professional culture and organisational wrongdoing would suggest otherwise: see, eg, Daniel Muzio et al, 'Bad Apples, Bad Barrels and Bad Cellars: A "Boundaries" Perspective on Professional Misconduct' in Donald Palmer, Kristen Smith-Crowe and Royston Greenwood (eds), *Organizational Wrongdoing: Key Perspectives and New Directions* (Cambridge University Press, 2016) 141, 147, 162 <https://doi.org/10.1017/CBO9781316338827> (opportunities for professional misconduct have increased because of the transformation of the legal profession by the redrawing of 'jurisdictional, geo-political and ecological boundaries'); Brooke Harrington, 'Turning Vice into Virtue: Institutional Work and Professional Misconduct' (2019) 72(9) *Human Relations* 1464, 1483, 1490 <https://doi.org/10.1177/0018726718793930> (legal practitioners are extensively involved in facilitating offshore tax avoidance and have legitimised their misconduct by 'recategorizing it as a form of professional service in the public interest').

155 David Chaikin, 'Are Lawyers Gatekeepers or Arbitrageurs in Corporate Governance?' in David Chaikin (ed), *Financial Crime Risk, Globalisation and the Professions* (Australian Scholarly Publishing, 2013) 73, 79–83.

and be satisfied that there is nothing unusual or suspicious about the transaction, so that there is no trigger for an SAR. This may be contrasted with most bankers who do not have a fiduciary obligation and do not engage with clients in the same way. Thus, banks frequently file SARs because they do not understand what their clients are up to. The different role of lawyers and their ethical framework compared to other businesses may explain in part why the number of SARs in the UK is lower than the expectations of the FATF.

The discussion above suggests that as far as the legal profession is concerned, the UK SAR regime is inefficient, if not largely ineffective, in providing vital intelligence to law enforcement. The position is worse in other countries where the number of STRs filed by lawyers is so small that the suspicious reporting regime is nearly completely useless.[156] To say that regulation of lawyers through an SMR system must be achieving something ignores the reality that the system has a cost. It is likely that Australia will have a similar experience to the UK where lawyers will feel compelled to report trivial suspicious matters, given the broad language of section 41 of the *AML/CTF Act* and the professional proclivity to engage in defensive reporting. The uncertainty as to the meaning of the concept of 'suspicion' – which is a big issue in the UK[157] – will also be of concern to lawyers in Australia because if they make a mistake and do not file an SMR in breach of section 41, they may be subject to legal and disciplinary sanctions. Australian legal practitioners are likely to focus on how they can comply with the law even if it results in undermining the trusted relationship between a lawyer and client. This raises the question as to the impact of the SMR regime on the ethical duties of lawyers.

C How Do the International AML Norms Treat Ethical Duties Such as the Duty to Protect Legal Professional Privilege?

Different views on AML and their impact on legal ethics and professional obligations have led to intense debates and constitutional battles in several countries/jurisdictions, including Canada, the EU, Jamaica and the British Privy Council. The main reason why the courts have reached different conclusions on the constitutionality of AML regulations for lawyers is their interpretation of whether LPP was adequately protected by national laws.[158] These national laws

156 French and German lawyers file less than 10 STRs each year: Ola Svenonius and Ulrika Mörth, 'Avocat, Rechtsanwalt or Agent of the State? Anti-Money Laundering Compliance Strategies of French and German Lawyers' (2020) 23(4) *Journal of Money Laundering Control* 849, 850 <https://doi.org/10.1108/JMLC-09-2019-0069>. In Hong Kong, legal professionals filed 677 STRS out of 97,577 STRs in 2023, while in Singapore only 4.8% of the 1,220 law practices have filed at least one STR for the period 2020–22: see 'No. of STRs Received', *Joint Financial Intelligence Unit* (Web Page, 30 November 2024) <https://www.jfiu.gov.hk/en/statistics_str.html>; Singapore Financial Intelligence Unit, *Legal Practitioners/Law Practitioners (2020–2022)* (Guidelines, 2024) 3 <https://law-society-singapore-prod.s3.ap-southeast-1.amazonaws.com/2024/04/Guidelines-—-Legal-Practitioners-and-Law-Practices-2020-—-2022-from-the-Suspicious-Transaction-Reporting-Office.pdf>.

157 *SARs Regime Report* (n 139) 86–117.

158 See, eg, *A-G v The Jamaican Bar Association* [2023] UKPC 6, [10]–[12] (Lords Briggs and Hamblen for the Court) ('*A-G v Jamaican Bar*'), where the Privy Council held that the AML regime in Jamaica applying to lawyers did not violate the constitutional rights of privacy, liberty and freedom from search

incorporated the international norms on LPP which have been promulgated by the FATF in relation to AML regulation.

In 2003, the *FATF Standards* were amended to require independent lawyers to conduct CDD (recommendation 22) and report suspicious transactions (recommendation 20) to public authorities but only for specified activities. Requiring the reporting of suspicious transactions and the prohibition on disclosure of STRs ('tipping-off') have been more controversial for lawyers than the CDD standards. To balance AML goals with the 'administration of justice and rule of law',[159] an Interpretive Note to recommendation 23 was issued. It stated that lawyers are not required to report suspicious transactions 'if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege'.[160] Each jurisdiction can define the scope of these protections, thereby recognising the variation between countries as to the source of the doctrine, its nature and the extent to which the doctrine overlapped with the duty of confidentiality.[161] Jurisdictions can choose whether lawyers report suspicious transactions directly to a government agency (an FIU) or through a professional organisation which has a co-operative arrangement with the FIU.[162]

For instance, in England and Wales, solicitors file SARs with the SRA, which decides what goes to the NCA. The European Court of Human Rights described this indirect reporting mechanism as a 'filter which protects professional privilege' in that suspicious reports would be shared with a fellow peer (the President of the Bar, in the case of France) who was ideally placed to assess whether the information was covered by privilege.[163] This raises questions for Australia about using existing legal regulators as AML supervisors like the UK. Unfortunately, it is too late to consider this option, as Australia has imitated the position in NZ where

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and property in that there was a demonstrable justification of the regime. Critical to the Court's decision was the finding that the AML system 'afforded LPP sufficient effective protection or safeguarding in practice': at [31] (Lords Briggs and Hamblen for the Court).

159 Laurel S Terry and José Carlos Llerena Robles, 'The Relevance of FATF's Recommendations and Fourth Round of Mutual Evaluations to the Legal Profession' (2018) 42(2) *Fordham International Law Journal* 627, 665–6.

160 Ibid 648.

161 For example, in some jurisdictions there is no difference between professional secrecy and the duty of confidentiality: Financial Action Task Force, *ML/TF Vulnerabilities of Legal Professionals* (n 93) 19–21.

162 In jurisdictions such as the United Kingdom and France, legal professionals file STRs with the SRA and the President of the Bar Association respectively. Although in New Zealand, lawyers file STRs with the police, which is the FIU.

163 The European Court of Human Rights ('ECHR') ruled that the implementation in France of the obligation to report suspicions did not amount to a disproportionate interference with lawyer–client privilege (which is protected by article 8 of the ECHR) because of two 'decisive' factors: the mandatory reporting obligation applied only to specified activities which were not connected with judicial proceedings; and the filing requirement was filtered through the President of the Bar Association: *Michaud v France* (European Court Human Rights, Fifth Section, Application No 12323/11, 6 December 2012) 32 [103], 38–9 [126]–[130] (Strasbourg J). See Sara De Vido, 'Anti-Money Laundering Measures Versus European Union Fundamental Freedoms and Human Rights in the Recent Jurisprudence of the European Court of Human Rights and the European Court of Justice' (2015) 16(5) *German Law Journal* 1271, 1284–8 <https://doi.org/10.1017/S207183220002112X>.

legal practitioners will file STRs with a government agency, for example, in NZ with the Police FIU.

D How Have AML Rules Impacted the Duty of Confidentiality and LPP?

In accordance with international AML norms discussed above, LPP has been incorporated in section 242 of the *AML/CTF Act*, which provides that the *AML/CTF Act* does not affect LPP. This provision is awkwardly expressed and has been criticised as ambiguous and ripe for reform.[164] LPP is central to the operation of the SMR system in that if the information is protected by LPP, the lawyer should not file an SMR. LPP is also important because it provides a ground to refuse to supply information or documents to AUSTRAC under the *AML/CTF Act*. However, before examining LPP, the duty of confidentiality will be scrutinised because LPP does not exist unless the information is confidential.

1 Duty of Confidentiality

The duty of confidentiality owed by the legal profession has an 800-year history, and has been described as not only a core duty but an intrinsic aspect of the profession's identity.[165] In comparison to other professions, the rationale[166] and nature of this duty differs significantly. It serves a paramount role in the public interest, encouraging clients to 'fully and freely tell their lawyers all the facts … without fear that the lawyer's knowledge of those facts may be used to establish claims against them or subject them to penalties'.[167] This duty persists from the very inception of the lawyer–client relationship, extending beyond the completion of services until even after the death of the client[168] – a unique feature not found in other professions.

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164 The Attorney-General's Department (Cth) has stated that section 242 should be reformed and has provided possible options: Attorney-General's Department (Cth), *Reforming Australia's AML/CTF Regime* (n 51) 21–3. The reforms to LPP have now been implemented in relation to clarifying the meaning of LPP. Section 242 has been repealed by the *AML/CTF Amendment Act 2024*, and replaced by new sections 242 and 242A: *AML/CTF Amendment Act 2024* (n 45) sch 4 item 30). The new section 242 provides that nothing in the *AML/CTF Act* (n 9) affects the right of a person to refuse to give information or produce a document if the information or document is privileged on the grounds of LPP. A new definition of LPP is introduced into section 5 of the *AML/CTF Act* which includes, but is not limited to, privilege under division 1 of part 3.10 (privileges) of the *Evidence Act 1995* (Cth): *AML/CTF Amendment Act 2024* (n 45) sch 4 item 1.

165 Carol Rice Andrews, 'Standards of Conduct for Lawyers: An 800-Year Evolution' (2004) 57(4) *Southern Methodist University Law Review* 1385, 1386.

166 The rationale of the duty of confidentiality is the same as for LPP. The main difference between the two duties is that there are additional requirements to establish LPP and that the public interest in protecting LPP is stronger than the duty of confidentiality. The LPP is absolute in that once it is established there is no weighing of the privilege against competing public interests.

167 Max Radin, 'The Privilege of Confidential Communication between Lawyer and Client' (1928) 16(6) *California Law Review* 487, 490 <https://doi.org/10.2307/3475332>.

168 The duty of confidentiality continues after the death of the client and is converted into a duty to the legal representative of the estate.

The LCA has similarly asserted that the duty of confidentiality is a 'core value' of the profession which would be undermined by an SMR regime.[169] The argument that the duty of confidentiality is so fundamental to the public interest that it should not be compromised may be critiqued by considering the current *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* ('*ASCR*'), which is the 'peak' set of ethical rules applicable to solicitors.[170] Rule 9.1 of the *ASCR* provides that solicitors must not disclose any information which is confidential to a client unless permitted by rule 9.2. This permissive rule contains several exceptions to the duty of confidentiality,[171] such as where the client impliedly or expressly authorises disclosure, where the law compels disclosure (eg, discovery or a subpoena to produce documents in civil litigation), or where disclosure is made in a confidential setting to obtain advice on solicitors' legal or ethical obligations. Rule 9.2 also contains exceptions which are designed to protect the public, such as where disclosure is for the 'sole purpose of avoiding the probable commission of a serious criminal offence' or where disclosure is for the 'purpose of preventing imminent serious physical harm to the client or to another person'.

To suggest that there should not be another exception to the duty of confidentiality, such as an SMR obligation, because it would compromise a core value is a circular argument. When Tranche 2 is implemented, lawyers would be under a new legal obligation to report suspicious matters, which would also amount to an ethical obligation under rule 9.2.

There has been ongoing discussion in Australia and other common law jurisdictions whether the exceptions of the duty of confidentiality should be further expanded, for example, to 'allow disclosure of information about organisational misconduct, financial harm and abuse of the justice system'.[172] Professor Christine Parker has persuasively argued that the ethical codes of the profession should include a whistleblower exception for cases where clients misuse legal services to 'subvert the administration of justice'.[173] She sees this as a logical extension of the lawyers' role as a 'gatekeeper of justice'.[174] While Professor Parker's proposal

169 Reporting suspicious matters would 'disturb the relationship of trust, integrity and honesty' and '[encroach] on the public interest and the manner in which justice is administered more broadly': Law Council of Australia, 'Law Council Submission' (n 92) 47 [145].

170 *Legal Profession (Solicitors) Conduct Rules 2015* (ACT); *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) ('*ASCR*'); *Rules of Professional Conduct and Practice* (NT); *Australian Solicitors' Conduct Rules 2012* (Qld); *Law Society of South Australia Australian Solicitors' Conduct Rules 2014* (SA); *Legal Profession (Solicitors' Conduct) Rules 2020* (Tas); *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Vic); *Legal Profession Conduct Rules 2010* (WA). I am grateful to the reviewer for the suggestion that the claim that breaching confidentiality undermines a core value of the legal profession should be critiqued by dealing with the relevant rules in the *ASCR*.

171 Law Council of Australia, *Australian Solicitors' Conduct Rules 2011 and Commentary* (Commentary, August 2013) 7–8 ('*ASCR and Commentary*').

172 Christine Parker, Suzanne Le Mire and Anita Mackay, 'Lawyers, Confidentiality and Whistleblowing: Lessons from the McCabe Tobacco Litigation' (2017) 40(3) *Melbourne University Law Review* 999, 1017, 1030–4.

173 Ibid 1048–50.

174 Lawyers may be regarded as a 'gatekeeper to justice' in that they owe their 'paramount duty to the court and administration of justice' which is superior to their duties to clients. The lawyers' ethical duties include the duty to be honest in 'all dealings in the course of legal practice', the duty to 'avoid any

aligns with the goals of AML policy, it differs in that she contemplates disclosure to a professional body or court, rather than a government agency. This does not mean that Professor Parker would necessarily object to an SMR regime, since her focus was to create an effective lawyer whistleblowing system akin to the process and protections of the *Public Interest Disclosure Act 2013* (Cth).[175]

Nevertheless, disclosure by a lawyer of confidential information concerning their suspicions of clients is somewhat different in that it is based on a low level of suspicion and could turn lawyers into 'agents of the state'. The potential of lawyers being an informant against their clients also arises because they would need to collect, record and retain extensive information for AML purposes, far beyond what is currently required for compliance with professional ethics. The confidential information, which must be stored for at least seven years, would be accessible to AUSTRAC under the *AML/CTF Act*. Further, reporting suspicious matters may potentially erode clients' trust if they fear their sensitive information which they disclosed in good faith is not safe with their lawyers.

The difficulty with this argument is that it is based on an assumption that an erosion of the lawyers' duty of confidentiality would have an adverse impact on the lawyer–client relationship. However, there is no empirical evidence to support the view that abrogating confidentiality would dissuade clients from approaching lawyers or disclosing sensitive information.[176] Moreover, there is no evidence that the public's trust of the legal profession has been undermined in the UK by their AML responsibilities. This may be because clients are not aware that their lawyers are filing SARs, or that the deleterious effects of weakened confidentiality have been exaggerated.[177] Most importantly, confidential information is protected from disclosure under AML rules where the information is subject to a claim of LPP.

2 Duty to Protect LPP

LPP, referred to as client privilege in Australia, emphasises that the privilege belongs to the client, not the legal advisor. LPP is based on common law and statute, particularly federal and state evidence legislation. There are important differences between LPP and confidentiality. Whereas the duty of confidentiality applies to all dealings with information about a client derived from the discharge

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compromise to their integrity and professional independence', and the duty not to 'deceive or knowingly or recklessly mislead the court': see Law Council of Australia, *ASCR and Commentary* (n 171) 5 (rules 3 and 4), 26 (rule 19).

175 Parker, Le Mire and Mackay (n 172) 1050. The *Public Interest Disclosure Act 2013* (Cth) contemplates disclosure by public servants both internally and externally so that it is consistent with the idea of reporting suspicious matters to a government agency.

176 Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, 2000) 259–62 <https://doi.org/10.1093/acprof:oso/9780198764717.001.0001>.

177 Some scholars argue that the duty of confidentiality (and LPP) is of 'dubious value to clients and to society as a whole' in that it benefits the guilty, is of no value to the innocent, and in fact harms the innocent. Further, they argue that weakened confidentiality rules are not a 'public bad' in that it is the legal profession which is the major beneficiary of such rules since they increase the demand for legal services: Daniel R Fischel, 'Lawyers and Confidentiality' (1998) 65(1) *University of Chicago Law Review* 1, 3, 23, 33 <https://doi.org/10.2307/1600183>. This is an outlier view which would be rejected by the judiciary and the legal profession.

by the lawyer of their retainer,[178] LPP attaches to the client resisting the 'enforced disclosure of information and documents arising from two types of professional service' supplied by the lawyer.[179] This refers to the two limbs of LPP, namely the giving and receiving of legal advice (legal advice privilege), and the conduct of existing or anticipated litigation (litigation privilege). Another important difference is that the obligation of confidentiality is a 'heavily qualified form of protection' which is displaced by obligations to produce documents and answer questions in civil litigation, while LPP when successfully claimed is 'almost … absolute' which cannot be superseded by an assertion of a government agency that they enjoy a general discretion to obtain the information to find out the truth.[180]

The detailed rules in determining whether LPP applies in a relevant legal context are a complex area of the law to understand. In Australia, LPP attaches to confidential communications between clients and lawyers made for the dominant purpose of giving and receiving legal advice or for use in existing or anticipated litigation. Whereas legal advice privilege applies only where the lawyer is 'acting in a professional capacity' and where the dominant purpose of the communication is 'related to the giving of legal advice', litigation privilege attaches to 'communications between lawyers or their clients and third parties' where the dominant purpose is 'in connection with the preparation of existing or contemplated litigation'.[181]

Legal practitioners must understand whether the privilege is lost or whether it has been waived. They must also discern whether the privilege has not come into existence because of the 'iniquity exception' or 'crime/fraud exception'.[182] This is a difficult task for lawyers when they are not aware of and are not complicit with their clients' hidden, improper or unlawful purposes.

On the other hand, there is a widespread belief by law enforcement and tax authorities that lawyers aggressively use LPP to obfuscate and delay complying with legitimate claims for documents. There have been several cases where legal practitioners have asserted LPP by routing non-legal advice through legal practitioners, warehousing of documents to avoid discovery in litigation,[183] or inappropriately relying on LPP as a justification for not producing documents in

178 This includes a wider range of communications than LPP, such as information or documents obtained in connection with professional services outside the giving of legal advice or the conduct of litigation, provided that such communications are impressed with the obligation of confidentiality: *A-G v Jamaican Bar* (n 158) [10] (Lords Briggs and Hamblen for the Court).

179 Ibid [7].

180 Ibid [10]–[12].

181 Rosemary Pattenden, *The Law of Professional-Client Privilege: Regulating the Disclosure of Confidential Information* (Oxford University Press, 2003) 545–8.

182 ALE Newbold, 'The Crime/Fraud Exception to Legal Professional Privilege' (1990) 53(4) *Modern Law Review* 472, 475 <https://doi.org/10.1111/j.1468-2230.1990.tb02829.x>; ibid 558–60.

183 See, eg, the McCabe tobacco litigation: Parker, Le Mire and Mackay (n 172) 1003.

response to tax authorities,[184] Royal Commissions[185] or AUSTRAC.[186] Although the LPP claims were not justifiable in these matters, the 'very nature and purpose of client legal privilege' makes it difficult to assess the extent of abuse.[187]

LPP operates in a different context under the SMR obligation under section 41 of the *AML/CTF Act*. Legal practitioners are required to make decisions concerning LPP without any input from their clients since there is a criminal prohibition on tipping-off. They will not be able to obtain instructions from their clients as to whether they wish to waive LPP; they must assume that their clients would not authorise any waiver or diminishment of their fundamental rights. Lawyers will be required to document why they have decided not to file an SMR because of LPP, and this leaves them open to the prospect of civil penalties for breaching section 41 and professional disciplinary sanctions if in hindsight it is shown that they have mistakenly interpreted or misapplied LPP. This is not a theoretical risk for lawyers since the documentation of privilege claims may be discovered through AUSTRAC exercising its wide-ranging information gathering powers under the *AML/CTF Act*.[188] That the legal profession may feel pressurised to not vigorously defend the right to LPP was one of the reasons why the Canadian Supreme Court held that LPP was not adequately protected under their AML laws.[189]

In understanding how LPP is likely to be applied in practice if the *AML/CTF Act* is extended to Australian lawyers, it may be useful to consider the experience of the UK. In 2021, the UK AML supervisors for the legal sector, in issuing guidance on ML,[190] stated that aspects of LPP may be so complex, and the professional and personal consequences for legal practitioners who make wrong decisions in

184 See, eg, *Federal Commissioner of Taxation v PricewaterhouseCoopers* (2022) 114 ATR 335. See also Neil Chenoweth, 'Tax Office Halved $1.4m PwC Fine for False Privilege Claims', *Australian Financial Review* (online, 25 October 2023) <https://www.afr.com/companies/professional-services/tax-office-halved-1-4m-pwc-fine-for-false-privilege-claims-20231017-p5ed2e>.

185 See, eg, *AWB Ltd v Cole* (2006) 152 FCR 382. See also Gonzalo Villalta Puig, 'Unethical Conduct in the Performance of International Government Contracts: AWB Ltd and the United Nations Oil-for-Food Programme' (2007) 37(1) *Public Contract Law Journal* 59.

186 See, eg, the Star Casino case: Liz Campbell, 'Corporate Misuse of Legal Professional Privilege: Concealing and Constituting Crimes' in Penny Crofts (ed), *Evil Corporations* (Routledge, 2024) 172, 179–83 <https://doi.org/10.4324/9781003402534-15>.

187 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (Report 107, December 2007) 497 [9.36].

188 The risk of legal professionals inadvertently breaching LPP has become more likely in that schedule 4 of the *AML/CTF Amendment Act 2024* (n 45) imposes requirements for legal professionals in certain circumstances when required to disclose information or produce documents to AUSTRAC to specific the basis of LPP in a proposed LPP form to be filed with AUSTRAC.

189 *Law Societies Supreme Court Decision* (n 77) 423–28 [42]–[57] (Cromwell J); Amy Salyzyn, 'A False Start in Constitutionalizing Lawyer Loyalty in *Canada (Attorney-General) v Federation of Law Societies of Canada*' (2016) 76 *Supreme Court Law Review* 169, 170–1 <https://doi.org/10.60082/2563-8505.1333>.

190 Legal Sector Affinity Group, *Anti-Money Laundering Guidance for the Legal Sector: Part 2a* (Guidance, 2021) 147–60 <https://www.lawsociety.org.uk/topics/anti-money-laundering/anti-money-laundering-guidance>. The guidance is used by supervisors to determine whether lawyers have complied with their professional obligations, and the judiciary is required to consider compliance with the guidance in assessing whether a person has committed various offences, including ML.

applying the doctrine so significant, that external legal advice may be necessary.[191] For global, large or mid-sized law firms which are knowledgeable and experienced with claims of LPP in the litigation context, LPP should not be an important issue, especially where they have structured their activities to maximise their capacity to protect the privilege of their clients.[192] In the case of sole practitioners or small law firms, the position may be very different,[193] so that there may be a significant risk that they will apply a mistaken view on the application of LPP, which will either undermine the effectiveness of the *AML/CTF Act* or violate their fundamental obligations to their clients.

E What Are the Legal and Practical Challenges Arising from the CDD Process?

This section provides a critique of key CDD requirements which are designed to reduce the misuse of services by money launderers. It focuses on the legal and practical challenges that lawyers will face in complying with the multitude of obligations under the CDD process. Unlike the STR regime, the CDD requirements do not present significant ethical issues for the legal profession.[194] Apart from the issue of costs, there are few obstacles in implementing the CDD requirements under Tranche 2.

CDD procedures are important for several reasons, not just in complying with AML requirements.[195] All persons in Australia are obliged to not deal in the proceeds of crime, not breach the strict prohibition on financing of terrorism and not violate financial sanctions laws.[196] It is prudent for legal professionals to put in place Know Your Client ('KYC') and CDD policies and procedures to ensure that their clients are not money launderers, terrorists or sanctioned persons. If lawyers are not aware of money laundering/terrorist financing ('ML/TF') and sanctions risks, and do not have CDD processes to deal with those risks, they face significant criminal exposure and the prospect of disciplinary punishment. There is some

191 Ibid 13. The latest guidance also confirms the need for independent legal advice where there is 'any doubt' as to whether LPP applies in the specific context: see Legal Sector Affinity Group, *Anti-Money Laundering Guidance for the Legal Sector* (Guidance, 2023) 156 <https://www.lawsociety.org.uk/topics/anti-money-laundering/anti-money-laundering-guidance>.

192 The practice of corporations structuring their communications albeit legitimately in a way that will 'protect significant parts of its operations from disclosure' has been criticised as giving corporations a benefit, from LPP, not available to natural persons: Liz Campbell, 'Legal Professional Privilege and Corporate Wrongdoing' (2023) 44(2) *Adelaide Law Review* 339, 349–50.

193 Some small firms are overly dependent on a limited number of clients for their revenue stream and may find that the cost of obtaining external legal advice on LPP may be uncommercial. The firms may not have the financial capacity to pass on the cost of such advice to clients.

194 However, there may be several ethical issues arising from CDD. For example, the prohibition on lawyers providing legal services until after they have completed the CDD process. Applying such a requirement in a strict fashion may result in clients not having access to legal advice in urgent circumstances.

195 The CDD international requirements are in recommendations 10 and 22 of the *FATF Standards* (n 2).

196 *Criminal Code Act* (n 7) divs 103 (financing terrorism), 400 (money laundering); *Autonomous Sanctions Act 2011* (Cth) s 16 (sanctions offence).

evidence that legal practitioners in Australia have limited awareness of ML/TF and sanctions risks,[197] an issue that must be urgently addressed.

Under international AML norms, the CDD requirements applicable to financial institutions have been extended to independent legal professionals, in both instances applying a risk-based approach.[198] The CDD requirements in Australia are comprehensive[199] and largely comply with the *FATF Standards*. They include the identification and verification of the client's identity and understanding their financial position as well as the intended nature of the business relationship. In the case of corporate clients, financial institutions must identify directors and the beneficial owners of the company and understand its ownership and control structure. There is also a requirement to carry out ongoing CDD by scrutinising transactions involving clients. The purpose of the CDD requirements is to determine the ML risk of clients on an individual basis, decide whether to accept that person as a client and assess the extent to which clients should be monitored.[200]

The CDD requirements which address AML risks are different in nature and purpose from the current legal and ethical requirements of lawyers to know customers in Australia. Under current requirements, the legal profession generally carries out KYC so that they can correspond with the client and provide proper and competent legal advice. Lawyers must identify who is authorised to give instructions on behalf of the corporate client. There are a wide variety of practices in identifying clients, with larger legal practices adopting sophisticated risk management systems.[201] A major deficiency is that legal practitioners do not 'typically make enquiries as to whether a client was acting as a nominee',[202] and determine whether to accept the client because of ML risk.[203] This is explicable because lawyers in Australia do not presently have any obligation to determine the beneficial ownership of corporate clients, which is an essential CDD rule under the *AML/CTF Act*.[204] This is a serious defect which is compounded by the failure of Australia to take any measure to increase the transparency of corporations and trusts which are requirements under international AML norms.[205] The reason this is important is that concealed ownership in companies[206] through abuses of nominee

197 Russ + Associates (n 97) 47–8.

198 The risk-based approach is in recommendation 1 of the *FATF Standards* (n 2).

199 *AML/CTF Rules* (n 35) ch 4. See also the new CDD requirements in schedule 2 of the *AML/CTF Amendment Act 2024* (n 45) which will result in new CDD rules that are more prescriptive than the current rules.

200 Attorney-General's Department (Cth), *Legal Practitioners and Conveyancers: A Model for Regulation* (n 48) 19.

201 Russ + Associates (n 97) 47.

202 Ibid 28.

203 ML risks include customer risk, transaction risk, product/service risk, delivery channel risk and geographic risk: see *AML/CTF Rules* (n 35) pt 4.13.

204 Ibid pts 1.2 (definition of a beneficial owner), 4.12 (collection and verification of beneficial ownership information). See Gordon Hook, 'Beneficial Ownership and Control of Corporate and Trust Structures: Global AML/CTF Standards' in David Chaikin and Gordon Hook (eds), *Corporate and Trust Structures: Legal and Illegal Dimensions* (Australian Scholarly Publishing, 2008) 86.

205 *FATF Standards* (n 2) recommendations 24 and 25.

206 See, eg, Financial Action Task Force and Egmont Group of Financial Intelligence Units, *Concealment of Beneficial Ownership* (Report, 2018).

arrangements[207] is a common theme in the AML literature. Obscuring beneficial ownership and control is a 'key and almost universal' mechanism for committing financial crimes such as tax offences[208] and corruption,[209] as well as laundering the proceeds of those crimes.[210]

There are, however, practical compliance challenges in implementing beneficial ownership ('BO') requirements. According to an empirical study, British lawyers consider that the BO requirements are the 'single most difficult aspect' of CDD.[211] This may seem surprising because the FATF considers that the UK is a global leader in BO transparency not only because of its effective supervision of CDD beneficial ownership requirements, but also because the general public, including legal practitioners, have access to BO information through a People with Significant Control Register which was created in 2016.[212] The legal profession in the UK has experienced several practical BO challenges such as the complexity and cost of applying BO to certain types of clients[213] and obtaining external validation of BO declarations and information supplied by clients. There is also the systemic problem that sophisticated criminals who are knowledgeable about the CDD process will succeed in deceiving the most intelligent and compliance-focused financial institutions and legal professionals.

1 Enhanced Customer Due Diligence and Politically Exposed Persons

Legal practitioners in Australia are likely to face significant compliance challenges in meeting the requirement to apply enhanced customer due diligence ('ECDD') measures to clients located or operating in high-risk countries, or clients who are politically exposed persons ('PEPs') where there is a higher corruption risk.[214] The definition of a PEP is problematic in that it includes the primary PEP, the family members of a PEP and 'known associates' of a PEP. There is also the practical problem of identifying a PEP. This is because governments have refused to compile a list of PEPs even though they are in a better position to gather such information, leaving the private sector to rely on expensive private service

207 See, eg, Daniel Nielson and Jason Sharman, *Signatures for Sale: How Nominee Services for Shell Companies are Abused to Conceal Beneficial Owners* (Report, 2022).

208 See, eg, Asia-Pacific Group on Money Laundering and Australian Taxation Office, *Money Laundering Associated with Tax Crimes in the Asia-Pacific* (Report, August 2023) 2.

209 See, eg, Emile van der Does de Willebois et al, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (Report, 2011).

210 See, eg, Financial Action Task Force, *Laundering the Proceeds of Corruption* (Report, July 2011).

211 Kebbell, *AML Compliance and the Legal Profession* (n 134) 100.

212 Ali Shalchi and Federico Mor, 'Registers of Beneficial Ownership' (Research Briefing, House of Commons Library, 6 April 2022) <https://researchbriefings.files.parliament.uk/documents/CBP-8259/CBP-8259.pdf>.

213 For example, trustees, private hedge funds, companies with complex corporate structures and global privately owned corporate clients based in non-EU jurisdictions which have not implemented recommendations 24 and 25 of the *FATF Standards* (n 2): Kebbell, *AML Compliance and the Legal Profession* (n 134) 98–111.

214 Politically exposed persons ('PEPs') are assumed to be a higher corruption risk due to the person's position or access to public funds: David Chaikin and JC Sharman, *Money Laundering and Corruption: The Symbiotic Relationship* (Palgrave Macmillan, 2009) 83–115. For the definition of PEPs and PEP rules, see *AML/CTF Rules* (n 35) pts 1.2, 4.13.

information providers. Another problem is that corrupt PEPs are unlikely to disclose their status to a reporting entity and will usually act through third parties. This means that the reporting entity may not discover the identity of the underlying 'real client', especially because they tend to rely on clients' declarations (which are easily falsified) and publicly available information in identifying a PEP. Even if a PEP is identified, many reporting entities will find that it is too risky to accept the PEP as a client because of the PEP rules that are costly to implement and require monitoring of the PEP's account.

Applying the PEP rules, such as ascertaining the source of funds and wealth of PEP customers[215] is very difficult in practice. These requirements are designed so that reporting entities understand whether the source of funds is legitimate. Whereas 'source of funds' refers to where a customer obtains finance for a specific transaction or service, 'source of wealth' refers to establishing the origin of the entire wealth of the customer.[216] There is a 'lack of legal certainty and absence of clear guidance' as to how the RBA and CDD processes must be applied to obtain source of funds and wealth information.[217] This may explain in part why British lawyers have not improved their compliance with this requirement.[218] While information about source of funds can be obtained from a bank or the client's professional advisors (eg, an accountant), determining whether the source of wealth is or is not illicit, especially for foreign clients, is more challenging.[219]

There is a question as to how far a law firm must investigate its clients to satisfy the requirement of taking 'adequate measures' to determine their source of wealth. For example, in a recent case in the UK, the world's largest law firm was accused of failing to take adequate measures to establish the source of wealth of a reputed foreign oligarch in circumstances where the firm did not find out the size and source of his 'substantial shareholding' in a state-owned company.[220] The lawyer who was responsible for managing the client relationship had informed the firm's compliance team that it would be 'rude' to keep on asking questions of the client. Ultimately, the law firm succeeded in defeating the disciplinary charge but only after demonstrating

215 In Australia, in relation to all customers, financial institutions must consider the risks posed by their customer's source of wealth and funds, and in the case of higher risk domestic PEPs and all foreign PEPs, take 'reasonable measures' to establish the customer's source of wealth and funds: *AML/CTF Rules* (n 35) pt 4.13.

216 'Source of Funds and Source of Wealth', *Australian Transaction Reports and Analysis Centre* (Web Page, 27 February 2024) <https://www.austrac.gov.au/business/core-guidance/customer-identification-and-verification/source-funds-and-source-wealth>.

217 Mario Menz, 'Evidencing Source of Wealth: Challenges, Questions, Solutions and Recommendations' (2024) 27(1) *Journal of Money Laundering Control* 171, 178 <https://doi.org/10.1108/JMLC-02-2023-0041>.

218 'Anti-Money Laundering Report 2022–23', *Solicitors Regulation Authority* (Web Page, 13 October 2023) <https://www.sra.org.uk/sra/research-publications/aml-annual-report-2022-23/>.

219 Menz (n 217) 176.

220 *SRA v Dentons UK and Middle East LLP* (Solicitors Disciplinary Tribunal, Case No 12476-2023, 18 June 2024).

that its CDD practices exceeded the industry standards at the relevant time and spending considerable legal resources in defending the charge.[221]

2 Impracticable Rules, Challenges and Effectiveness

In the Australian debate, a key question arises: should the CDD rules tailored for large financial institutions be modified for legal practitioners? Some of these rules, such as the requirement for lawyers to conduct CDD before providing legal services, are problematic. This rule is impractical as lawyers may only be able to apply CDD requirements after commencing work for the client. Typically, the due diligence process in law firms does not proceed by applying prescriptive and artificial rules, but instead is gradually applied 'as circumstances dictate, pursuant to cautious business practices'.[222] When a law firm is not satisfied with its CDD information, it may choose not to represent the client due to risk concerns and potential damage to reputation, even if technically compliant with AML obligations.[223] However, if the firm decides to take on a higher risk client (arising from an information deficiency), it is obliged to mitigate the risk which may result in the firm spending considerable resources in monitoring the client's instructions, conduct and transactions.

The effectiveness of CDD, ECDD, PEPs, beneficial ownership, and source of wealth and funds requirements in combating financial crime is much debated. Whether the rules are effective in combating financial crime will depend on the purpose of the rule and the appropriate test of its effectiveness.[224] AML regulators have relied on a narrow view of effectiveness to explain why the CDD processes are working, albeit not to their high expectation. For example, the SRA in England and Wales stated that the test of AML effectiveness is not whether criminals are misusing legal services because this is inevitable,[225] but whether lawyers have hardened their entire CDD process to make it more difficult and costly for criminals to access their services. According to this view, the CDD regulatory process is about harm prevention and reduction; that is, mitigating AML risks for the profession and the public.

The difficulty with this approach is that we do not know whether the CDD processes have in fact made any difference in combating serious and organised crime. Some commentators question whether CDD processes are 'expensive box-ticking exercises that inconvenience the honest but does not effectively bar

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221 John Hyde, 'SDT Dismisses Case Against Dentons as SRA Left with Massive Costs Bill', *Law Society Gazette* (online, 12 March 2024) <https://www.lawgazette.co.uk/news/sdt-dismisses-case-against-dentons-as-sra-left-with-massive-costs-bill/5119021.article>. This decision was overturned on appeal: see *Solicitors Regulation Authority Ltd v Dentons UK and Middle East LLP* [2025] EWHC 535 (Admin).

222 Law Council of Australia, 'Law Council Submission' (n 92) 26 [68].

223 There is some evidence that law firms will decline instructions rather than accept a client that raises suspicions: Cracknell (n 86) 148.

224 On the issue of effectiveness, see Ronald F Pol, 'Anti-Money Laundering Effectiveness: Assessing Outcomes or Ticking Boxes?' (2018) 21(2) *Journal of Money Laundering Control* 215 <https://doi.org/10.1108/JMLC-07-2017-0029>.

225 Solicitors Regulation Authority, *Anti Money Laundering Report* (Report, May 2016) 21.

the dishonest from using false identities to access financial services'.[226] What we do know is that the compliance costs for the entire CDD process is the single most expensive item in AML.[227] While large law firms in the UK view their CDD systems as generally effective,[228] it is uncertain if small legal practices in Australia can handle the expected CDD requirements under Tranche 2. This underscores the need for significant AML education for Australian legal practitioners and increased support from AUSTRAC to comply with AML regulations.

V FUTURE DIRECTIONS AND PRACTICAL SUGGESTIONS

Australia has squandered a 20-year opportunity of addressing the significant issue of exploitation of legal services by organised crime and money launderers. Facing external pressure by the FATF to fully implement Tranche 2, the Australian Parliament in December 2024 passed legislation which subjects legal professionals to new AML obligations. Since the AML regime for lawyers will not commence until 31 March 2026,[229] there is time to design and implement AML rules and guidelines that are appropriate and proportionate to the actual ML risks faced by legal practitioners.

A major cultural change will need to take place in the legal profession, as government supervision will replace the traditional self-regulatory system. Lawyers will be subject to a new regulator, AUSTRAC, that has a huge administrative task of supervising the DNFBP population that may be up to four times the current number of reporting entities. Despite the announcement of a major boost in funding for AUSTRAC, it is unlikely that this will be sufficient to meet the human resources and financial costs, staff training and data systems implications of the new AML regime.

This article has explored the justification or otherwise of extending the AML system to the legal profession. It has examined the effectiveness of AML laws through theoretical arguments and the practical experience of jurisdictions like the UK which has regulated lawyers under AML. Although there is no doubt that ML is a critical geo-political/criminal/socio-economic problem, we do not know whether our response through AML regulation has been appropriate, proportionate and effective. In contrast to criminalisation of ML and confiscation of illicit assets which have a direct deterrent impact on serious and organised crime, AML's contribution is indirect through providing intelligence that may lead to ML prosecutions or asset forfeiture. More empirical academic research is needed to address knowledge gaps, such as our

226 Louis de Koker, 'The FATF's Customer Identification Framework: Fit for Purpose?' (2014) 17(3) *Journal of Money Laundering Control* 281, 293 <https://doi.org/10.1108/JMLC-01-2014-0003>.

227 In a survey of 300 individuals operating in the UK financial services sector, CDD processes constituted 67% of the overall financial crime costs, with on-boarding of clients amounting to a third of the CDD cost: Forrester Consulting, *True Cost of Financial Crime Compliance Study, 2023* (Report, September 2023).

228 Kebbell, *AML Compliance and the Legal Profession* (n 134) 199–203.

229 *AML/CTF Amendment Act 2024* (n 45) s 2. Apart from the requirement to enrol with AUSTRAC, all other AML obligations applicable to the legal profession commence on 31 March 2026.

understanding of how the legal profession facilitates (wittingly or unwittingly) ML and how AML rules operate in the real world.[230]

This article has focused on two important AML strategies: CDD and STR. Legal practitioners in the UK have found it difficult to apply CDD to PEPs, the beneficial ownership requirements and establishing the source of wealth of their clients. Nevertheless, it is believed that the CDD rules have been useful in preventing the misuse of legal services for illicit activities. Lawyers often handle large financial transactions and manage client funds, which can be exploited for ML if not properly addressed through CDD processes. In contrast, there are serious doubts whether the reporting of suspicious transactions by the legal profession has produced identifiable benefits, such as transmitting valuable and actionable intelligence to public authorities. The STR system has been criticised for undermining the lawyer–client relationship by eviscerating the duty of confidentiality and compromising the trust placed by clients in their legal advisors.

One of the challenges is that lawyers in Australia may not accept the FATF and AUSTRAC's rhetoric that prescriptive AML regulation is necessary, justifiable and effective. It is likely that many in the legal profession will question the 'legitimacy' of the AML regime, in circumstances where the leaders of the profession have strongly objected to and resisted AML regulation over a 20-year period. This means that AUSTRAC and the professional bodies have a lot of work to do in ensuring that the legal profession is fully committed to its new obligations.

In the UK, there has been a marked emphasis by the SRA on training legal professionals about their responsibilities under AML rules. This has increased awareness and capability within the profession to understand and mitigate ML risks. Similarly, in Australia, a top priority for AUSTRAC should be engaging with the professional law bodies to educate legal practitioners as to when they must enrol with AUSTRAC, the nature and variety of ML risks, the sophisticated mechanisms by which criminals can misuse their legal services, and the complex obligations and consequences for breaching those obligations. There is an urgent need for educational materials such as new typologies which demonstrate how even the most experienced legal practitioners can be deceived by money launderers. Lawyers will be better equipped to play a positive and informed role in combating ML if they work with their peers assisted by experts in exploring ML scenarios with legal, practical and ethical features. Through practical ML case studies, lawyers can develop a deeper understanding of how the duty of confidentiality and LPP operate in the context of suspect matters reporting.

The LCA and local law societies should translate the new AML obligations by reframing and revising their ethical codes of practices on a multitude of issues, including CDD, acceptance of clients and declining or terminating representation. In carrying out this task, they should work closely with AUSTRAC to ensure compatibility between AML rules and ethical obligations. It would be worthwhile to examine the excellent work done by the American Bar Association, the Canadian

230 The lack of empirical research in ML and AML in Australia compared to other jurisdictions, such as the United Kingdom, should be addressed. A good starting point would be to carry out an empirical study of the few solicitors who have recently been convicted of ML in Australia.

Federation of Law Societies and the equivalent professional bodies in the UK on these topics.

The challenges faced by legal practitioners under a new AML regime are enormous. Besides understanding the content of the AML rules, lawyers must deal with the complexity and evolving nature of regulation. Lawyers must stay updated with the latest AML rules and the most recent insights into ML risks, which can be a significant burden. The UK experience suggests that implementing AML measures can be quite costly and resource intensive, particularly for smaller law firms who cannot pass on compliance costs in the same way as larger firms. This may lead to difficulties in achieving full compliance due to a lack of adequate resources or expertise. In order to deal with this issue, it would be useful if the LCA and local law societies develop AUSTRAC-acceptable AML training packages geared towards specific types of practices.[231]

Lastly, considering their new legal and ethical obligations, legal practitioners must devise new processes in onboarding and exiting client relationships. Lawyers must think carefully as to how they can properly and competently inform their relevant clients of the essential features of the AML regime, including matters such as the loss of confidentiality arising from SMRs and the tipping-off prohibition. Legal practitioners must improve their communication skills to ensure that the AML regime does not undermine their trusted relationship with their clients and at the same time fulfil their new legal responsibilities under a reformed *AML/CTF Act*.

231 I am grateful to the reviewer for this suggestion. I note that following the enactment of the *AML/CTF Act* several service providers (for example, the late Joy Geary) created specific training programs for small and medium-sized reporting entities.