

To: Attorney-General's Department  
3/5 National Circuit, Barton ACT 2600  
Canberra City ACT 2601  
Australia

15 June 2023

Dear Sir/Madam,

# SUBMISSION

## MODERNISING AUSTRALIA'S ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING REGIME

**Part 2, Questions 26 and 27: Tranche-two entities**

**Extending AML/CTF reporting obligations to legal professionals**



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# About the submitter

The **Financial Integrity Hub at Macquarie University Law School** drives transformative change through interdisciplinary and future-focused research that provides cutting-edge solutions to the global challenge of financial crime. The Financial Integrity Hub is independent and focuses exclusively on the integrity of financial systems and compliance with the domestic and global regimes for anti-money laundering and counter-terrorist financing. There is currently no other research centre of this nature in Australia. The Hub is distinguished by its exceptional attributes, including a well-established track record and comprehensive interdisciplinary coverage across diverse fields, including law, business, security and cyber.

This submission was prepared by **Dr Doron Goldbarsht**<sup>1</sup> and **Professor Louis de Koker**.<sup>2</sup> Experts from four other jurisdictions contribute their special insights in Part III, ensuring that this is a comprehensive submission that can assist in moving forward with the AML/CTF reforms.<sup>3</sup> We thank **Dr Katie Benson** for the United Kingdom section,<sup>4</sup> **Gary Hughes** for the New Zealand section,<sup>5</sup> **Yehuda Shaffer** for the Israel section,<sup>6</sup> and **Dr Jamie Ferrill** and **Dr Daniel Leslie** for the Canada section.<sup>7</sup>

We write in support of applying the AML/CTF Act across various gatekeeping industries, known as DNFBPs. These industries – which include real estate agents, lawyers and other independent legal professionals, notaries, accountants, trust and company service providers, and dealers in precious metals and stones – play a key role in facilitating efforts by individuals and companies to enter the financial system. They are therefore considerably exposed to the risk of handling illicitly sourced funds. Imposing stronger regulations on DNFBPs is of enormous importance in preventing money laundering and strengthening Australia’s national security. This submission, however, will focus solely on the necessity of applying the AML/CTF Act to legal professionals.

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<sup>3</sup> On 25 May 2023, in a meeting of the Senate Legal and Constitutional Affairs Legislation Committee, Senator Scarr stated that he had looked closely at the Canadian model and that it is somewhat different from the UK and New Zealand models. Senator Scarr asked Sarah Chidgey, Deputy Secretary for the National Security and Criminal Justice Group, if that is something that is being actively considered as part of her discussions with the Law Council of Australia and the state law societies. Ms Chidgey responded: ‘Yes. New Zealand and the UK particularly, in terms of legal professional privilege, came up, but the Canadian model is also one we’re looking at.’ See Senate Legal and Constitutional Affairs Legislation Committee, Thursday, 25 May 2023, 63.

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# Introduction

The involvement of legal professionals in the facilitation of money laundering and terrorist financing is of growing concern. According to a key Financial Action Task Force (FATF) recommendation, countries should require lawyers, notaries and other independent legal professionals – including sole practitioners, partners and employed professionals within firms (legal professionals)<sup>8</sup> – to identify, assess and mitigate their money laundering and terrorist financing risks. Legal professionals, states the recommendation, should document their assessments, keep them up to date, and have appropriate mechanisms in place to provide risk assessment information to competent authorities and self-regulatory bodies. Aspects of this recommendation create tensions with legal professional privilege, when it applies. This privilege plays an important role in the administration of justice. Nonetheless, **more than 200 jurisdictions have introduced new or amended regulatory regimes to cover the legal sector, thus complying with the FATF standards.** Australia is now one of only five nations – alongside China, Haiti, Madagascar and the United States – that do not yet regulate legal professionals as envisaged by FATF.

Australia's AML/CTF regime is based on the international standards developed by FATF. Australia was a founding member of FATF, which operates by consensus. As a FATF member, therefore, Australia has been an active co-designer of the FATF standards since 1990.

Various pieces of legislation have been amended to align with the FATF recommendations. In 2006, the Australian Government passed tranche I of legislation establishing a new AML/CTF regime covering the financial sector in order to meet Australia's international obligations as a FATF member. Australia promised to apply the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act) to legal professionals – tranche II – by 2008. In July 2010 – already well behind schedule – the government deferred discussion of tranche II until mid-2011 to allow time for recovery from the global financial crisis.<sup>9</sup> However, Australia has not yet fulfilled its promise.<sup>10</sup> **Australian legal professionals do not have comprehensive AML/CTF obligations – at least not yet.**

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<sup>8</sup> This submission adopts the definition of 'legal professionals' used by FATF: FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (June 2013) annex 3. The recommendations explicitly exempt corporate legal officers (CLOs) and professionals working for government agencies, who may already be subject to AML/CTF measures. With regard to AML/CTF risks and CLOs, see Doron Goldbarsht, 'Am I My Corporate's Keeper? Anti-Money Laundering Gatekeeping Opportunities of the Corporate Legal Officer' (2020) *International Journal of the Legal Profession*, doi: 10.1080/09695958.2020.1761369.

<sup>9</sup> Lishan Ai, 'A Cost-Effective Strategy of Implementing International Anti-Corruption Initiatives' (2012) 16(1) *Journal of Money Laundering Control* 83, 86.

<sup>10</sup> David Chaikin, 'Corporate Lawyers and the Challenge of the Professional Gatekeeper Paradigm' (Conference Paper, 5th International Conference on Financial Criminology, 2013). See also FATF, *Australia: 3rd Enhanced Follow-up Report & Technical Compliance Re-Rating* (November 2018) 8.

This submission delves into the role of legal professionals in money laundering and terrorism financing activities, as well as their position within the national and global AML/CTF regulatory framework. It also includes a comparative case study examining how other common law jurisdictions – namely, the United Kingdom, Canada, Israel and New Zealand – have complied with the FATF recommendations concerning the legal profession.

Part I focuses on the extent to which legal professionals participate in the facilitation of money laundering and terrorist financing. Part II highlights the existing global regime that was introduced to mitigate this concern, as well as the current Australian regime and its implementation of the international standard. Part III focuses on the approaches taken to preserve legal professional privilege in comparable common law countries. Part IV discusses the costs and benefits of extending AML/CTF reporting obligations to the legal profession. The submission concludes by urging Australia to comply with the international standard by applying the AML/CTF regime to the legal profession.

# Part I: The role of legal professionals in money laundering and terrorist financing

The involvement of certain legal professionals in money laundering and terrorism financing is viewed as a significant problem.<sup>11</sup> The reliance of criminals on legal professionals, it is suggested,<sup>12</sup> is due to the stringent AML/CTF controls imposed on regulated institutions, making it more difficult to launder criminal proceeds and heightening the risk of detection. This necessitates the use of increasingly complex laundering methods,<sup>13</sup> which may require professional legal expertise. Criminals seek out the involvement of legal professionals in their money laundering activities sometimes because a legal professional is required to complete certain transactions, and sometimes to access specialised legal and notarial skills and services that could assist in laundering the proceeds of crime.<sup>14</sup> Furthermore, the perception among the launderers is that legal professional privilege or professional secrecy will delay, hamper or effectively prevent investigation or prosecution against them if they engage the services of legal professionals.<sup>15</sup>

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<sup>11</sup> Valsamis Mitsilegas, 'Countering the Chameleon Threat of Dirty Money: "Hard" and "Soft" Law in the Emergence of a Global Regime against Money Laundering and Terrorist Financing' in Adam Edwards and Peter Gill (eds), *Transnational Organised Crime: Perspectives on Global Security* (Routledge, 2006) 202.

<sup>12</sup> FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (June 2013) 7.

<sup>13</sup> Kate Benson, 'Money Laundering, 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*, vol 1 (Palgrave, 2018) 111; Ping He, 'Lawyers, Notaries, Accountants and Money Laundering' (2006) 9(1) *Journal of Money Laundering Control* 62.

<sup>14</sup> FATF, *Typology Report* (2002).

<sup>15</sup> FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (2013); FATF, *Risk-Based Approach: Guidance for Legal Professionals* (23 October 2008).

Legal professional services may be targeted for money laundering and terrorist financing in the following ways. First, criminals may use legal practitioners to move cash; to deposit, transfer or withdraw funds; or to open bank accounts. This can conceal the connections between criminals and the proceeds of their crimes. Second, legal professionals may operate trust accounts to deposit, hold and disburse funds on behalf of clients. Criminals may use legal professionals to facilitate the movement of illicit funds through these trust accounts. Third, criminals may use legal professionals to move illicit funds disguised as the proceeds of legitimate debt recovery action. Fourth, legal professionals may unwittingly assist criminals in money laundering and terrorist financing through real estate activities by establishing and maintaining domestic or foreign legal entity structures and accounts; facilitating or conducting financial transactions; receiving and transferring large amounts of cash; falsifying documents; establishing complex loans and other financial arrangements; and facilitating the transfer of ownership of property to nominees or third parties. Fifth, legal professionals have specialist knowledge of the establishment and administration of corporate structures. These structures allow criminals and terrorists to conceal illicit funds; obscure ownership through complex layers; legitimise illicit funds; and, in some cases, avoid tax and regulatory controls.<sup>16</sup>

## Part II: The existing global and Australian regimes

### THE GLOBAL REGIME

Concerns about legal professionals acting as advisers and facilitators for money laundering and terrorist financing have been on the agenda of law enforcement and regulators for many years.<sup>17</sup> In 2001, FATF included the legal profession among seven sectors identified as gatekeepers for money laundering and terrorist financing.<sup>18</sup> FATF issued revised recommendations in 2003, recommending for the first time that they apply to legal professionals when preparing for or carrying out transactions for a client.<sup>19</sup>

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<sup>16</sup> AUSTRAC, *Strategic Analysis Brief: Money Laundering through Legal Practitioners* (December 2015).

<sup>17</sup> Kim-Kwang Raymond Choo, 'Designated Non-Financial Businesses and Professionals: A Review and Analysis of Recent Financial Action Task Force on Money Laundering Mutual Evaluation Reports' (2014) 27(1) *Security Journal* 1. For guidance for lawyers, see American Bar Association, International Bar Association, and Council of Bars and Law Societies of Europe, *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* (2010).

<sup>18</sup> The other six sectors are casinos and other gambling businesses; dealers in real estate and high value items; company and trust service providers; notaries; accountants and auditors; and investment advisers. See FATF, *Annual Report 2001–2002* (2002) para 87.

<sup>19</sup> FATF, *Annual Report 2002–2003* (2003) 6. For an argument that there is little evidence that the costs of the regime produce commensurate benefits to FATF members or other jurisdictions, see Law Council of Australia, Submission in Response to Consultation Paper *Legal Practitioners and Conveyancers: A Model for Regulation under Australia's Anti-Money Laundering and Counterterrorism Financing Regime* (7 February 2017) 15.

In 2012, FATF completed a comprehensive review of its standards and published revised recommendations to bolster global safeguards and further defend financial system integrity by granting governments more effective tools for combatting financial crimes. The recommendations have since been revised many times, most recently in February 2023, to ensure that they remain up to date.<sup>20</sup>

FATF Recommendation 28 pertains to the role of lawyers in preventing money laundering and terrorist financing. It states that countries should ensure that their legal professionals are aware of their obligations to combat these illicit activities and should implement measures to ensure that lawyers are not misused for money laundering or terrorist financing purposes. Of particular relevance is Recommendation 22, which focuses on customer due diligence (CDD). This includes identifying and verifying the identity of the client and beneficial owners where relevant; understanding the nature and purpose of the business relationship, including the source of funds; and maintaining records of the CDD material. Also relevant is Recommendation 23, which deals with other measures.

Recommendation 22 provides that FATF CDD and record-keeping requirements (Recommendations 10, 11, 12, 15 and 17) apply to legal professionals acting for their clients in specified activities, including buying and selling real estate; managing client money, securities or other assets; managing bank, savings or securities accounts; organising contributions for the creation, operation or management of companies; creating, operating or managing legal persons or arrangements; and buying and selling business entities.

Under Recommendation 23, legal professionals must report suspicious transactions when, on behalf of a client, they engage in a financial transaction in relation to the activities described above. However, legal professionals acting as independent legal professionals are not required to report suspicious transactions (but they do need to perform CDD) if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.<sup>21</sup>

## **IMPEDIMENTS TO AUSTRALIA REGULATING LEGAL PROFESSIONALS**

To comply with their duty to the court and to the administration of justice, legal professionals in Australia must not engage – in the course of practice or otherwise – in conduct which demonstrates that they are not a fit and proper person to practise law, or which is likely to a material degree to be prejudicial to, or diminish public confidence in, the administration of justice, or bring the profession into disrepute.<sup>22</sup> A breach of the regulatory rules can constitute

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<sup>20</sup> FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (updated February 2023), [www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html](http://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html) (FATF Recommendations).

<sup>21</sup> FATF Recommendations (n 20), Recommendation 23, Interpretive note, p 90.

<sup>22</sup> See, for example, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 5.1.

unsatisfactory professional conduct or professional misconduct and may give rise to disciplinary action.<sup>23</sup> The duty to the court and to the administration of justice is paramount and prevails to the extent of inconsistency with any other duty,<sup>24</sup> even if the client gives instructions to the contrary.<sup>25</sup> Therefore, when a lawyer becomes aware that a client is engaging in unlawful conduct, the lawyer must counsel the client against such conduct without participating in the conduct. When the client insists on taking a step that is, in the legal professional's opinion, dishonourable, the legal professional can stop acting for the client.

Money laundering and terrorism are criminalised under Division 400 of the Criminal Code.<sup>26</sup> Section 400.9, for example, imposes liability on a person who possesses or deals with money or property and it is reasonable to suspect that the money or property is derived (either in whole or in part) from the commission of indictable offence against a federal law, a state or territory law, or a foreign law. Legal professionals are currently within the scope of the Criminal Code and it is important that they take steps to mitigate the risk of contravening those provisions.

The AML/CTF Act stipulates what a reporting entity must do if it reasonably suspects that a matter falls within the wide circumstances outlined in the Act.<sup>27</sup> In essence, the Act standardises risk mitigation measures in relation to the criminal liability that may be incurred under the Criminal Code. A legal professional is not a 'reporting entity'. The AML/CTF Act also states that the law relating to legal professional privilege is not affected by the Act.<sup>28</sup> The operative sections of the AML/CTF Act – which include identification verification, ongoing CDD, and reporting suspicious matters<sup>29</sup> – act to diminish the unique relationship that exists between lawyer and client, part of which involves legal professional privilege.

## AUSTRALIA'S COMPLIANCE WITH THE GLOBAL REGIME

FATF first conducted a mutual evaluation report (MER) on Australia's AML/CTF policies in 2005.<sup>30</sup> The MER found that while Australia had indeed legislated according to the standards, there were deficiencies that amounted to a failure to comply with all accepted standards. Australia was deemed non-compliant with Recommendation 22 (which was then numbered Recommendation 12). In a subsequent evaluation, FATF noted that some progress had been made through the adoption, in 2006 and 2007 respectively, of the AML/CTF Act and the AML/CTF Rules, last amended in 2014. However, Australia deemed that only casinos and bullion dealers

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<sup>23</sup> Ibid, r 2.3.

<sup>24</sup> Ibid, r 3.1.

<sup>25</sup> As Mason CJ observed in *Giannarelli v Wraith* (1988) 165 CLR 543, 556.

<sup>26</sup> Mathew Leighton-Daly, 'Money Laundering Offences: Out with Certainty, in with Discretion?' (2015) 24(1) *Revenue Law Journal* 1.

<sup>27</sup> AML/CTF Act, s 41.

<sup>28</sup> Ibid, s 242.

<sup>29</sup> Ibid, ss 3, 36, 41.

<sup>30</sup> Financial Action Task Force, *Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism – Australia* (October 2005); Stuart Ross and Michelle Hannan, 'Australia's New Anti-Money Laundering Strategy' (2007) 19 *Current Issues in Criminal Justice* 135, 140.



were subject to AML/CTF obligations under the standard. The AML/CTF Act also provides exemptions for legal professionals, even though these two sectors have been identified as high money-laundering threats in Australia’s national threat assessment.

The AML/CTF Act applies to a ‘reporting entity’, which is a person who provides a designated service,<sup>31</sup> as well as legal professionals when they provide designated services; however, it does not affect the law relating to legal professional privilege. Legal professionals are obliged under the Financial Transactions Reports Act 1988 to report when they receive more than \$10,000 in cash,<sup>32</sup> but these obligations are not specific to legal professionals. As a result, Australia was again rated non-compliant with Recommendation 22.<sup>33</sup> Because it does not subject legal professionals to AML/CTF requirements on suspicious transaction reporting, instituting internal controls, and complying with higher risk country requirements, Australia was also rated as non-compliant with Recommendation 23.<sup>34</sup>

## **Part III: The approaches taken to preserve legal professional privilege in comparable common law countries**

Many countries comply with the international standard for legal professionals. This should not be taken for granted, considering the tension with legal professional privilege.<sup>35</sup> For example, in Hong Kong, there was no statutory obligation for CDD and record-keeping for legal professionals. In 2008, FATF rated Hong Kong non-compliant with the global standard.<sup>36</sup> Hong Kong then took progressive steps to comply.<sup>37</sup> The Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap 615) was amended by the Counter-Terrorist Financing (Financial Institutions) (Amendment) Ordinance 2018, including to apply statutory CDD and record-keeping requirements to legal professionals when they conduct specified transactions.<sup>38</sup> Singapore, in its third MER, was rated non-compliant with Recommendation 22.<sup>39</sup> FATF noted that AML/CFT measures for legal

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<sup>31</sup> AML/CTF Act, ss 5, 6.

<sup>32</sup> Financial Transactions Reports Act 1988, s 15. It is important to note that the obligations under that Act do not apply to a transaction to which the AML/CTF Act applies.

<sup>33</sup> FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures – Australia* (April 2015) 168.

<sup>34</sup> *Ibid.*

<sup>35</sup> Chaikin (n 10).

<sup>36</sup> FATF, *Third Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism – Hong Kong, China* (11 July 2008) 152, 156.

<sup>37</sup> FATF, *4th Follow Up Report: Mutual Evaluation of Hong Kong, China* (19 October 2012) 29–32. See Foster Hong-Cheuk Yim and Ian Philip Lee, ‘Updates on Hong Kong’s Anti-Money Laundering Laws’ (2018) 21(3) *Journal of Money Laundering Control* 290.

<sup>38</sup> See ‘Enhancing Hong Kong’s Regulatory Regime for Combating Money Laundering and Terrorist Financing (I)’, *Hong Kong Lawyer* (12 April 2018).

<sup>39</sup> FATF, *3rd Mutual Evaluation Report – Singapore* (2001) 208.

professional were not consistent with the FATF standards and there were deficiencies in the CDD measures for legal professionals. Singapore took steps to enhance its AML/CFT requirements with regard to the legal profession and in 2016 was rated partly compliant.<sup>40</sup>

The regulation of misconduct by lawyers and their obligations to report clients whose transactions raise suspicions varies across jurisdictions, often influenced by constitutional provisions, cultural traditions, and the bargaining power and social prestige of the legal profession. The following are case studies of four jurisdictions with similar common law systems to Australia. These jurisdictions also face the challenge of compliance with global norms and recognises the importance of legal professional privilege.

## THE UNITED KINGDOM MODEL

In 2007, the United Kingdom was rated partially compliant with the FATF requirements. By 2018, it had improved to achieve a rating of largely compliant.<sup>41</sup>

In the UK, legal professionals<sup>42</sup> are subject to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (Money Laundering Regulations) when participating in financial or real property transactions by ‘assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction’.<sup>43</sup> The Money Laundering Regulations require legal professionals and other specific business sectors to apply risk-based customer due diligence measures and take other steps to prevent their services being used for money laundering or terrorist financing. They are required to comply with several measures to ‘know their clients’ and monitor the use of their services, including risk assessment, customer due diligence and record-keeping measures, and the implementation of adequate policies, systems and procedures. They are also required to be supervised for AML/CTF purposes by a designated supervisory authority. Non-compliance with certain parts of the Money Laundering Regulations is considered a criminal offence, punishable by up to two years’ imprisonment, a fine or both.<sup>44</sup>

Legal professionals are also subject to the Proceeds of Crime Act 2002 (POCA), which established the primary criminal money laundering offences in the UK and applies to all persons. While the offences contained in sections 327–329 of POCA apply to all persons, section 330 contains the offence of ‘Failure to disclose: regulated sector’, which lays out provisions to enforce the disclosure of suspicious transactions by members of the regulated sector, including legal professionals. A

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<sup>40</sup> FATF, *Mutual Evaluation Report – Singapore* (September 2016) 165–67.

<sup>41</sup> FATF, *Mutual Evaluation Report – United Kingdom* (2007) 284; FATF, *Mutual Evaluation Report – United Kingdom* (2018) 209.

<sup>42</sup> Specifically, the UK Money Laundering Regulations apply to ‘independent legal professionals’, defined as a firm or sole practitioner who by way of business provides legal or notarial services to other persons.

<sup>43</sup> Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, reg 12.

<sup>44</sup> *Ibid*, reg 86.

person commits an offence if: (i) they know or suspect, or have reasonable grounds to know or suspect, that another person is engaged in money laundering; (ii) the information or other matter in which their knowledge or suspicion is based, or which gives reasonable grounds for such knowledge or suspicion, comes to them in the course of a business in the regulated sector; and (iii) the person does not make the required disclosure as soon as is practicable after the information or other matter comes to them.<sup>45</sup>

The UK was an early and enthusiastic adopter of AML regulation for the legal profession, perhaps due to the strong criminal justice agenda of the government at the time, the desire to be seen as a ‘front-runner in the fight against financial crime’, and a cultural tradition of cooperative public-private approaches in the UK.<sup>46</sup> The Money Laundering Regulations implemented in full the requirements of the EU Money Laundering Directives for legal professionals, while POCA went beyond the requirements of the Second Directive and the FATF standards by criminalising failure to report suspicions of money laundering and by requiring only knowledge, suspicion or reasonable grounds for suspicion rather than the intentional conduct stipulated in the EU Directives.

Within the UK, legal professional privilege covers confidential communications that fall under the categories of ‘advice privilege’ and ‘litigation privilege’. Advice privilege covers communications between a lawyer and their client for the purpose of giving or receiving legal advice. Litigation privilege protects confidential communications between a lawyer and their client or a third party, and between the client and the third party, made in relation to litigation that has commenced or is a reasonable prospect. Legal professional privilege is a privilege against disclosure, which recognises the right of an individual to confidentiality in their communications with a lawyer for the purpose of obtaining legal advice and representation.<sup>47</sup>

However, there are limits to the protections provided by legal professional privilege. In the UK, the ‘crime/fraud exception’ to the principle states that legal professional privilege ‘does not extend to documents which themselves form part of a criminal or fraudulent act, or communications which take place in order to obtain advice with the intention of carrying out an offence’.<sup>48</sup> If a lawyer knows that a transaction they are working on is intended to further a criminal offence, communications relating to the transaction are not privileged and should be disclosed. The position is more complex if a lawyer merely suspects that a transaction has the intention of furthering a criminal offence. In that case, if the suspicions are correct, communications are not

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<sup>45</sup> POCA, s 330.

<sup>46</sup> Delphine Nougayréde, ‘Anti-Money Laundering and Lawyer Regulation: The Response of the Professions’ (2019) 43 *Fordham International Law Journal* 321, 327; Michael Levi, *Lawyers, Their AML Regulation and Suspicious Transaction Reporting* (Report for the Cullen Commission, 2020) 2.

<sup>47</sup> Legal Sector Affinity Group, *Anti-Money Laundering Guidance for the Legal Sector* (2023), [www.sra.org.uk/globalassets/documents/solicitors/firm-based-authorisation/lisag-aml-guidance.pdf?version=4903b4](http://www.sra.org.uk/globalassets/documents/solicitors/firm-based-authorisation/lisag-aml-guidance.pdf?version=4903b4).

<sup>48</sup> *Ibid*, 152.

privileged, but if they are unfounded the communications remain privileged.<sup>49</sup>

POCA requires the reporting of suspicions of money laundering, and the disclosure of information on the clients involved, to the relevant authorities, and this can override the duty of confidentiality. However, exemptions from certain provisions of POCA, and a defence to the associated reporting requirements, are provided when certain communications are received by legal professionals in ‘privileged circumstances’.<sup>50</sup> However, again, an exception applies when the communication was given with a view to furthering a criminal purpose. ‘Privileged circumstances’ under this part of POCA are not the same as provided by the principle of legal professional privilege, although in many cases communication that falls under ‘privileged circumstances’ will also be covered by legal professional privilege.

The scope and application of principles of confidentiality and privilege in relation to AML are, therefore, complex. The way that the legislation is structured in the UK, with a reporting obligation and then an exception or a defence, means that lawyers must actively assess whether legal professional privilege applies, rather than simply assuming that it does.<sup>51</sup> Due to this complexity and the potential implications for legal professionals of making the wrong decision in relation to the application of the laws in this area, the UK’s Legal Sector Affinity Group (which comprises the designated AML supervisors of the legal profession) provides extensive guidance on this topic. That guidance covers the application of legal professional privilege, privileged circumstances in POCA, and tensions with the disclosure obligations under POCA.<sup>52</sup>

## THE NEW ZEALAND MODEL

Analysis of New Zealand’s modern AML regime centres on the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act). The Act came about largely in response to a FATF mutual evaluation that year, which was critical of New Zealand’s prior legal regime. Although passed in October 2009, most obligations in the AML/CFT Act came into force only in 2013. The implementation can be conveniently split into two key phases:

- measures taken (2009–13) for financial institutions and casinos (Phase 1); and
- measures from 2016 onwards for designated non-financial businesses and professions (DNFBPs) (Phase 2).

The discussion below addresses only Phase 2 and, in particular, the steps taken to preserve legal professional privilege.

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<sup>49</sup> Ibid, 160.

<sup>50</sup> POCA, s 330(6)(b), (10).

<sup>51</sup> Levi (n 46), 36.

<sup>52</sup> Legal Sector Affinity Group (n 47), 152–69.

The wider Phase 2 coverage was already contemplated at the outset when the Ministry of Justice was framing the original AML/CFT Draft Bill in 2008. But, for various reasons, the political change to bring professions under the AML regime did not come about until specific 2017 reforms. The Phase 2 reforms were eventually accelerated after embarrassing revelations in the Panama Papers, which were disclosed by the International Consortium of Investigative Journalists, with New Zealand in danger of being branded as a tax haven.

The specific catalyst to move forward with the New Zealand changes came in the Shewan Inquiry Report of 2016, officially the Government Inquiry into Foreign Trust Disclosure Rules.<sup>53</sup> The Shewan Inquiry and the examples disclosed in the Panama Papers highlighted risks for legal service providers – especially around property transactions, trusts and opaque corporate structures. A particular concern was that New Zealand’s renowned ease of doing business and its safe reputation – including favourable tax settings for foreign or offshore trusts – may be attracting criminal groups and agents, who may seek to position money for cleansing through the country.

As a result, lawyers were made the first professional sector of the DNFBP categories to be captured by the AML regime. Since 1 July 2018, the AML/CFT Act has been applied in full to law firms of all sizes if they provide any of the captured services. Subsequent staged implementation extended the regime to other non-financial sectors at different times: accountants, real estate agents, licensed conveyancers, the TAB totalisator gaming body, and selected dealers in high-value assets. All those groups were transitioned into the system over approximately 2.5 years and now co-exist as reporting entities alongside banks, casinos and financial system players. As a result of plugging many of those gaps in the regulatory coverage, New Zealand achieved improved ratings of ‘largely’ or ‘partially’ compliant for the relevant DNFBP recommendations in a more recent FATF mutual evaluation published in April 2021.

New Zealand has a complicated regulatory structure involving three AML Supervisors and a separate Financial Intelligence Unit housed directly within the NZ Police. Since the introduction of Phase 1, the Department of Internal Affairs (DIA) has supervised casinos, non-deposit taking lenders, and money changers/remitters, as well as cash security, debt collection and factoring, financial leasing, payroll, safe deposit, tax pooling and non-bank credit card firms. Since 2017, it has been charged with also supervising accountants, lawyers, real estate agents, TAB and dealers in high-value goods. The DIA is the default Supervisor and now has a much larger reporting entity catchment than its counterpart regulators.

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<sup>53</sup> Government Inquiry into Foreign Trust Disclosure Rules, *Report* (27 June 2016), [www.treasury.govt.nz/publications/information-release/government-inquiry-foreign-trust-disclosure-rules](http://www.treasury.govt.nz/publications/information-release/government-inquiry-foreign-trust-disclosure-rules), especially at 53–55.

For the legal profession, designated or captured activities are explicitly defined in the AML/CFT Act, largely following the FATF recommendations. Those activities capture most core property and corporate legal work, but not litigation, criminal defence representation of an accused (unless involving ancillary services or holding funds in trust account), and other speciality services. Full AML obligations apply to work in establishing trusts and companies, administration/secretariat of corporate forms, transactional and trust account services, substantive law work for clients in real estate, business sales/mergers and finance, trust, trustee, asset planning or tax structuring fields. Those activities were selected on the basis of their money laundering risk.

A particular difficulty faced by lawyers – but not by other DNFBP reporting entities – involved the strong ethical duties owed to the client, including to keep client confidences and uphold legal privilege in communications. The AML regime took care to recognise that difficulty when coverage expanded in 2017. Both legal advice and litigation privileged communications are preserved – where privilege truly applies.

The most pointed obligation for lawyers is the obligation to make a Suspicious Activity Report (SAR), equivalent to an SMR in Australia. In New Zealand, that obligation is found in section 40 of the AML/CFT Act, fleshed out by the definitions in section 39A. In simplified terms, if a lawyer (or any reporting entity) has ‘reasonable grounds to suspect’ that an activity or transaction – or even a proposed transaction or activity, or a mere inquiry about services – is or may be related to crime, money laundering, criminal proceeds or terrorism, it must report securely and speedily to Police via a designated online portal.

Section 40 is set out in these terms:

**40 Reporting entities to report suspicious activities**

- (1) Subsections (3) and (4) apply to reporting entities other than high-value dealers.
- (2) *[omitted]*.
- (3) If this subsection applies, the reporting entity must, as soon as practicable but no later than 3 working days after forming its suspicion, report the activity, or suspicious activity, to the Commissioner *[of Police]* in accordance with section 41.
- (4) Nothing in subsection (3) requires any person to disclose any information that the person believes on reasonable grounds is a privileged communication.

It can be seen that section 40(4) is unequivocal in preserving a right not to disclose privileged communications. There is no requirement to submit a SAR when privilege or secrecy genuinely applies. However, with legal privilege having developed traditionally as a common law concept, there was a need for clarity around what elements and communications are truly amenable to privilege.

Following separate parallels provided in New Zealand's Evidence Act 2006 for dealing with privilege claims in court, section 42(1) of the AML/CFT Act defines what amounts to a privileged communication:

**42 Privileged communication defined**

- (1) A communication is a **privileged communication** if –
- (a) it is a confidential communication (oral or written) (including any information or opinion) –
    - (i) that passes between –
      - (A) a lawyer and another lawyer in their professional capacity; or
      - (B) a lawyer in his or her professional capacity and his or her client; or
      - (C) any person described in subparagraph (A) or (B) and the agent of the other person described in that subparagraph (or between the agents of both the persons described) either directly or indirectly; and
    - (ii) that is made or brought into existence for the purpose of obtaining or giving legal advice or assistance; or
  - (b) it is a communication (including any information or opinion) that –
    - (i) is subject to the general law governing legal professional privilege; or
    - (ii) is specified in section 53, 54, 55, 56, or 57 of the Evidence Act 2006.

Just as crucially, the Act in section 42(2) then delineates what is not privileged:

- (2) However, a communication is not a privileged communication –
- (a) if there is a prima facie case that the communication or information is made or received, or compiled or prepared –
    - (i) for a dishonest purpose; or
    - (ii) to enable or aid the commission of an offence; or
  - (b) if, where the information wholly or partly consists of, or relates to, the receipts, payments, income, expenditure, or financial transactions of any specified person, it is contained in (or comprises the whole or a part of) any book, account, statement, or other record prepared or kept by the lawyer in connection with a trust account of the lawyer within the meaning of section 6 of the Lawyers and Conveyancers Act 2006.

That has helped dispel the assumption that every communication with a lawyer attracts privilege – regardless of whether it is a substantive or mechanical piece of correspondence, and regardless of its purpose. That latter definition recognises that the perceived sanctity of legal professional privilege has never been absolute. The common law has always recognised exceptions to privileged communications, which also find a place in the New Zealand rules of professional conduct for admitted barristers and solicitors. Fraud, corruption or criminality can pierce a hole in the protective blanket of legal privilege.

As well as an overriding duty to the court over clients, under the Lawyers: Conduct and Client Care Rules 2008 (RCCC),<sup>54</sup> a series of provisions that require lawyers to use legal processes only for proper purposes;<sup>55</sup> to not assist any person in activity the lawyer knows to be fraudulent or criminal, and to not knowingly assist in the concealment of fraud or crime;<sup>56</sup> and to consider whether they should disclose confidential information (using permissive language, such as ‘may’ not ‘must’) relating to the business or affairs of a client where it relates to the anticipated commission of a crime of fraud,<sup>57</sup> or is reasonably believed to relate to past use of legal services for crime or fraud, or where it is necessary to disclose to avoid certain types of loss/harm to others that are also mentioned in the Rules.<sup>58</sup>

So privilege and confidentiality still exist, albeit uneasily, alongside SAR obligations. DIA guidance material also acknowledges this balancing act. Lawyers can end up in situations where they are pulled in two different ethical directions. In practice, this needs careful navigation. The obligation to make SARs and effectively ‘dob in’ a client can remain an area of real anxiety for lawyers, even after a few years of the AML/CFT regime applying. Legal practice can tend to generate many borderline situations and grey areas. These are among the most difficult judgment calls to be made across the wide field of AML/CFT Act obligations.

In recognition of the special difficulties encountered only by the legal profession, the most recent Ministry of Justice Statutory Review of the AML/CFT Act (6 November 2022) has recommended extending the time frame for lawyers to take advice and determine whether to make a SAR to five working days (from three working days currently, where it will remain for other reporting entities).

It seems that the intersection of suspicion and privilege is complex and multi-factored, and sometimes lawyers will need to obtain specialist independent advice. But, although complex, the issues are not irreconcilable.

## THE ISRAELI MODEL

Israel was rated non-compliant with the recommendations in 2008, as it imposed no reporting obligations on legal professionals. In 2014, it amended the Prohibition on Money Laundering Law (5760-2000) and, in 2018, FATF found that Israel met the CDD requirements for legal professionals.<sup>59</sup>

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<sup>54</sup> Lawyers: Conduct and Client Care Rules 2008 (RCCC), made under delegated authority of the Lawyers and Conveyancers Act 2006, comprising the ethical code for the regulation of all lawyers admitted in New Zealand.

<sup>55</sup> RCCC, r 2.3.

<sup>56</sup> RCCC, r 2.3.

<sup>57</sup> RCCC, r 8.4(b).

<sup>58</sup> RCCC, r 8.4(d).

<sup>59</sup> FATF, *Mutual Evaluation Report – Israel* (2008) 185; FATF, *Mutual Evaluation Report – Israel* (2018) 224.



The lawyer–client relationship in Israel is governed by legislation that vigorously upholds the fundamental notion of lawyer–client privilege. Pursuant to the laws of evidence, any documentation and matters exchanged by an attorney and his or her client (or on behalf of the client) relating to the provision of legal services cannot be submitted as evidence unless the client agrees to ‘release the privilege’.<sup>60</sup> The Israel Bar Law 1961 similarly provides that documentation and matters exchanged between a client and a lawyer must not be disclosed by the lawyer in any legal proceeding, investigation or search unless the client releases the privilege.<sup>61</sup> The Bar Association (Professional Ethics) Rules 1986 further provide that a lawyer will keep confidential any issue brought to his or her attention by a client unless the client agrees otherwise.<sup>62</sup> The seriousness of these duties is reflected in Penal Law 5737-1977, which provides a penalty of six months’ imprisonment for a legal professional who breaches the privilege.<sup>63</sup> While lawyer–client privilege is clearly protected by domestic law, the Supreme Court maintains that it should not be used in a way that creates a haven in the lawyer’s office for criminal activities.<sup>64</sup>

FATF operates using a risk-based approach. This role includes monitoring and reporting on the implementation of compliance by member states with its recommendations. As part of this process, FATF has created what are known as the black and grey lists. The black list is a statement identifying countries or jurisdictions with serious deficiencies in countering money laundering, terrorist financing, and financing proliferation. The currently blacklisted countries are the Democratic Republic of Korea, Iran (countermeasures) and Myanmar (enhanced due diligence measures).<sup>65</sup> The grey list identifies countries that are under increased monitoring and are actively working with FATF to address deficiencies in their AML/CTF regime. The countries appearing on the current grey list include Albania, the Cayman Islands, the Philippines, South Africa, and the United Arab Emirates.<sup>66</sup> Recommendation 19 denotes that financial institutions should be required to apply enhanced due diligence measures to business relationships and transactions with natural and legal persons, and financial institutions, from countries for which this is called for by FATF.<sup>67</sup> To be blacklisted or greylisted therefore creates reputational damage, as those in other jurisdictions may be hesitant to do business with nations that are subject to additional reporting requirements.

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<sup>60</sup> Evidence Ordinance 5731-1971 (new version), s 48a. See also *Muskuna v Maor* (1978) Appeal 632/77, cited in Lyat Eyal, ‘Ethical Issues – The Eroding Attorney–Client Privilege in Israel’ (2019) 25(1) *Trust and Trustees* 48, 49.

<sup>61</sup> Israel Bar Law 1961, s 90.

<sup>62</sup> Bar Association Rules (Professional Ethics) 5746-1986, s 19.

<sup>63</sup> Penal Law 5737-1977, s 496.

<sup>64</sup> *Abargil v State of Israel* (2015) 751/15, cited in Eyal (n 60) 49. For example, the court held that lawyers’ fees are not privileged information and must be disclosed. In 5740/97 *Ploni v. Yeshayahu Faireyzen*, the court held that the identity of the beneficiary does not enjoy the protection of legal privilege.

<sup>65</sup> FATF, ‘High-Risk Jurisdictions Subject to a Call for Action’ (24 February 2023), [www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Call-for-action-February-2023.html](http://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Call-for-action-February-2023.html).

<sup>66</sup> FATF, ‘Jurisdictions under Increased Monitoring’ (24 February 2023), [www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-february-2023.html](http://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-february-2023.html); Louis de Koker, John Howell and Nicholas Morris, ‘Economic Consequences of Greylisting by the Financial Action Task Force’ (2023) 11(5) *Risks* 81, doi.org/10.3390/risks11050081.

<sup>67</sup> FATF Recommendations (n 20), Recommendation 19, p 19.

When FATF began its black list in 2000, Israel was classified as ‘non-cooperative’ because its AML efforts fell short of the FATF standards.<sup>68</sup> In 2008, the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL, a FATF-style regional body) published an evaluation report, based on the FATF recommendations, on the strength of AML/CTF measures in Israel.<sup>69</sup> The report found that – despite considerable threats to the state of Israel from organised criminal activity and related money laundering – there was a notable gap in the regime. This was because non-financial professions – including lawyers – had not been accounted for in domestic AML legislation.<sup>70</sup> A 2013 follow-up report noted that Israel had implemented some AML/CTF efforts, but still had no AML/CTF regime in place for lawyers.<sup>71</sup> Israeli authorities had informed the evaluation team that legislative change to include lawyers in the regime was ‘extremely difficult and complex’ due to objections from the Israeli Bar Association, which was concerned that AML/CTF obligations – particularly the reporting of suspicious transactions – would violate lawyer–client privilege and confidentiality.<sup>72</sup>

Following these reports, mounting pressure from FATF catalysed reform to encourage AML/CTF practice in the legal profession. Israel implemented new rules for lawyers in connection with the provision of business services by amending its AML legislation in consideration of industry risks.<sup>73</sup> For the first time, lawyers were required to conduct due diligence procedures, establish record-keeping practices, and perform CDD when they provide business services. The CDD process conducted by lawyers is predicated on the completion of a statutory form by the client.<sup>74</sup> The lawyer then conducts a risk assessment of the client and documents the time and date on which this has been done.

Where certain information attained by a lawyer suggests that the client is of high risk for money laundering or terrorism financing, the lawyer must refrain from providing business services; however, the main obligation which does not apply to lawyers in Israel is suspicious transaction reporting.<sup>75</sup> A lawyer who fails to comply risks facing disciplinary proceedings initiated by the Bar Association for breach of a newly introduced AML ethical duty.<sup>76</sup>

In 2018, a FATF evaluation report found that these profession-specific measures had enabled Israel

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<sup>68</sup> FATF, *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (June 2000).

<sup>69</sup> MONEYVAL, *Detailed Assessment Report on Israel: Anti Money Laundering and Combating the Financing of Terrorism* (2008).

<sup>70</sup> *Ibid.*

<sup>71</sup> MONEYVAL, *Report on Fourth Assessment Visit: Anti-Money Laundering and Combating the Financing of Terrorism: Israel* (December 2013).

<sup>72</sup> *Ibid.*, 30, 167.

<sup>73</sup> Prohibition on Money Laundering Law (Amendment No 13) 5774-2014.

<sup>74</sup> *Ibid.*, s 8b(a).

<sup>75</sup> Money Laundering Order (Obligations of Identification and Records Keeping by Business Service Providers for Avoidance of Money Laundering and Terror Financing) 2014, s 2.

<sup>76</sup> An additional AML ethical rule was introduced by the Bar Association in September 2015. See FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures: Israel, Mutual Evaluation Report* (December 2018) 130.

to incorporate lawyers into its AML/CTF regime to some extent, deeming it partially compliant with related FATF recommendations.<sup>77</sup> In light of this improvement and other satisfactory developments in the overall domestic AML/CTF regime,<sup>78</sup> Israel was granted full membership in FATF in 2018 after holding observer status since 2016.<sup>79</sup>

## THE CANADIAN MODEL

In Canada, money laundering is explicitly prohibited by the Criminal Code.<sup>80</sup> Additionally, the Proceeds of Crime (Money Laundering) and Terrorist Financing Act<sup>81</sup> establishes legal provisions against money laundering and terrorist financing activities.

In the case of *Canada (Attorney General) v Federation of Law Societies of Canada*,<sup>82</sup> the Supreme Court of Canada ruled that lawyers are exempted from the regulatory regime that governs the conduct of other financial intermediaries, such as accountants. This exemption applies specifically to the activities of the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), a federal agency responsible for searching and seizing data related to illegal transactions and the individuals involved in them. The Supreme Court determined that the constitutional entitlement of clients to solicitor–client confidentiality rendered the applicability of the FINTRAC regime to lawyers unconstitutional.

The regulations in question would have imposed requirements on lawyers to collect information about their clients, including details about their financial transactions. Additionally, lawyers would have been obligated to disclose the collected client information to federal government authorities upon request. However, the Supreme Court of Canada ruled that these regulatory requirements violated certain protections enshrined in the Charter of Rights and Freedoms. The court found that the impugned provisions infringed upon the constitutional protections against unreasonable search and seizure<sup>83</sup> and rights to security of the person.<sup>84</sup> Specifically, the requirements were deemed unconstitutional as they would have resulted in the violation of solicitor–client privilege. This privilege safeguards the confidentiality of communications between lawyers and their clients, preventing disclosure without the client’s consent.<sup>85</sup>

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<sup>77</sup> Ibid.

<sup>78</sup> Also noteworthy is the introduction of the Cash Control Act (2018), which indirectly contributes to the reduction of money laundering risks through lawyers. The law stipulates that transactions above certain thresholds prohibit parties from giving or receiving payments in cash. Furthermore, due to the similarities between cashed checks and open checks with cash, restrictions have also been imposed on their use.

<sup>79</sup> FATF, ‘Israel Becomes a Member of the FATF’ (10 December 2018), [www.fatf-gafi.org/publications/fatfgeneral/documents/israel-fatf-member.html](http://www.fatf-gafi.org/publications/fatfgeneral/documents/israel-fatf-member.html).

<sup>80</sup> Criminal Code, RSC 1985: s 462.31; terrorist financing, ss 83.02, 83.03; possession of property obtained by crime, s 354.

<sup>81</sup> Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, ss 74–82. A proposed amendment, if passed, will add a structuring offence at s 77.3.

<sup>82</sup> *Canada (AG) v Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401, para 110.

<sup>83</sup> Section 7.

<sup>84</sup> Section 8.

<sup>85</sup> *Federation of Law Societies of Canada*, at para 9.

Justice Cromwell, writing on behalf of the majority of the Supreme Court, concluded that the infringement on the client's rights under the Charter was not justifiable under section 1, which allows for reasonable limits on rights and freedoms. As a result, the impugned provisions were deemed unconstitutional,<sup>86</sup> and the court affirmed that solicitor–client privilege must remain as close as possible to absolute in order to be relevant, and that the court must enforce rigorous norms to ensure its protection.

The *Federation of Law Societies of Canada* case confirmed that Canada's Law Societies have the responsibility to regulate and govern the conduct of lawyers effectively in order to prevent and curtail their involvement in money laundering activities. The regulation of lawyers in relation to their participation in money laundering is not within the jurisdiction of FINTRAC,<sup>87</sup> and lawyers are exempt from reporting to the government information about suspicious transactions involving their clients.

In Canada, the legal profession operates as a self-regulated entity and is constitutionally under the jurisdiction of provincial and territorial authorities. This means that the regulation and governance of lawyers, including their professional conduct and ethical obligations, are primarily overseen by provincial and territorial law societies or bar associations. These regulatory bodies have the authority to set standards, enforce disciplinary measures, and ensure compliance with legal professional norms within their respective jurisdictions.

The concept of lawyer self-regulation was clarified and affirmed by the Supreme Court of Canada in the case of *Pearlman v Manitoba Law Society Judicial Committee*.<sup>88</sup> In that case, the Supreme Court outlined its understanding of the governance of the legal profession, identifying three aspects of control that are integral to self-regulation. First, self-regulation involves control over determining who is eligible to practise law. This includes setting the criteria and qualifications that individuals must meet to be granted the privilege of practising law. Second, self-regulation encompasses establishing the conditions or requirements that are imposed on those seeking to enter the legal profession. This involves setting standards for legal education, licensing examinations, and professional development, among other factors, to ensure that individuals entering the legal profession meet the necessary competencies and ethical obligations. Third, self-regulation entails determining the appropriate means to enforce and uphold the established conditions and requirements. This includes the establishment of disciplinary processes, ethical rules, and mechanisms to address professional misconduct, ensuring that lawyers adhere to the

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<sup>86</sup> For a detailed analysis and discussion of the earlier legal proceedings, see Amy Salyzyn, 'A False Start in Constitutionalizing Lawyer Loyalty in Canada (Attorney General) v. Federation of Law Societies of Canada', *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* (21 July 2016).

<sup>87</sup> 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 Journal* 1.

<sup>88</sup> *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869, 84 DLR (4th) 105, 886.

standards and principles set forth by the legal profession.

Across Canada, there are 14 law societies (provincial and territorial), each responsible for regulating the legal profession within its respective jurisdiction. These law societies operate independently and have their own regulatory frameworks to govern the conduct and professional standards of lawyers practising in their region. To facilitate coordination and collaboration among the various law societies, the Federation of Law Societies of Canada plays a crucial role. The Federation is not a regulatory body itself but rather an association representing the various law societies across Canada. It does not possess binding authority over its constituent parts. Instead, it functions as a service provider to its member law societies.<sup>89</sup>

The Federation has developed Model Rules to Fight Money Laundering and Terrorist Financing as guidelines for its member law societies. These model rules serve as a reference for the law societies when formulating their own regulations and standards to address money laundering and terrorist financing risks within the legal profession. One of the model rules prohibits lawyers from accepting cash payments exceeding a threshold from a client, aiming to mitigate the potential risks associated with large cash transactions. Additionally, the model rules include provisions requiring lawyers to verify the identities of their clients, helping to ensure the integrity and transparency of legal transactions.<sup>90</sup> The model has now been adopted in jurisdictions across Canada.<sup>91</sup> For example, on 1 January 2022, the Law Society of Ontario adopted the model rules following the approval of the by-law amendments. The amendments maintain the Law Society's AML/CTF rules separately from the federal AML/CTF regime in order to preserve solicitor–client privilege, confidentiality, and the independence of the legal profession. They also require licensees to conduct sufficient due diligence on client transactions and work to enhance existing AML/CTF provisions while preserving the Law Society's regulatory authority vis-à-vis the federal government.<sup>92</sup>

Under the Model Code of Professional Conduct for Legal Professionals, legal professionals are prohibited from knowingly assisting in any illegal conduct or engaging in actions or omissions that they know or should know will aid in the commission of a crime.<sup>93</sup> This prohibition applies to situations where legal professionals are involved in services related to financial transactions. Legal professionals are expected to exercise vigilance and act diligently when providing services that involve financial transactions. If suspicions or doubts arise regarding whether their activities may be assisting in criminal activity or fraud, legal professionals have an obligation to make reasonable inquiries to gather information about the nature and objectives of the client's engagement. They

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<sup>89</sup> Alice Woolley, *Understanding Lawyers Ethics in Canada* (LexisNexis Canada, 2011).

<sup>90</sup> For the Federation Model Rule, see Federation of Law Societies of Canada, 'Fighting Money Laundering and Terrorist Financing', <https://flsc.ca/what-we-do/fighting-money-laundering-and-terrorist-financing/>.

<sup>91</sup> With the exception of Quebec.

<sup>92</sup> The Law Society of Ontario lists further information: Law Society of Ontario, *Report to Convocation* (27 May 2021), <https://lawsocietyontario.azureedge.net/media/lso/media/about/convocation/2021/convocation-may-2021-professional-regulation-committee-report.pdf>.

<sup>93</sup> Rule 3.2–7 and s 11(1) of the Client Identification and Verification Model Rule.

are also required to document this information and consider whether it is necessary to withdraw from the representation. Law Society by-laws and rules of professional conduct establish the professional and ethical obligations that apply to all members of the legal profession.

A joint working group of representatives of the Federation and the Government of Canada established a collaborative forum in 2019 to address issues concerning AML/CTF risks that may arise within the legal practice. One of the main objectives of this forum is to support the Federation in developing and improving its guidance to the legal profession regarding AML/CTF measures. The aim is to enhance the profession's understanding and ability to effectively combat these illicit activities. Members of the legal profession are expected to adhere to the obligations and any failure to meet them may result in disciplinary action through the complaints and disciplinary process administered by the respective provincial law society.<sup>94</sup> Legal professionals in Canada, like all individuals, are subject to the provisions of the Criminal Code. However, they are exempted from the federal legislative regime under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act due to constitutional principles that protect the rights of clients and the obligations of legal professionals within their confidential relationships.

While FATF is relatively satisfied with Canada's public regulatory mechanisms for addressing money laundering in sectors other than law firms, it finds the measures taken by the legal profession to be inadequate, stating that '[f]ollowing a 13 February 2015 Supreme Court of Canada ruling legal counsels, legal firms and Quebec notaries are not required to implement AML/CFT measures'.<sup>95</sup>

## Part IV: Costs and benefits of extending AML/CTF obligations to the legal profession

### TREND OF POSITIVE COMPLIANCE

Australia – a member of FATF since 1990 – shows ongoing amenability to implementing the international standard. Where the 2005 MER found the implementation to be insufficient, FATF recommended that Australia enact new legislation or amend existing legislation. Australia did so. Many of the deficiencies were addressed by the AML/CTF Act.<sup>96</sup> The 2015 MER found that, although Australia was not yet fully compliant, it had indeed improved its compliance with many of

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<sup>94</sup> FATF, *Third Mutual Evaluation on Anti-Money Laundering and Combating the Financing of Terrorism – Canada* (29 February 2008) 13. Canada was rated non-compliant.

<sup>95</sup> FATF, *Anti-Money Laundering and Counter Terrorist-Financing Measures – Canada* (September 2016) 15.

<sup>96</sup> One of the objects of the AML/CTF Act is to address matters of international concern, including the FATF recommendations. See s 3(3)(a).

the deficiencies that had been identified. The same trend of positive compliance was found in the last follow-up report on Australia's AML/CTF regime.

FATF evaluated Australia's compliance with the FATF standards in 2005. It found Australia fully compliant with only eight of the 40 recommendations (20%). Australia improved, achieving full compliance with 12 recommendations (30%) by 2015 and 17 recommendations (42.5%) by 2018. In 2005, Australia did not comply at all with nine recommendations (22.5%), which was reduced to six recommendations (15%) by 2016 and five recommendations (12.5%) by 2018 – in other words, Australia was, in one way or another, compliant with 35 recommendations (87.5%). In addition, Australia's compliance improved for 13 recommendations between 2005 and 2015, and for another seven recommendations between 2015 and 2018 – an improvement for 20 recommendations (50%) from 2005 to 2018. **Australia has entirely ignored only three FATF recommendations: Recommendation 13, dealing with correspondent banking, and Recommendations 22 and 23, dealing with the legal profession.**

## **RISK TO FINANCIAL REPUTATION**

FATF has announced various measures to be taken against countries that do not remove detrimental rules and practices. Pending the adoption of appropriate laws and policies, FATF demands that countries scrupulously apply Recommendation 19, which holds that '[f]inancial institutions should be required to apply enhanced due diligence measures to business relationships and transactions with natural and legal persons, and financial institutions, from countries for which this is called for by FATF'. These enhanced due diligence measures should be proportionate to the risk. Countries should, for example:

- refuse to allow the establishment of subsidiaries, branches or representative offices of financial institutions from (or in) the country concerned, or otherwise take into account the fact that the relevant financial institution is from a country that does not have adequate AML/CTF systems;
- limit business relationships or financial transactions with the country, or persons within it;
- prohibit financial institutions from relying on third parties located in the country concerned to conduct elements of the CDD process; and
- require increased supervisory examination and/or external audit requirements for branches and subsidiaries of financial institutions based in the country concerned.<sup>97</sup>

Any country that is subjected to such countermeasures suffers a blow to its international reputation and all banking operations within the country could be scrutinised for suspicious activity. While this does not, strictly speaking, amount to sanctions, it creates substantial difficulties for the country in question.

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<sup>97</sup> FATF Recommendation 19.2(c), (e), (f), (h).

It is not suggested that FATF will apply such countermeasures to Australia for failing to comply with Recommendations 22 and 23. There also seems to be a low risk that FATF will find that Australia has a sufficient number of strategic deficiencies to be considered for grey listing. Therefore, the primary reason for Australia to expand its regime to include legal professionals is to increase the effectiveness of its AML/CTF system to combat crime more effectively and efficiently. This would enhance public confidence in the Australian financial system, fulfill Australia's domestic and international AML/CTF obligations, and enhance the safety of the Australian public.

It is strongly in the interests of Australia to act now and amend the AML/CTF Act to include legal professionals. If the government waits until pressure from FATF (such as deadlines for compliance and, if necessary, a finding of non-compliance) forces it to comply, this may tarnish Australia's reputation and adversely affect the legitimacy and effectiveness of its AML/CTF regime. Given Australia's record of compliance with the FATF regime, it is clearly a question of when – not if – Australia will extend its AML/CTF obligations to legal professionals.

## Conclusion

The full implementation of the AML/CTF regime in Australia, which will include legal professionals (in tranche II), has been delayed for too many years. In April 2016, the Attorney-General's Department report on the statutory review of the AML/CTF regime identified the tranche II laws as a priority area for action. In March 2022, the Australian Senate's Legal and Constitutional Affairs Committee recommended that Australia's AML/CTF regime be extended to the legal profession. Debate continues around whether and how this should be implemented, with concerns raised by representatives of the profession about conflicts with legal professional privilege and the regulatory burden for lawyers. In the 2023 Budget, which was published last May,<sup>98</sup> the Australian Government announced its focus on strengthening Australia's AML/CTF framework. As part of that initiative, \$14.3 million has been allocated over four years to support policy and legislative reforms aimed at fortifying the country against illicit financing. The funding includes \$8.6 million over three years dedicated to AUSTRAC. This financial support will facilitate the development and consultation with stakeholders on legislative reforms to modernise Australia's AML/CTF regime. Furthermore, it will enable AUSTRAC to prepare for and participate in the evaluation of Australia's regime against global standards conducted by FATF.

The government should take immediate action to address the deficiencies identified by FATF. It is of utmost importance and in Australia's best interests.

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<sup>98</sup> <https://budget.gov.au/>.



# Bibliography

- Ai, Lishan, 'A Cost-Effective Strategy of Implementing International Anti-Corruption Initiatives' (2012) 16(1) *Journal of Money Laundering Control* 83
- American Bar Association, International Bar Association, and Council of Bars and Law Societies of Europe, *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* (2010)
- AUSTRAC, *Strategic Analysis Brief: Money Laundering through Legal Practitioners* (December 2015)
- Benson, Kate, 'Money Laundering, 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, Vol 1* (Palgrave, 2018) 111
- Bromwich, Rebecca, '(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 Journal* 1
- Chaikin, David, 'Corporate Lawyers and the Challenge of the Professional Gatekeeper Paradigm' (Conference Paper, 5th International Conference on Financial Criminology, 2013)
- Choo, Kim-Kwang Raymond, 'Designated Non-Financial Businesses and Professionals: A Review and Analysis of Recent Financial Action Task Force on Money Laundering Mutual Evaluation Reports' (2014) 27(1) *Security Journal* 1
- De Koker, Louis, Howell, John and Morris, Nicholas, 'Economic Consequences of Greylisting by the Financial Action Task Force' (2023) 11(5) *Risks* 81
- 'Enhancing Hong Kong's Regulatory Regime for Combating Money Laundering and Terrorist Financing (I)', *Hong Kong Lawyer* (12 April 2018)
- Eyal, Lyat, 'Ethical Issues – The Eroding Attorney–Client Privilege in Israel' (2019) 25(1) *Trust and Trustees* 48
- FATF, *3rd Mutual Evaluation Report – Singapore* (2001)
- FATF, *4th Follow Up Report: Mutual Evaluation of Hong Kong, China* (19 October 2012)
- FATF, *Annual Report 2001–2002* (2002)
- FATF, *Annual Report 2002–2003* (2003)
- FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures – Australia* (April 2015)
- FATF, *Anti-Money Laundering and Counter Terrorist-Financing Measures – Canada* (September 2016)
- FATF, *Australia: 3rd Enhanced Follow-up Report & Technical Compliance Re-Rating* (November 2018)
- FATF, 'High-Risk Jurisdictions Subject to a Call for Action' (24 February 2023), [www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Call-for-action-February-2023.html](http://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Call-for-action-February-2023.html)
- FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (updated February 2023)
- FATF, 'Israel Becomes a Member of the FATF' (10 December 2018), [www.fatf-gafi.org/publications/fatfgeneral/documents/israel-fatf-member.html](http://www.fatf-gafi.org/publications/fatfgeneral/documents/israel-fatf-member.html)
- FATF, 'Jurisdictions under Increased Monitoring' (24 February 2023), [www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-february-2023.html](http://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-february-2023.html)
- FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (June 2013)
- FATF, *Mutual Evaluation Report – Israel* (2008)
- FATF, *Mutual Evaluation Report – Israel* (2018)
- FATF, *Mutual Evaluation Report – Singapore* (September 2016)
- FATF, *Mutual Evaluation Report – United Kingdom* (2007)
- FATF, *Mutual Evaluation Report – United Kingdom* (2018)
- FATF, *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (June 2000)
- FATF, *Risk-Based Approach: Guidance for Legal Professionals* (23 October 2008)
- FATF, *Third Mutual Evaluation on Anti-Money Laundering and Combating the Financing of Terrorism – Canada* (29 February 2008)
- FATF, *Third Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism – Hong Kong, China* (11 July 2008)
- FATF, *Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism – Australia* (October 2005)

- FATF, *Typology Report* (2002)
- Federation of Law Societies of Canada, 'Fighting Money Laundering and Terrorist Financing', <https://flsc.ca/what-we-do/fighting-money-laundering-and-terrorist-financing/>
- Goldbarsht, Doron, 'Am I My Corporate's Keeper? Anti-Money Laundering Gatekeeping Opportunities of the Corporate Legal Officer' (2020) *International Journal of the Legal Profession*, doi: 10.1080/09695958.2020.1761369
- Government Inquiry into Foreign Trust Disclosure Rules, *Report* (27 June 2016), [www.treasury.govt.nz/publications/information-release/government-inquiry-foreign-trust-disclosure-rules](http://www.treasury.govt.nz/publications/information-release/government-inquiry-foreign-trust-disclosure-rules)
- He, Ping, 'Lawyers, Notaries, Accountants and Money Laundering' (2006) 9(1) *Journal of Money Laundering Control* 62
- Law Council of Australia, Submission in Response to Consultation Paper *Legal Practitioners and Conveyancers: A Model for Regulation under Australia's Anti-Money Laundering and Counterterrorism Financing Regime* (7 February 2017)
- Law Society of Ontario, *Report to Convocation* (27 May 2021), <https://lawsocietyontario.azureedge.net/media/lso/media/about/convocation/2021/convocation-may-2021-professional-regulation-committee-report.pdf>
- Legal and Constitutional Affairs Legislation Committee Senate Committee (Thursday, 25 May 2023) 63
- Legal Sector Affinity Group, *Anti-Money Laundering Guidance for the Legal Sector* (2023), [www.sra.org.uk/globalassets/documents/solicitors/firm-based-authorisation/lsg-aml-guidance.pdf?version=4903b4](http://www.sra.org.uk/globalassets/documents/solicitors/firm-based-authorisation/lsg-aml-guidance.pdf?version=4903b4)
- Leighton-Daly, Mathew, 'Money Laundering Offences: Out with Certainty, in with Discretion?' (2015) 24(1) *Revenue Law Journal* 1
- Levi, Michael, *Lawyers, Their AML Regulation and Suspicious Transaction Reporting* (Report for the Cullen Commission, 2020)
- Mitsilegas, Valsamis, 'Countering the Chameleon Threat of Dirty Money: "Hard" and "Soft" Law in the Emergence of a Global Regime against Money Laundering and Terrorist Financing' in A Edwards and P Gill (eds), *Transnational Organised Crime: Perspectives on Global Security* (Routledge, 2006) 202
- MONEYVAL, *Detailed Assessment Report on Israel: Anti Money Laundering and Combating the Financing of Terrorism* (2008)
- MONEYVAL, *Report on Fourth Assessment Visit: Anti-Money Laundering and Combating the Financing of Terrorism: Israel* (December 2013)
- Nougayrède Delphine, 'Anti-Money Laundering and Lawyer Regulation: The Response of the Professions' (2019) 43 *Fordham International Law Journal* 321
- Ross, Stuart and Michelle Hannan, 'Australia's New Anti-Money Laundering Strategy' (2007) 19 *Current Issues in Criminal Justice* 135
- Salyzyn, Amy, 'A False Start in Constitutionalizing Lawyer Loyalty in Canada (Attorney General) v. Federation of Law Societies of Canada', *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* (21 July 2016)
- Woolley, Alice, *Understanding Lawyers Ethics in Canada* (LexisNexis Canada, 2011)
- Yim, Foster Hong-Cheuk, and Ian Philip Lee, 'Updates on Hong Kong's Anti-Money Laundering Laws' (2018) 21(3) *Journal of Money Laundering Control* 290

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