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Australian Institute of Criminology

Perceptions of money laundering and financing of terrorism in a sample of the Australian legal profession in 2008–09

Kim-Kwang Raymond Choo
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Julie Walters
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AIC Reports
Research and
Public Policy Series

122 part 1

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www.aic.gov.au



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ISSN 1836-2060 (Print)
1836-2079 (Online)

ISBN 978 1 922009 54 8 (Print)
978 1 922009 55 5 (Online)

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Published by the Australian Institute of Criminology
GPO Box 2944
Canberra ACT 2601
Tel: (02) 6260 9200
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Website: <http://www.aic.gov.au>

Please note: Minor revisions are occasionally made to publications after release. The online versions available on the AIC website will always include any revisions.

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General editor, Research and Public Policy Series :
Dr Adam M Tomison, Director, Australian Institute of Criminology

Note: Research and Public Policy Series publications are peer reviewed

Edited and typeset by the Australian Institute of Criminology

A full list of publications in the AIC Reports series can be found on the Australian Institute of Criminology website at <http://www.aic.gov.au>

Foreword

Each year, many billions of dollars in proceeds of crime are laundered in and through Australia (Walker 2007). Minimising opportunities for money laundering represents an important means of reducing the incidence of large-scale organised, financial crime in Australia. As financial institutions work towards full compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), it is possible that criminals may look to the professional sectors in order to facilitate the laundering of illicit funds and the financing of terrorist activities. Professionals are potentially attractive to criminals because of their capacity to create corporate vehicles, their expert knowledge and the lack of suspicion that is generally directed towards them due to their high social standing.

It is possible for lawyers unwittingly to be involved in laundering the proceeds of crime for their clients by creating corporate vehicles, trusts and other legal arrangements and by allowing the use of their own trust accounts to facilitate the placement, layering and ultimately laundering of funds. They also have the knowledge and expertise to advise clients on how to organise their financial arrangements in such a way that money laundering could be facilitated while also lending some legitimacy to illegal activities by reason of being associated with legal practitioners. There is also the possibility that some unprofessional lawyers will seek to launder the proceeds of their own criminal activities through the use of the same types of financial operations that other criminals might use.

The present study by the Australian Institute of Criminology sought to investigate the extent to which a sample of legal practitioners in Australia perceived that risks of involvement in money laundering were present in the profession in Australia in the year 2008-09.

The existing anti-money laundering/counter-terrorism financing (AML/CTF) regulatory framework in Australia is currently focused on the financial, gaming and bullion services sectors, although solicitors are required to report specified cash transactions to the regulator, AUSTRAC. In addition, federal criminal offences are in place to address situations in which solicitors (as well as other individuals) deliberately, recklessly or negligently participate in or assist in money laundering activity. Finally, legal practitioners are also subject to professional regulation that arguably reduces the risk of their involvement in money laundering.

In order to implement Australia's international obligations set out by the Financial Action Task Force on Money Laundering and to make the use of professional legal services unattractive to those seeking to engage in money laundering and financing of terrorism activities, regulatory requirements would need to be extended to specified services provided by professionals within the legal sector, as well as to specified services provided by accountants, real estate agents, dealers in precious metals, and trust and company service providers.

In order to provide an indication of how a sample of legal practitioners from mainly small firms viewed the AML/CTF regime in Australia in 2008-09, the Australian Institute of Criminology, in partnership with the Law Council of Australia, undertook survey research into the prevalence of, and future threat to, the Australian legal sector of becoming involved in money laundering or financing of terrorism activities. The survey of legal practices in the eastern Australian states and the Australian Capital Territory specifically sought to gather information on:

- how legal practices perceive the money laundering and financing of terrorism risks posed by their clients and their clients' transactions;
- the extent to which clients of lawyers make use of legal services that could be used to facilitate money laundering and financing of terrorism;
- the kinds of risks that are likely to arise for those in the legal sector in connection with the commission or facilitation of money laundering and financing of terrorism;
- the risk management tools currently employed by legal practices;
- the perceived benefits and noted concerns regarding the capture of legal professionals under the AML/CTF Act; and
- the perceived value of applying existing AML/CTF legislative regimes to legal practices in Australia.

In this report, the findings of the survey are presented. They describe how a sample of the legal profession in Australia responded to the perceived risks of money laundering and financing of terrorism and how they perceived the prospects of further regulation in this area.

In order to ensure the validity of the findings, the AIC spent significant effort and time having them reviewed and workshopped with key government

agencies, as well as the Law Council of Australia and its constituent bodies. While this iterative process of review and revision took considerable time and delayed completion of the final report, it was important to ensure that the views of relevant stakeholders were considered and integrated into the final report. Overall, it should be recognised that the results as presented relate to the information provided by survey respondents and do not necessarily reflect the policy position of the Australian government or other stakeholders.

Overall, it should be recognised that while a useful insight into legal practitioners' perceptions of ML/TF risks, the information and analysis presented in this report is also limited because it consists of the self-reported perceptions of survey respondents, contextualised by the publically available literature able to be examined by the AIC. The findings and conclusions do not necessarily reflect the policy position of the Australian government or other stakeholders.

Adam Tomison
Director and Chief Executive

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Acknowledgements

The authors gratefully acknowledge the assistance and advice of the Law Council of Australia and its constituent bodies who took part in preparing and administering the survey—the ACT Law Society, the Law Institute of Victoria, the New South Wales Law Society, the Queensland Law Society and the Victorian Bar Inc.

The authors are also grateful for the feedback on earlier drafts provided by staff at the Attorney-General's Department, AUSTRAC and the Law Council of Australia.

The authors also acknowledge the valuable assistance provided by current and former colleagues at the Australian Institute of Criminology, particularly Hannah Chadwick, Simone Gangell and Dr Brent Davis.

Finally we are also grateful to the many legal practitioners who agreed to participate in the survey.

The views expressed are not necessarily those of the Australian Government.

Acronyms

ABN	Australian Business Number
ACN	Australian Company Number
AFP	Australian Federal Police
AIC	Australian Institute of Criminology
AML	anti-money laundering
AML/CTF	anti-money laundering/counter-terrorism financing
APG	Asia-Pacific Group on Money Laundering
AUSTRAC	Australian Transaction Reports and Analysis Centre
CDD	customer due diligence
DNFBPs	designated non-financial businesses and professions
FATF	Financial Action Task Force
KYC	know your customer
OCDD	ongoing customer due diligence

Executive summary

Money laundering is the process by which criminals, particularly those involved in serious and organised crime, seek to convert illegally derived funds into assets that appear to be legitimate. In its *Organised Crime in Australia* report, the Australian Crime Commission (ACC 2011) stated that '[c]ontemporary estimates suggest that the level of money laundering in and through Australia is at least \$10 billion a year'. Criminals use a range of sometimes complex procedures and transactions to disguise the proceeds of what they have done so that their funds cannot be traced and confiscated by the authorities. Such complex financial processes can also be used to disguise the origins of funds used to finance terrorist activities. In this case, often legitimately derived funds are used for illegal terrorist purposes.

Both types of activity have created concern for governments across the globe and led to the development of a sophisticated regulatory regime designed to deter and to prevent these illegal activities, and to obtain financial intelligence for use by law enforcement and counter-terrorism agencies. Under Australia's Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (AML/CTF Act), at 30 June 2012, some 8,444 entities had reporting obligations to the government regulator, the Australian Transaction Reports and Analysis Centre (AUSTRAC). The financial intelligence gathered is used by AUSTRAC and its partner agencies to examine cases of alleged crime, which may then be referred for investigation by police and where appropriate, referral for prosecution. In 2010–11, AUSTRAC provided financial intelligence to 39 government agencies who conducted 2.0 million searches of its data holdings (AUSTRAC 2012a).

As financial institutions and other regulated businesses work towards full compliance with the AML/CTF Act, it is suspected that criminals may increasingly look to the professional sectors in order

to facilitate the laundering of illicit funds and the financing of terrorist activities. Professionals, such as lawyers and accountants, are potentially attractive to criminals because of their capacity to create corporate vehicles, their expert knowledge and the lack of suspicion that is generally directed towards them due to their high social standing.

At present in Australia, the work of lawyers is generally not included within the remit of the AML/CTF Act, unlike in some other developed countries that require specified transactions to be reported to comparable financial intelligence units (Walters et al. 2012). Lawyers in Australia do, however, have a range of obligations at present under the *Criminal Code Act 1995* (Cth), the *Charter of the United Nations Act 1945* (Cth), the *Proceeds of Crime Act 2001* (Cth), and the *Financial Transaction Reports Act 1988* (Cth). These relate, inter alia, to getting funds to, from or for a terrorist organisation, providing support to a terrorist organisation, financing a terrorist, dealing in the proceeds of crime, or dealing with property reasonably suspected of being proceeds of crime, dealing with freezable assets, giving an asset to a proscribed person or entity, notifying the Australian Federal Police (AFP) of controlled assets and reporting to AUSTRAC significant cash transactions.

Internationally, the Financial Action Task Force (FATF) on Money Laundering seeks to coordinate global efforts to minimise risks of money laundering and terrorism financing by promoting its Forty Recommendations that ask countries to incorporate these principles into their criminal justice systems, law enforcement procedures and financial regulatory systems (FATF 2012). Recommendation 22(d) requires lawyers, notaries, other independent legal professionals and accountants to apply the customer due diligence (CDD) and record-keeping requirements when they prepare for, or carry out transactions for their clients concerning the following activities:

- buying and selling of real estate;
- managing of client money, securities or other assets;
- management of bank, savings or securities accounts;
- organisation of contributions for the creation, operation or management of companies;
- creation, operation or management of legal persons or arrangements; and
- buying and selling of business entities (FATF 2012).

In order to provide an evidence base to support the inclusion of legal professionals within the anti- money laundering/counter-terrorism financing (AML/ CTF) regime globally, FATF is conducting a study to assess the vulnerabilities of legal professionals regarding money laundering and terrorist financing. The FATF Working Group on Typologies aims to study the legal environment, to gather case material, to understand the regulatory gaps and challenges, and to identify red flag indicators including the specific services and expertise offered by legal professionals and what makes them attractive to criminals (Goldsmith 2012).

In order to be FATF compliant, the application of Australia's AML/CTF Act may need to be extended to specified services provided by a number of business and professional sectors not currently regulated. The sectors in question include lawyers, accountants, real estate agents, dealers in precious metals, and trust and company service providers.

The question that has arisen is whether it is necessary and desirable to extend the AML/CTF Act to specified services provided by these business and professional sectors. The determination of this issue largely depends on the level of risk of involvement in money laundering and financing of terrorism found to be present, and whether the costs of regulating them outweigh the likely benefits to be derived in terms of minimising financial crime and assisting in the investigation and prosecution of those alleged to have acted illegally. Finally, consideration needs to be given as to the international implications of Australia being non-compliant with the FATF recommendations.

The present study

The present report focuses on Australian legal professionals from the eastern jurisdictions who

agreed to participate in the study. The research forms part of an Australian Institute of Criminology (AIC) research program funded by the Australian Government to examine a variety of areas of money laundering and terrorism financing risks and to consider legislative and other response strategies most appropriate to deal with such risks. One of the areas of risk that the AIC examined in some detail concerned the designated non-financial businesses and professions (DNFBPs), the report of which has been published separately as Walters et al. (2013).

The aims of the present study were to:

- describe how legal practices perceive the money laundering and financing of terrorism risks posed by their clients and their clients' transactions;
- identify the risk management tools currently employed by legal practices;
- outline the perceived benefits and noted concerns regarding the capture of legal professionals under the AML/CTF Act.

In March 2010, a questionnaire was sent to 7,946 legal practices in New South Wales, Victoria, Queensland and the Australian Capital Territory by the law societies within these jurisdictions. One response was sought from each separate legal practice concerning their views and practices undertaken in the period 1 July 2008 to 30 June 2009.

Of the 7,946 practices contacted, 443 responded (373 online and 70 by post) representing a response rate of 5.6 percent (3 respondents, who answered only 1 question before exiting the survey, were removed, leaving a final sample of 440). Such a small sample of respondents raises the possibility that any practitioners who had some personal involvement in illegal or unprofessional activities might have chosen not to respond to the survey. There is also the risk that respondents could have been less than honest in their responses to some questions. These issues of sampling and veracity arise in any self-report study and conclusions need to take these methodological considerations into account.

Although a relatively small sample, it reflected the profile of all practices in New South Wales in terms of practice size; namely, a high representation of sole practitioners (63%) and small-sized practices. The vast majority of respondents (87%) also reported having

five or fewer full-time equivalent legal practitioners with a current practising certificate in the 12 month period ending 30 June 2009. Eighty-nine percent of respondents identified their role within their practice as being the proprietor, partner, principal or director.

Survey respondents were asked to:

- rate the level of money laundering/terrorism financing risk perceived to be associated with certain client groups or client instructions;
- estimate how frequently customer identification and ongoing customer due diligence (OCDD) procedures are used;
- assess the benefit of using standard AML/CTF procedures; and
- rate their level of concern regarding possible outcomes from observing AML/CTF procedures (eg increased compliance costs).

Arguably, there was a risk that practitioners might seek to understate their perceptions of risk in order to avoid the imposition of regulation – a phenomenon observed by AUSTRAC (personal communication 2013). There was, however, nothing in the results of the present survey to indicate that respondents had sought to distort the findings of the study for ulterior motives.

Perceptions of risk

There are many ways that DNFBPs (including legal professionals) can facilitate and commit money laundering, either intentionally or unwittingly. To understand how legal practices perceive the money laundering and financing of terrorism risks posed by their clients and their clients' transactions and activities, survey respondents were provided with a series of hypothetical situations involving clients and their transactions that were identified as potentially involving a high risk of money laundering or financing of terrorism. The majority of respondents (60% or more) flagged these situations and clients as suspicious; that is, in their view, they did potentially involve a risk of money laundering or terrorism financing.

Actual experience of high-risk situations or clients was relatively low among the surveyed respondents – 15 percent or less of respondents reported exposure in the previous 12 months. Similarly, very few respondents reported that their practice had ever had concerns that a client was involved in money

laundering or financing of terrorism activities. Just seven percent had been engaged by a client who may have been or was involved in the disguise, transfer or transaction of proceeds of crime, two percent by a client involved in the disguise, transfer or transaction of instruments of crime and less than one percent for possible involvement in the financing of a terrorist act or organisation. These findings support those of Walters et al., (2013) in which it was found on the basis of prior research that reported instances of money laundering within the legal profession were rare.

Use of risk management practices

At the core of the increased emphasis on AML/CTF risk management in Australia is a range of preventive activities that fall within the general description of so-called CDD. CDD comprises the collection and verification of initial 'know your client' (KYC) information (ie details obtained from client identification procedures) and ongoing monitoring of customers and their transactions (AUSTRAC 2009a). By not undertaking client identification procedures and conducting proper due diligence on their clients' activities (including when accepting a new client), legal professionals may unwittingly provide assistance in money laundering and/or terrorism financing activities.

Just over half (56%) of respondents stated that they had always or often used client identification procedures when accepting a new client in the 12 months prior to the survey and this included respondents who might not have higher risk clients. However, fewer than half (40%) regularly undertook OCDD with their clients. Of those who regularly used client identification procedures, 54 percent also reported undertaking CDD, suggesting that more than half of the respondents had decided not to observe the full spectrum of risk management tools available. There tended to be a greater use of client identification procedures if a client was a trustee, incorporated entity or unincorporated association and for these clients, activities usually entailed verification of the entity's Australian Business Number (ABN) or Australian Company Number (ACN) (for a trustee or incorporated entity) or Business Registration Number (for an unincorporated association). Verification of the authenticity of a signature was often or always used by fewer than half of the respondents when accepting a new client, irrespective of who the client was.

Of the types of legal services that FATF Recommendation 22(d) specifies as requiring CDD and record-keeping requirements, the most common type offered by respondents during the 12 month period ending 30 June 2009 involved the buying or selling of real estate. The majority (63%) of respondents who indicated that their practice always or often provided services involving the buying or selling of real estate did not, however, use any OCDD procedures, although 58 percent did regularly employ customer identification procedures before accepting a new client.

Prior research has indicated that the money laundering or financing of terrorism risk profile for a legal practice largely depends on its size and client base, and the practice areas in which it engages (The Law Society 2009a). It is generally expected that respondents from smaller sized practices may not have the budget and/or the resources to undertake comprehensive AML/CTF measures. Comments made by survey respondents confirmed this opinion with respect to smaller practices. Other factors influencing the degree to which due diligence procedures were rigorously applied included a familiarity with clients, the customer profile of the practice and an opinion that the risk to the practice (and indeed the sector as a whole) was minimal. This may be perceived as reflecting a risk-based assessment that ensures that due diligence resources are appropriately directed to higher risk situations. Alternatively, it could be suggested that some practitioners simply failed to appreciate the money laundering or financing of terrorism risks that their practice faced.

Benefits of and concerns regarding anti-money laundering/counter-terrorism financing obligations

Businesses are able to derive a number of benefits from seeking to minimise their involvement in money laundering or financing of terrorism. These include both reputational benefits in not being associated with criminal activities undertaken by their clients, as well as financial benefits of preventing risks of financial crime that might be perpetrated against their own

business. Accordingly, legal practices could well be supportive of government attempts to prevent illegal behaviour through the use of AML/CTF controls. However, they might 'object to the imposition of reporting requirements that they believe are intrusive, costly and whose effectiveness is not clearly supported by factual data' (Sica 2000: 59).

When the present respondents were asked about the benefits to be derived from implementing standard AML/CTF procedures, fewer than half (43%) believed that CDD would produce a high or very high benefit to their legal practice in minimising either risks of inadvertent money laundering or financing of terrorism. Respondents considered suspicious matter reporting, client identification and staff training as the three most 'useful' AML/CTF procedures, where 'usefulness' was defined as providing a very high or high benefit to practitioners. The costs associated with introducing or implementing AML/CTF procedures and of undertaking ongoing compliance were of considerable concern for respondents, perhaps influenced by the majority of respondents being sole practitioners for whom cost considerations are likely to be important. It should also be noted that the perceived costs of compliance may have changed since this survey was undertaken.

Seventy-one percent of respondents had high or very high concerns about the cost of implementation and 76 percent had a similar level of concern about the cost of ongoing compliance activities. Related to these concerns was the likely necessity of offsetting these costs by increasing legal costs to clients, such as by increasing minimum charge-out rates, or raising additional disbursements—71 percent of respondents had high or very high expectations that this course of action might have to be taken. Concerns about cost were not unexpected since many previous studies have estimated that AML/CTF compliance (for other sectors) is expensive and complicated (eg see Gill & Taylor 2004; Harvey 2008a, 2008b; Saythe 2008), although others have noted that estimating accurate costs of compliance is a difficult exercise (Doyle 2007; Harrington, Morgensten & Nelson 2000). However, Australia's risk-based approach allows reporting entities to tailor their compliance programs and expenditure to the level of risk they determine to be applicable to their individual circumstances, with the outcome

being that low-risk entities might be likely to have relatively low levels of compliance costs.

The impact of AML/CTF procedures on solicitor/client relationships, the application of legal professional privilege and the effects on legal practice more generally were of considerable concern to at least half of the respondents, although these concerns did not rank as highly as concerns regarding cost. Some concerns stemmed from the uneasy partnering of suspicious matter reporting and other reporting obligations with a lawyer's duty to maintain professional confidentiality. A number of respondents expressed the view that they may be, in some instances, forced to breach legal professional privilege and client confidentiality in order to comply with AML/CTF obligations. In the words of one respondent, there was some unease about 'having to treat every client, including ordinary law-abiding citizens, friends and close personal acquaintances as potential money launderers and supporters of terrorism' (questionnaire respondent personal communication 2010). Whether concerns of this nature continue to be raised if particular legal professional services are brought within the AML/CTF regime remains to be seen.

Awareness-raising for the profession

AUSTRAC (2007: np) has acknowledged that 'by building stronger and more cooperative relationships with the reporting entities it regulates and by nurturing a culture of voluntary compliance with the law', the effectiveness of the AML/CTF

regime in Australia will be maximised. In addition to AUSTRAC's ongoing industry consultations and development of red-flag indicators of anti-money laundering (AML) risk for lawyers, the Law Council of Australia has released an AML Guide for legal practitioners that suggests a number of strategies to minimise possible risks of money laundering, such as having policies on cash handling and procedures for a number of specified matters such as dealing with unexplained changes in the client's instructions. Working with AUSTRAC, it has also widely circulated AUSTRAC information on practitioners' existing AML/CTF obligations and has published another article on money laundering red flags that may assist the profession in identifying and mitigating the risks involved (LCA 2012).

Arguably, there is a need to continue criminological research into aspects of AML/CTF that will provide a comprehensive understanding of the actual and/or emerging vulnerabilities that professionals face. This could include the identification of new and emerging areas of risk that legal practices face, based on sanitised case studies derived from law enforcement and other intelligence sources, as well as in-depth analysis of official statistics and data collected by regulators and other agencies.

Future research could also monitor changes in attitudes of legal professionals to the AML/CTF regime, if it were introduced, in order to identify areas of particular concern that might need additional resourcing in terms of education and dissemination of information.



Introduction

The primary aims of those who commit organised and economic crimes are to secure a financial advantage and to be able to make use of their criminal proceeds without being detected by law enforcement and regulatory agencies. Many criminals, but by no means all, seek to disguise the origins of their criminal proceeds by engaging in a process of money laundering. Others, however, simply spend the money obtained with little attempt at concealment, which often leads to detection by law enforcement and regulatory agencies, prosecution and punishment. Organised criminals, in particular, see many benefits in money laundering that include the ability to enhance their lifestyle and to enable the profits of their crimes to be reinvested in future criminal activities or in legitimate or illegitimate business operations.

There are three stages to laundering the proceeds of crime. In the initial or placement stage, the money launderer introduces illegal profits into the financial system. In some cases, illegally obtained funds may already lie within the financial system, such as where funds have been misappropriated electronically from the accounts of businesses. Placement can also entail splitting large amounts of cash into less conspicuous smaller sums that are then deposited directly into a bank account (an activity also known as *structuring*), or by purchasing a series of financial instruments (eg cheques or money orders) that

are then collected and deposited into one or more accounts at other locations.

After the funds have entered the financial system, the money launderer may engage in a series of transactions to distance the funds from their source. In this *layering* stage, the funds might be channelled through the purchase of investment instruments, or by transferring money electronically through a series of accounts at various banks. The launderer might also seek to disguise the transfers as payments for goods or services, thus giving them a legitimate appearance. Another device used at the layering stage is to use corporate and trust vehicles to disguise the true beneficial ownership of the tainted property.

Having successfully processed criminal proceeds through the first two phases, the money launderer then moves to the third or *integration* stage, in which the funds re-enter the legitimate economy. The launderer might choose to invest the funds in real estate, luxury assets, or business ventures. It is at this stage that criminals seek to enjoy the benefits of their crimes, without risk of detection.

Although the immediate aims of financing terrorist activities and laundering the proceeds of crime are different, many of the techniques used are similar.

Rather than trying to distance the funds from the crime, terrorists will want to move money undetected from the source of the fundraising

activity to the location of the group or persons that will carry out the terrorist activity. This may be a physical distance, in the case of fundraisers in one location supporting activity in elsewhere, or it may involve moving legitimate income to allow the purchase of goods or services, for example, to provide general support to a terrorist or group of terrorists or to directly finance a terrorist act (FATF 2010: 23).

In response to mounting international concern about money laundering, FATF was established in 1989. FATF is an inter-governmental body that sets international standards and develops and promotes policies to combat money laundering and terrorist financing. In 1990, FATF issued a set of 40 Recommendations to combat money laundering. The current 40 Recommendations, which have been revised on a number of occasions to reflect changing concerns and priorities, set out the framework for AML efforts and provide a set of countermeasures covering the criminal justice system and law enforcement, the financial system and its regulation, and measures to enhance international cooperation (FATF 2004a, 2012).

The FATF 40 Recommendations have three primary objectives:

- to support the criminalisation of money laundering and the financing of terrorism;
- to ensure that assets linked to money laundering or the financing of terrorism can be frozen and confiscated; and
- to ensure that financial institutions and other regulated businesses comply with the recommendations.

In keeping with most comparable regulatory regimes, Australia's current AML/CTF regime is risk based. The regime requires businesses supplying designated services to comply with the legislation but leaves it to the discretion of the affected parties as to how they meet some of these obligations. The focus in the legislation is on the nature of the service rather than on the nature of industry sector involved. The reporting entity, rather than AUSTRAC, is given responsibility for both determining the level of risk represented by any customer and any transaction and the appropriate response. The presumption is that a risk-based regime allows businesses to

be given more latitude in determining what level of risk any particular client or transaction represents and how best to manage that risk (Ross & Hannan 2007).

Recommendation 22(d) of the revised 2012 FATF Recommendations requires lawyers, notaries, other independent legal professionals and accountants to apply the CDD and record-keeping requirements when they prepare for or carry out transactions for their clients concerning the following activities:

- buying and selling of real estate;
- managing of client money, securities or other assets;
- management of bank, savings or securities accounts;
- organisation of contributions for the creation, operation or management of companies; and
- creation, operation or management of legal persons or arrangements,
- buying and selling of business entities (FATF 2012).

The question that has arisen is whether it is necessary and desirable to extend the AML/CTF Act to specified services provided by these business and professional sectors, particularly in light of the national legal professional reform also being undertaken throughout participating states and territories (AGD 2012). The benefits of extending AML/CTF regulation to legal professionals largely depends on the level of risk of involvement in money laundering and financing of terrorism found to be present and whether the costs of regulating them outweigh the likely benefits to be derived in terms of minimising financial crime and assisting in the investigation and prosecution of those alleged to have acted illegally. In addition, consideration needs to be given to the international implications of Australia being non-compliant with the FATF recommendations.

Designated non-financial businesses and professions

Those seeking to launder the proceeds of their crimes or to finance terrorist activities often make use of conventional business structures and

commercial activities. Central to legitimate business activity is the need to create corporate entities with which to carry out business transactions and to buy and sell property and other assets to expand opportunities and to maximise profits. Professional advisers may play a central role in facilitating these activities and both legitimate business people, as well as criminals are able to make use of the services that professionals provide to expand their operations and to maximise their profits. Some money laundering activities entail complex financial structures, transactions and many corporate entities and criminals may seek to engage the services of professionals in order to help them navigate their way through the creation and use of such devices (Levi 2008). The concern is that professional advisers could become party to laundering the proceeds of crime for their clients, or facilitating the financing of terrorism on behalf of their clients. On rare occasions, professionals themselves may seek to launder the proceeds of their own criminal activities, such as where they have acquired funds illegally from their clients, or otherwise engaged in dishonest business practices and wish to disguise the origins of the proceeds of their crimes.

As a result of those risks that arise through the potential for professional advisers to be unwittingly involved in facilitating money laundering and the financing of terrorism, FATF determined to bring various business sectors within the AML/CTF regulatory regime. The DNFBPs identified by FATF as posing risks of this kind are:

- legal practitioners, notaries, other legal professionals and accountants providing services to external clients;
- casinos;
- real estate agents;
- dealers in precious metals;
- dealers in precious stones; and
- trust and company service providers.

There are two principal ways in which DNFBPs can become involved in money laundering and financing of terrorism. First, DNFBPs may commit financial crimes that generate funds that require laundering (see Box 1). Secondly, DNFBPs may give advice to their clients, assist, encourage or otherwise facilitate laundering of funds generated by the illegal activities of their clients (see Box 2).

Despite the few reported examples of DNFBPs being involved as advisers and facilitators of money laundering, there remains a potential for them to be unwittingly or intentionally involved. Nelen (2008), for example, has identified possible links between the real estate sector and organised crime groups who seek to launder the proceeds of their crimes. More recently, professional services, including accountants, solicitors and real estate agents, have been identified among the sectors involved in AUSTRAC case studies between 2007 and 2010. AUSTRAC's typology reports show that 23 of the 174 case studies presented from 2007 to 2010 (13%) involved individuals within these sectors. Of the 23 cases, two involved lawyers as defendants.

Professionals may be targeted by those wishing to launder the proceeds of crime, owing to the fact that laundering has become a higher risk activity for criminals who make use of the regulated financial services sector. Principles of crime displacement dictate that if crime becomes too difficult owing to the presence of capable guardians or effective regulatory measures, criminals will choose easier and less risky methods of activity. In the words of FATF (2008a: 9):

Regardless of the strength and effectiveness of [anti-money laundering/counter-terrorism financing] controls, criminals will continue to attempt to move illicit funds undetected and will, from time to time, succeed. They are more likely to target the DNFBP sectors if other channels become more difficult. For this reason, DNFBPs, including dealers in precious metals and stones may be more or less vulnerable depending on the effectiveness of the AML/CTF procedures applied in other sectors.

Vulnerabilities of the legal sector

Legal professionals, like other DNFBPs, have been described as providing a 'gatekeeper' service in the facilitation of money laundering. As Schneider (2006: 39) explains:

lawyers are not the money laundering end, but a means to an end; they play an intermediary role by facilitating access to other money laundering vehicles—bank accounts, real estate, companies, 'safe haven' countries, etc.

Box 1 Examples of legal practitioners laundering the proceeds of their own financial crimes

Example 1 (Australia)

An Australian-based solicitor structured funds to an offshore account in Hong Kong. It is believed that at times he actually carried cash to Hong Kong. His colleague, a Hong Kong-based solicitor, arranged for the creation of offshore companies in the British Virgin Islands and bank accounts in Hong Kong to receive structured funds from Australia. These funds were then transferred to other countries by the Hong Kong-based solicitor in order to hide them from authorities or were returned to Australia in order to appear legitimate (AUSTRAC 2007a).

Example 2 (Singapore)

A former lawyer in Singapore allegedly embezzled Sing\$12m from a client's account in his law firm. The individual then bought Sing\$2m worth of jewellery and precious stones from a high-end jewellery store before leaving the country. He reportedly transferred Sing\$1.8m to the jeweller's bank account and paid a further Sing\$270,000 using a cash cheque from the client's account of his law firm (Lum 2007).

The manner by which legal professionals can potentially facilitate the laundering of funds centres on their role in the provision of advice and legal assistance around investments, company formation, trusts and other legal arrangements (FATF 2004a; He 2006; Schneider 2006). This may include recommendations and advice regarding the use of certain accounts, such as trust accounts and offshore accounts, in which to place and layer funds, the establishment of shell or legitimate companies, and/or the purchase of financial instruments or other assets such as real estate. These actions, if used for illicit purposes, can be used to shape complex money laundering schemes that act to conceal or legitimise the source of illegally derived funds.

The nature of professional culpability

Smith (2013) has explored the ways in which professionals can become involved in acting illegally, either for their own benefit, or on behalf of their clients, by assessing the intentions behind their actions and the extent to which these are blameworthy. Prior research into financial crime by professionals has identified situations in which lawyers have unwittingly been involved in illegal activities conducted by their clients (Smith 2004). Involvement in money laundering can occur on a continuum of culpability involving varying degrees of *mens rea*. Figure 1 is a diagrammatic representation of the typologies involved, arranged in ascending order of seriousness.

The differing levels of criminality and or misconduct shown in Figure 1 exist on three levels—unwitting involvement of professions in illegality, situations in which professionals entertain suspicions that their clients might be acting illegally and the most serious cases of actual involvement in money laundering. The least serious cases arise where professionals are completely ignorant of what their clients are undertaking in terms of illegality, such as might occur where an organised criminal makes use of a lawyer to support an illegal activity that is entirely covert and without any evidence that the professional could ascertain to become aware of the illegal activity. Instances of unwitting involvement could also arise due to inadequate professional standards being demonstrated by the lawyer, thus enabling them to be drawn into their clients' illegal activities through ineptitude. Cases could also arise where lawyers fail to understand the intricacies of what their clients are doing, such as could occur where sophisticated clients embark upon complex financial international transactions that exceed the professional competency of their advisers. Such instances could result in professional disciplinary action with further remedial education being ordered, or supervisory conditions placed on the right to practise. More serious instances of involvement could be described as 'client-centred altruistic behaviour', in which professionals seek to do everything feasible in order to meet their clients' expectations, regardless of their professional obligations of probity. This could lead to advice being given or corporate structures created in the absence of due diligence and thorough

Box 2 Examples of legal practitioners facilitating the laundering of the proceeds of their clients' financial crimes

Example 1 (Australia)

Legal practitioners have been linked to tax evasion cases investigated in Operation Wickenby in recent years.

In February 2010, a solicitor was found guilty of conspiring to dishonestly cause a risk of loss to the Commonwealth. He outlined a mechanism to enable a client who had been convicted of tax evasion and a bankruptcy offence, to evade paying tax to the Australian Government by claiming income as payment for legal fees. The court found that the solicitor had received a fee of \$22,000 for his role in the scheme. In March 2003, he was found to have sent an email to a Swiss-based accounting firm, which (the court held) was a calculated deception to enable his client to evade tax. The solicitor consented to a pecuniary penalty order for the fee he received and \$1,000 in legal fees, and was sentenced to two years' imprisonment to be released on recognisance after serving 12 months (2010 [VSC 121], see also ACC 2011: 41).

Example 2 (United Kingdom)

In March 2011, a solicitor in Wales was convicted at Cardiff Crown Court of money laundering and perverting the course of justice in connection with the purchase of properties on behalf of a convicted drug trafficker. The solicitor was sentenced to four years and eight months' imprisonment. The solicitor acted on behalf of his friend to fraudulently secure mortgage advances and to launder the proceeds of drug trafficking by buying property. Fraudulent mortgage transactions worth more than £650,000 were involved over an 18 month period that were in direct contravention of regulations that clearly stated that a solicitor cannot act for a buyer and provide funds at the same time. In October 2009, police undertook a search of the solicitor's home leading to the restraint of all his assets, including his black Lamborghini Gallardo worth more than £80,000. In February 2011, the solicitor applied to the court for permission to sell the car but further investigations revealed that it had already been sold in defiance of the court order. The solicitor was again arrested and further charged in relation to this offence (Wales Online 2011).

Example 3 (United Kingdom)

In 2010, one of Nigeria's wealthiest and most influential politicians was arrested in Dubai and then extradited to London. Some \$35m of his alleged UK assets were frozen in 2007. As his trial at London's Southwark Crown Court was about to begin, he changed his plea to guilty and admitted stealing money from Delta state and laundering it in London through a number of offshore companies. His London solicitor was convicted of laundering \$37m through offshore companies and investment properties, and was sentenced to 10 years' imprisonment (Nigeria ex-Delta state governor guilty plea. BBC News Africa 27 February 2012. <http://www.bbc.co.uk/news/world-africa-17181056>).

Example 4 (Canada)

A lawyer was employed by an international drug importer to launder the proceeds of his criminal activity. The lawyer established a web of offshore companies in a country with weak corporate regulations on behalf of his client. These companies were then used to hide the movement of the proceeds of crime case. He also cooperated with several other lawyers for the use of their trust accounts to receive cash and transfer funds (APG 2008).

Example 5 (United States)

In a US case, the defendant attorney agreed to assist in the laundering of illicit funds by transferring them through his client account to a fictitious corporation in the Cayman Islands. The attorney advised the proprietor of the funds that the Internal Revenue Service could not reach the Cayman Islands corporation due to there being no relevant tax treaty between the United States and the island. The attorney also suggested that a corporation with an associated bank account be established in Liechtenstein as an additional destination for illicit funds to be transferred to via his client account. He later unknowingly confessed to undercover agents that due to his lawyer–client privilege he believed that would not be forced to answer to the queries of law enforcement services nor the criminal justice system regarding his client account (Bell 2002).

investigation of the legality of what is being proposed by the client (Smith 2013).

More serious situations arise where professionals act negligently in investigating their clients' proposals, not taking adequate steps to find out what is being undertaken. More serious still are situations in which

wilful blindness is present—where lawyers simply fail to ask appropriate and relevant questions or omit to take steps to find out what their clients are engaged in. Finally, professionals could act with reckless disregard of the risks, having clear suspicions that their clients are acting illegally, but refusing to explore what is being proposed. At the highest level of

Figure 1 A continuum of professional misconduct



culpability are situations where lawyers have actual knowledge of illegality being conducted by their clients, or where they acquiesce in their clients' illegality, perhaps even indirectly facilitating it for personal gain. The most serious cases arise where lawyers actually instigate criminal activities themselves and make use of criminals to assist their involvement in organised crime (Smith 2013).

Each of these scenarios can result in a range of regulatory interventions that reflect the seriousness and culpability of the conduct involved. Regulatory responses can include the use of conciliation, civil action, disciplinary action and criminal action. Sanctions attaching to each of these approaches include (arranged also in order of seriousness) requirements to deliver apologies, financial compensation, licensing restrictions, fines, non-

custodial orders and in rare cases, imprisonment. The range of systems and sanctions (or mechanisms for redress) can be presented in a regulatory pyramid based on frequency of use and severity of sanctions, such as that used in the responsive regulatory model proposed by Braithwaite (2002). Smith (2004) explains how the many different systems that exist should be used having regard to their aims and to their ability to alter the behaviour of offenders and others in the professional community. To impose condign punishment such as imprisonment may be satisfying in the retributive sense for a complainant, but it may do nothing to ensure that misconduct is not repeated and that others refrain from engaging in similar forms of deviance in the future.

In addition, thought needs to be given to expanding the range of available responses to deal with money

laundering by professionals. Sanctions such as adverse publicity, other financial penalties, or further compulsory training in ethics and professional conduct could be considered. Adverse publicity is a powerful sanction when directed against professionals, although care must be taken that this is not used in an oppressive or unfair way, or in such a way as to permit 'grandstanding' of criminal conduct (Smith 2013).

Based on the results of the present survey research, it may be the case that a high proportion of lawyers will never encounter, or be involved in, or aware of situations of money laundering during their careers and, if they do, as professionals governed by codes of practice will act appropriately to report their suspicions officially to police and regulatory agencies. A small number will, however, act illegally themselves or facilitate money laundering by their clients. Others may unwittingly become involved in money laundering activities perpetrated by their clients. It is to this very small group of individuals that effective preventive and disciplinary measures need to be directed. What is needed is for the risk environment in which professionals practice to be publicised and for the dangers of involvement in money laundering to be illuminated and explained.

Anti-money laundering/counter-terrorism financing regime

A number of jurisdictions subject to FATFs Recommendations have engaged in substantial debate over the application of AML/CTF regimes to the professions and the result of this debate has been the adoption of a variety of approaches. Generally speaking, AML/CTF laws pose considerable problems for the professions. There are particular problems for legal practitioners even where legal professional privilege is maintained after the implementation of AML/CTF requirements. AML/CTF regulatory requirements may result in a substantial impact on the relationship between practitioner and client, which may impinge on the ability of the professional to provide a fully informed service to their client. Additionally, many professionals may find themselves in the position of having unwittingly committed a criminal offence while carrying out their professional responsibilities (He 2006).

In Australia, the AML/CTF Act came into force on 12 December 2006 and covers both industry sectors

with obligations under the *Financial Transaction Reports Act 1988* (Cth) (including the prudentially regulated financial sector) and a range of other designated businesses and their services. The following is a list of the currently regulated sector under the AML/CTF Act (designated entities within each regulated sector appear in brackets):

- banking (banks, building societies, credit unions, finance corporations, housing societies, merchant banks);
- alternative remittance (independent remitters, remittance providers);
- securities/derivatives (futures brokers, mortgage and network finance providers, securities dealers);
- managed funds/superannuation (investment companies, managed funds, principle or discretionary, traders, retailers, superannuation trusts, unit trusts);
- gambling (casinos, on course bookmakers, pubs and clubs, on-line bookmakers, totalisers);
- foreign exchange (foreign exchange providers, payment service providers, cash carriers, travellers cheques issuers); and
- financial services (factorers, forfeiters, hire purchase companies, lease companies, pastoral houses, friendly societies, life insurers).

In Australia, a range of obligations exist at present under the *Criminal Code Act 1995* (Cth), the *Charter of the United Nations Act 1945* (Cth), the *Proceeds of Crime Act 2001* (Cth), and the *Financial Transaction Reports Act 1988* (Cth). concerning the financing of terrorism. These relate, inter alia, to getting funds to, from or for a terrorist organisation, providing support to a terrorist organisation, financing a terrorist, dealing in the proceeds of crime, or dealing with property reasonably suspected of being proceeds of crime, dealing with freezable assets, giving an asset to a proscribed person or entity, notifying the AFP of controlled assets and reporting to AUSTRAC significant cash transactions.

Money laundering offences are criminalised at the Commonwealth level in Division 400 of the *Criminal Code Act 1995* (Cth). The definition of money laundering in the *Criminal Code Act 1995* (Cth) is broad and does not delimit predicate offences, unlike in other countries that specify a list of relevant predicate offences. Predicate offences are,

instead, those that attract a minimum sentence of at least one year's imprisonment. Australia's money laundering offences are distinguished from each other according to the amount of money involved in the activity and the level of intent of the accused.

Aims of the study

This report presents the findings of an AIC survey of legal professionals and was designed to contribute to the Australian Government's policy development concerning the proposed extension of the AML/CTF legislative regime to the legal profession. The report aims to:

- describe how legal practices perceive the money laundering and financing of terrorism risks posed by their clients and their clients' transactions;
- identify the risk management tools currently employed by legal practices; and
- outline the perceived benefits and noted concerns regarding the capture of legal professionals under the AML/CTF Act.

This research project was approved by the AIC's Human Research Ethics Committee in February 2010 (Application PO149).

Methods

The survey of legal practices was developed with the assistance of the Law Council of Australia (the national representative body for the Australian legal profession), which has represented the interests of Australian legal professionals in relation to government policy on the AML/CTF obligations since 2005. Its members are the state and territory law societies and Bar Associations, as well as the Law Firm Group. These are known as the 'constituent bodies' of the Law Council of Australia and include the:

- Australian Capital Territory Bar Association;
- Bar Association of Queensland Inc;
- Law Institute of Victoria;
- Law Society of New South Wales;
- Law Society of South Australia;
- Law Society of Tasmania;

- Law Society of the Australian Capital Territory;
- Law Society of the Northern Territory;
- Law Society of Western Australia;
- New South Wales Bar Association;
- Northern Territory Bar Association;
- Queensland Law Society;
- South Australian Bar Association;
- Tasmanian Bar Association;
- Victorian Bar Inc;
- Western Australia Bar Association; and
- LLFG Limited (a corporation with large legal practice members).

During 2009, a questionnaire was developed by the AIC with the assistance of the Law Council of Australia and its constituent bodies in New South Wales, Victoria, Queensland and the Australian Capital Territory. These were the jurisdictions that agreed to assist in the research project following the AICs request to the Law Council of Australia in March 2009 that was addressed to all jurisdictions. The final survey instrument is contained in *Appendix 2*, along with the template of the covering letter which was sent to legal practices by the relevant constituent bodies in their respective states and the Australian Capital Territory (see *Appendix 1*), and an accompanying Glossary of Terms used in the questionnaire (see *Appendix 3*).

In March 2010, the questionnaire was sent to a total of 7,946 legal practices in New South Wales, Victoria, Queensland and the Australian Capital Territory by the following law societies:

- NSW Law Society (sent to 3,602 practices);
- Law Institute of Victoria (sent to 2,764 practices);
- Queensland Law Society (sent to 1,422 practices); and
- ACT Law Society (sent to 158 practices).

Reminders were also sent by the respective law societies between March and April 2010.

The survey was voluntary and the identity of the practices and individuals who received and responded to the survey was not disclosed to the AIC. Each participating practice received information about the project and instructions on completing the survey. It was suggested that

Table 1 Distribution of legal practice business models

Business model	n	%
Sole practitioner	284	63
Partnership	82	18
Incorporated practice	81	18
Multidisciplinary practice	6	1
Community legal centre	0	0
Total ^a	453	—

a: Respondents could select multiple responses

Note: This Table presents data on responses to question 1: *Please select the types of business models which most closely represent your legal practice*

Source: AIC Legal Professionals Survey [computer file]

Table 2 Distribution of number of full-time equivalent legal practitioners currently in practice^a

Legal practitioners (n)	n	% ^b
1–5	383	87
6–10	26	6
11–20	15	3
21–99	13	3
100+	3	<1
Total	440	

a: Full-time employed legal practitioners with a current practising certificate

b: Percentages may not total 100 due to rounding

Note: This Table presents data on responses to Question 3: *How many full-time equivalent legal practitioners with a current practising certificate did your practice have on 30 June 2009?*

Source: AIC Legal Professionals Survey [computer file]

the person in the practice with the most relevant expertise on risk management (which may specifically include AML/CTF) should respond to the survey questions and for that person to canvass the views of others within the practice, where necessary, prior to answering the questions. Surveys could either be completed online by logging on to the relevant law society site (no password was required to log on, ensuring responses were anonymous) or in hard copy form. Respondents who completed hard copies of the survey were requested to post the survey to the AIC. In order to preserve anonymity, no completed surveys were accepted by the AIC as email attachments. In addition, the questionnaire did not ask the respondent in which state or territory their practice was located, again in order to preserve confidentiality. Respondents were asked questions concerning activities in the period 1 July 2008 to 30

June 2009.

About the respondents

Of the 7,946 mail outs, a total of 443 responses (373 online and 70 postal) were received, representing a response rate of 5.6 percent. Three respondents, who answered only one question before exiting the survey were removed from the final sample, leaving a total of 440 useable responses. Such a small sample of respondents raises the possibility that any practitioners who potentially have, or indeed had, some personal involvement in illegal or unprofessional activities might have chosen not to respond to the survey. There is also the risk that respondents could have been less than honest in their responses to some questions. These issues of sampling and veracity arise in any self-report study

Table 3 Distribution of practices' geographical scope

Geographical scope	n	% ^a
Single location practice within one state/territory	376	85
Multiple location practice within one state/territory	34	8
Practice with one or more regional offices	13	3
Practice with one or more interstate offices	16	4
Practice with one or more international offices	1	<1
Total	440	

a: Percentages may not total 100 due to rounding

Note: This Table presents data on responses to Question 2: *Please select the geographical scope which most closely represents your legal practice*

Source: AIC Legal Professionals Survey [computer file]

Table 4 Primary role of respondent in legal practice

	n	% ^a
Proprietor/partner/principal/director	392	89
Practice manager	21	5
Practice manager	18	4
Risk manager	1	<1
AML/CTF compliance officer	0	0
Other ^b	8	2
Total	440	

a: Percentages may not total 100 due to rounding

b: Includes Accounts Manager, Financial Controller, Chief Financial Officer, Consultant, Finance and Administration Manager and Finance Manager and Accounts and Practice Management Support

Note: This Table presents data on responses to Question 4: *Which of the following best describes your primary role?*

Source: AIC Legal Professionals Survey [computer file]

and conclusions need to take these methodological considerations into account. While the number of respondents was small, the survey respondent profile was consistent with that of New South Wales (in terms of practice size), which has the largest concentration of legal practitioners and legal practices in Australia (ABS 2010, 2009). Accordingly, it is reasonable to assume that the responses were representative of the practices surveyed in the states and territories in question.

Almost two-thirds of respondents (63%), when asked to select the types of business models that most closely represented their legal practice, chose 'sole practitioner'. No respondents indicated that their practice was a community legal centre (see Table 1).

The majority of survey respondents (87%) also reported having five or fewer full-time equivalent legal practitioners with a current practising certificate in the 12 month period ending 30 June 2009 (see Table 2).

Respondents were also asked to indicate the geographical scope of their practice—that is, whether it had a single location in one state or territory, had multiple locations, or had regional, interstate or international offices. The dominant response chosen was a 'single location' practice based in one jurisdiction (85%). This profile is also consistent with statistics published by URBIS (2010) for the Law Society of New South Wales. Table 3 shows the distribution of practices' geographical scope.

Table 5 Types of services provided by the respondents' practices

Services	Extent to which services were provided									
	Always		Often		Sometimes		Seldom		Never	
	n	%	n	%	n	%	n	%	n	%
Managing your clients' money, securities, and other assets	10	3	19	4	57	13	86	20	268	61
Managing your clients' banking and other accounts	4	1	2	<1	26	6	62	14	346	79
Creating, operating, or managing legal entities and arrangements	11	3	53	12	120	27	98	22	158	36
Organising the financial contributions for creating, operating, or managing companies	2	<1	7	2	28	6	64	15	339	77
Buying or selling business entities	27	6	104	24	130	30	67	15	112	25
Buying or selling real estate	110	25	174	40	54	12	21	5	81	18

Note: Row percentages may not total 100. This Table presents data on responses to Question 5: *To what extent did your practice provide each of the following services during the 12 months ending 30 June 2009?*

Source: AIC Legal Professionals Survey [computer file]

The majority of respondents self-identified as the proprietor/partner/principal/director (89%) of the practice, followed by practice managers (5%) and practitioners (4%; see Table 4). Only two respondents identified themselves as the practice's chief financial officer (both respondents indicated their practices had between 21 and 99 full-time equivalent legal practitioners) and one respondent self-identified as the practice's risk manager (this respondent indicated that their practice had 100 or more full-time equivalent legal practitioners). No respondent self-identified as the practice's AML/CTF compliance officer.

The types of services provided by the respondents' practices were diverse (see Table 5). The most common services provided (indicated by the respondent as *often* or *always* providing this service) during the 12 month period ending 30 June 2009 were:

- buying or selling of real estate properties (65%);
- buying or selling of business entities (30%); and
- creating, operating, or managing of legal entities and arrangements (15%; see Table 5).

Over three-quarters (79%; n=346) of respondents indicated that they had never been involved in managing their clients' banking and other accounts or organising the financial contributions for creating, operating, or managing companies.

As noted above, Recommendation 22(d) of the revised 2012 FATF Recommendations, requires lawyers, notaries, other independent legal professionals and accountants to apply the customer due diligence and record-keeping requirements only when they prepare for or carry out transactions for their clients concerning certain specified activities. On the basis of the information provided in Table 5, it appears that the following percentages of respondents in the present survey *never* engaged in each of the following types of potentially regulated activities (noting that the survey questions did not exactly match the FATF recommendation):

- managing of client money, securities or other assets (61% never provided this service);
- management of bank, savings or securities accounts (79% never provided this service);

- creation, operation or management of legal persons or arrangements (36% never provided this service);
- organisation of contributions for the creation, operation or management of companies (77% never provided this service);
- buying and selling of business entities (25% never provided this service);
- buying and selling of real estate (18% never provided this service).

Accordingly, of the 440 respondents, between 21 percent and 82 percent had engaged in relevant services during the 12 months ending 30 June 2009. Owing to the small number of respondents, it was not possible to analyse the data for those who did and did not provide relevant services, although it should be noted that a number of respondents would not be practising in areas subject to AML/CTF regulation.

Following collection of the responses from the participants, the AIC analysed the data and prepared a draft of the report that integrated the findings with information from a range of other sources. In order to ensure the validity of the findings, the AIC also spent considerable effort and time having them reviewed and workshopped with key government agencies, as well as the Law Council of Australia and its constituent bodies.

Structure of the report

This report of the findings of the survey is organised into four sections, following this introductory material. The first section examines perceptions and knowledge among the Australian legal professionals surveyed concerning money laundering/terrorism financing risks and the types of clients or client encounters that may indicate involvement in such illegal activities. The following section describes the types of risk-management practices (client identification procedures and OCDD) that are recommended for use in counteracting potential money laundering or financing of terrorism and the extent to which they are currently used in the Australian legal practices surveyed. Since legal professionals may be obliged to perform risk management procedures if brought within the AML/CTF Act, this section also reviews the reasons some professionals or practices preferred to not regularly apply them.

The penultimate section considers the three central concerns of the legal profession regarding AML/CTF obligations namely, cost, other regulatory burdens and the nature of the lawyer–client relationship. The former two represent concerns expressed by most sectors recommended for additional regulatory oversight but the third, specific to the legal fraternity, represents a fundamental principle of the rule of law. The final section outlines some of the potential consequences of including the legal profession within the AML/CTF legislative regime and outlines possible directions for further research in this area.

Perceptions of risk

A number of methods have been identified by which businesses including DNFBPs can facilitate and commit money laundering—either unwittingly, or intentionally. Typology reports, such as those prepared by the FATF, AUSTRAC and the Asia–Pacific Group on Money Laundering (APG), that are based on real-life cases illustrate some of the detected methods by which lawyers have facilitated and/or committed money laundering in the past. In the 2008 APG typologies report, summaries of cases of money laundering are presented that involved:

- the use of a lawyer's trust account to purchase property using bank drafts purchased overseas from the proceeds of crime;
- the use of legal arrangements for real estate purchases or to establish offshore companies for the purposes of money laundering; and
- collusion between lawyers and mortgage brokers to avoid suspicious transaction reporting (APG 2008).

AUSTRAC's typology reports (AUSTRAC 2007–12) and its Money laundering in Australia 2011 report (AUSTRAC 2012b), have included few examples

Box 3 Red flags of money laundering risks in the legal profession

Is this an unusual client or transaction for you?

- Why is a client who lives a long distance from your practice contacting you in relation to a retainer that has no geographic connection to your practice?
- Why is a client instructing you in a field or type of work you have not practised in before?
- Why are foreign nationals, who are overseas residents, instructing your practice when you have no connection or profile within that country?

Usual source of funds and third party funding

- How can the third party afford to provide this money?
- Have the funds come from someone else because your client is on the sanctions list and cannot access a bank account of their own?

Sudden changes in instructions

Source: Adapted from The Law Society 2010

of legal practitioners being involved in money laundering. If lawyers are brought within the AML/CTF regime, it could be expected that more attention would be placed on this sector in terms of the number of relevant typology reports involving legal practitioners. The FATF guidance on sector-specific money laundering and terrorism financing risks includes actions that lawyers can take to determine whether a particular client poses a higher than acceptable risk and the potential impact of any mitigating factors on that assessment, based on the lawyer's own assessment criteria and knowledge of the client. Understanding risk is especially pertinent when circumstances, such as difficult economic conditions, may encourage a relaxation of risk-

based decision making in order to accept new, vital business (The Law Society 2010).

Examples of warning signs have been prepared, alongside the aforementioned typology reports, to educate the legal profession about the types of clients and associated instructions that may point to their involvement in illegal activity. Many of these warning signs are well known to the sector already but are distributed, nonetheless, in order to reinforce where risks may lie. A list of potential high-risk behaviours is set out in Box 3.

In Australia, the Law Council's *Anti-Money Laundering Guide for Legal Practitioners* includes suggested risk management approaches in response to key money laundering warning signs

Table 6 Perceptions and experience of money laundering/financing of terrorism risks^a

Situation	Yes		No		Unsure	
	n	%	n	%	n	%
Client requests that the legal practice act as merely an intermediary by receiving and transmitting funds when closing a business transaction						
Potentially involves a money laundering or terrorism financing risk	386	88	23	5	31	7
Practice encountered this	46	10	382	87	12	3
Client insists that the legal practice offer services to a client outside of the area of its expertise or its normal geographic area						
Potentially involves a money laundering or terrorism financing risk	296	67	72	16	72	16
Practice encountered this	62	14	371	84	7	2
Client has unusual or unexpected sources of funding (that remain unexplained)						
Potentially involves a money laundering or terrorism financing risk	382	87	21	5	37	8
Practice encountered this	47	11	366	83	27	6
Client insists on the creation of unnecessarily complicated business structures						
Potentially involves a money laundering or terrorism financing risk	315	72	51	12	74	17
Practice encountered this	35	8	390	89	15	3
Client insists on the creation of unnecessarily complicated transaction paths						
Potentially involves a money laundering or terrorism financing risk	356	81	33	8	51	12
Practice encountered this	21	5	407	93	12	3
Client activity involves undervaluing transactions						
Potentially involves a money laundering or terrorism financing risk	320	73	49	11	71	16
Practice encountered this	59	13	362	82	19	4
Client requests transactions involving suspect countries (eg tax havens) for unexplained purposes						

Table 6 (continued)

Situation	Yes		No		Unsure	
	n	%	n	%	n	%
Potentially involves a money laundering or terrorism financing risk	390	89	19	4	31	7
Practice encountered this	15	3	423	96	2	<1
Client makes regular or unexplained changes to the legal practice's instructions						
Potentially involves a money laundering or terrorism financing risk	204	46	93	21	143	33
Practice encountered this	73	17	351	80	16	4
Client makes regular or unexplained changes to its business entities						
Potentially involves a money laundering or terrorism financing risk	287	65	56	13	97	22
Practice encountered this	18	4	410	93	12	3
Client insists that the legal practice conduct transactions between parties in unusually limited time frames for no evident legal, tax, business, economic or other legitimate reasons						
Potentially involves a money laundering or terrorism financing risk	306	70	47	11	87	20
Practice encountered this	35	8	389	88	16	4
Client insists that the legal practice deal with the trustee of a trust without identifying the existence of the beneficiaries						
Potentially involves a money laundering or terrorism financing risk	279	63	59	13	102	23
Practice encountered this	25	6	401	91	14	3
Client insists that the legal practice facilitate large international funds transfers						
Potentially involves a money laundering or terrorism financing risk	379	86	17	4	44	10
Practice encountered this	24	5	414	94	2	<1
Client insists that the legal practice facilitate transactions involving large quantities of cash for an unexplained purpose						
Potentially involves a money laundering or terrorism financing risk	404	92	14	3	22	5
Practice encountered this	4	1	434	99	2	<1
Client requests that the legal practice facilitate multiple deposits made to the same overseas account by different entities or individuals						
Potentially involves a money laundering or terrorism financing risk	388	88	14	3	38	9
Practice encountered this	3	1	433	98	4	1
Client makes a request to the legal practice for services that are outside of the client's normal business activities or market						
Potentially involves a money laundering or terrorism financing risk	206	47	104	24	130	30
Practice encountered this	60	14	360	82	20	5

a: Percentages may not total 100 due to rounding

Note: This Table presents data on responses to Question 10: *The following situations have been identified as potentially involving a high risk of money laundering (ML) or financing of terrorism (TF) in circumstances in which there is no reasonable justification evident. Please indicate (1) your agreement or otherwise that the situation could potentially involve such a risk, and (2) if your practice has ever had experience of each situation*

Source: AIC Legal Professionals Survey [computer file]

such as those described in Box 3 (LCA 2009).

Risks emanating from areas of practice

In order to understand how legal practitioners perceive money laundering and financing of terrorism risks posed by their clients, and the risks created by their clients' transactions and activities, survey respondents were provided with a series of situations identified as potentially involving a high risk of money laundering or financing of terrorism in circumstances where there is no other reasonable justification evident. Respondents were asked to indicate whether they agreed or disagreed or were unsure whether the situation as presented could potentially involve such a risk and if their practice had ever experienced the situation in question.

From Table 6 it is apparent that 60 percent or more of all respondents regarded the majority of situations presented as suspicious and potentially involving a potentially involving a high risk of money laundering or financing of terrorism in circumstances in which there is no reasonable justification evident. In just two situations (1. clients making regular or unexplained changes to instructions and 2. clients making a request for services outside their normal business activities) fewer than half the respondents indicated that these presented such a risk. These results suggest that the Australian legal sector has a good understanding of money laundering or financing of terrorism risk-related situations. Less than 15 percent of respondents reported that their practice had actually experienced any of these situations.

The situation perceived by the greatest proportion of respondents (92%) as potentially entailing a risk was where a client insists that the legal practice facilitate

Table 7 Assessment of situations not involving a risk of money laundering/terrorism financing but that have been experienced

Situation	n	%
Client requests that the legal practice act as merely an intermediary by receiving and transmitting funds when closing a business transaction	13	1
Client insists that the legal practice offer services to a client outside of the area of its expertise or its normal geographic area	34	8
Client has unusual or unexpected sources of funding (that remain unexplained)	12	3
Client insists on the creation of unnecessarily complicated business structures	22	5
Client insists on the creation of unnecessarily complicated transaction paths	15	3
Client activity involves undervaluing transactions	31	7
Client requests transactions involving suspect countries (eg tax havens) for unexplained purposes	3	1
Client makes regular or unexplained changes to the legal practice's instructions	63	14
Client makes regular or unexplained changes to its business entities	19	4
Client insists that the legal practice conduct transactions between parties in unusually limited time frames for no evident legal, tax, business, economic or other legitimate reasons	27	6
Client insists that the legal practice deal with the trustee of a trust without identifying the existence of the beneficiaries	29	7
Client insists that the legal practice facilitate large international funds transfers	6	1
Client insists that the legal practice facilitate transactions involving large quantities of cash for an unexplained purpose	2	<1
Client requests that the legal practice facilitate multiple deposits made to the same overseas account by different entities or individuals	4	1
Client makes a request to the legal practice for services that are outside of the client's normal business activities or market	57	13

Source: AIC Legal Professionals Survey [computer file]

transactions involving large quantities of cash for an unexplained purpose. Interestingly, only four respondents (1%) reported that they had actually encountered this. Arguably, some respondents could have failed to self-report such activities that should have been reported to the regulator. The situation that the highest proportion of respondents (17%) had actually encountered was where a client makes regular or unexplained changes to the legal practice's instructions. Almost half (46%) of respondents believed that this would present a high risk. The situation for which respondents were most unsure if a risk existed (33%) was where a client makes regular or unexplained changes to the legal practice's instructions.

One group of legal professionals who may be at heightened risk are those who did *not* consider or were unclear whether the situations presented involved a risk of money laundering or terrorism financing but had, in fact, experienced (or were unsure whether they had experienced) such a situation in the previous 12 months. Only a very small percentage of respondents (14% or less) fell into this category (see Table 7). The situation where a client makes regular or unexplained changes to the legal practice's instructions most frequently fell within the category; not presenting as a high risk, but actually being experienced as a high risk in practice. Also, a client may make regular or unexplained changes to the legal practice's instructions and this could be done for innocent reasons. Accordingly, respondents who knew of the reasons would not indicate any risk of money laundering. A similar explanation could arise where clients make a request for services that are outside of the client's normal business activities or market, but for which an innocent explanation exists and is known to the lawyer.

Risks emanating from clients

There is a risk that criminals may not only exploit the expertise of legal professionals (and other DNFBPs) but also their professional status in order to minimise suspicions surrounding their criminal activities. For example, Di Nicola and Zoffia (2004: 208) explain that a

lawyer representing a client in a financial transaction or...providing an introduction to a financial institution lends a certain amount of credibility in the eyes of the transactor because of the ethical standards presumed to be associated with the work of such professions.

Legal practitioners and legal practices should consider whether they are comfortable in acting for, or continuing to act for, high-risk clients or transactions in situations where enhanced due diligence checks may be necessary (Queensland Law Society 2008; see also Law Council of Australia 2009). Such situations include:

- unusual or unnecessarily secretive or obstructive clients;
- clients with unusual or expected sources of funding or settlement requests;
- clients with unusual or unnecessarily complicated business structures or transaction paths;
- clients involved in loss-making or mis-valued transactions;
- litigation matters that are settled 'too easily' (eg settled for a value either significantly above or below what might be normally expect);
- transactions involving high-risk countries;
- unexplained changes in client's instructions or business entities;
- instructions outside the legal practitioners/practices normal geographic area, area of expertise or client market; and
- clients requesting to take shortcuts or bypass standard processes/activities.

Survey respondents were provided with several categories of clients and their behaviours that have been identified as potentially involving a high money laundering or terrorism financing risk. They were asked to indicate whether or not they agreed that each of these circumstances could potentially involve such a risk and also whether or not their practice had ever experienced the client types or behaviours in question.

From Table 8, it is apparent that most respondents did not report encountering the types of clients or behaviours presented. More than half of all respondents flagged each of these circumstances as potentially indicative of suspicious behaviour and for the remainder, there was a tendency to

Table 8 Perceptions and experience of money laundering/terrorism financing risks emanating from clients

Situation	Yes		No		Unsure	
	n	%	n	%	n	%
Client is inappropriately secretive						
Potentially involves money laundering or terrorism financing risk	296	67	52	12	92	21
Practice encountered this	93	21	328	74	19	4
Client's litigation matters are settled too easily and on uncommercial terms						
Potentially involves money laundering or terrorism financing risk	263	59	70	16	107	24
Practice encountered this	26	6	401	91	13	3
Client offers to pay additional fees or a bonus to legal practitioner without due reason						
Potentially involves money laundering or terrorism financing risk	263	59	72	16	105	24
Practice encountered this	13	3	422	95	5	1
Client insists on the use of short cuts or foregoing standard processes						
Potentially involves money laundering or terrorism financing risk	232	52	91	21	117	26
Practice encountered this	102	23	326	74	12	3
Client insists that the legal practitioner receive payment for fees from an unknown or unassociated third party						
Potentially involves money laundering or terrorism financing risk	320	72	43	10	77	17
Practice encountered this	26	6	401	91	13	3
Client asks the legal practice to receive payment for fees in cash where this is an atypical method of payment						
Potentially involves money laundering or terrorism financing risk	340	77	39	9	61	14
Practice encountered this	42	9	386	87	12	3
Client makes unusual or unexpected settlement requests						
Potentially involves money laundering or terrorism financing risk	335	76	39	9	66	15
Practice encountered this	43	10	375	85	22	5
Client insists on services that appear to protect, allow or depend on more client anonymity than is normal under the circumstances						
Potentially involves money laundering or terrorism financing risk	310	70	43	10	87	20
Practice encountered this	20	5	412	93	8	2
Client is a politically exposed person						
Potentially involves money laundering or terrorism financing risk	259	58	46	10	135	30
Practice encountered this	7	2	426	96	7	2

Note: This Table presents data on responses to Question 11: *The following types of clients, and client behaviours, have been identified as potentially involving a high risk of money laundering (ML) or financing of terrorism (TF) in circumstances in which there is no reasonable justification evident. Please indicate (1) your agreement or otherwise that these circumstances could potentially involve such a risk, and (2) if your practice has ever had experience of each*

Source: AIC Legal Professionals Survey [computer file]

be unsure whether the client and their behaviour represented a risk.

The client behaviour that was most often perceived by respondents as posing a high risk was where the client asked the legal practice to receive payment for fees in cash where this was an atypical method of payment (77%). This, however, was only encountered by nine percent of respondents in practice. The client behaviour posing the highest risk that was experienced by the highest proportion of respondents (23%) was where a client insists on the use of shortcuts or foregoing standard processes. More than half (52%) the respondents perceive this client behaviour to entail a high risk of money laundering or terrorism financing. The client type that respondents were most unsure about was politically exposed persons and this client type was actually experienced by only seven respondents (2%). Arguably, some respondents were unsure about the risks associated with politically exposed persons, simply because they were unfamiliar with the term, although the survey instrument contained a comprehensive glossary of terms such as this.

For high-risk situations, one group of respondents who could be seen as being potentially vulnerable

to exploitation were those who did not perceive the specified clients or behaviours as risk indicators and yet reported experiencing such clients or behaviours in practice. As Table 9 shows, this group comprised 15 percent or less of all respondents depending on the client scenario in question. Arguably, there may be legitimate reasons for certain client behaviours, such as a client being secretive in order not to disclose an extra-marital relationship that would not be indicative of money laundering or financing of terrorism risk, and not reported as such.

Refusing to act for high-risk clients

Survey respondents were asked whether their practice ever had concerns that a client was involved in money laundering or financing of terrorism activities and whether their practice had ever refused to act for a client because of such concerns. Overall, very few respondents reported that their practice had had concerns of this nature. Specifically, the reported levels of concern were where a client had been involved in:

Table 9 Assessment of potential clients and behaviours not involving a risk of money laundering or terrorism financing but that have been experienced		
Situation	Not considered/unsure if involving risk of money laundering or terrorism financing	
	n	%
Client is inappropriately secretive	47	11
Client's litigation matters are settled too easily and on uncommercial terms	23	5
Client offers to pay additional fees or a bonus to legal practitioner without due reason	5	1
Client insists on the use of shortcuts or foregoing standard processes	65	15
Client insists that the legal practitioner receive payment for fees from an unknown or unassociated third party	15	3
Client asks the legal practice to receive payment for fees in cash where this is an atypical method of payment	18	4
Client makes unusual or unexpected settlement requests (eg direction of settlement funds to an unknown third party)	26	6
Client insists on services that appear to protect, allow or depend on more client anonymity than is normal under the circumstances	14	3
Client is a politically exposed person	7	2

Source: AIC Legal Professionals Survey [computer file]

- the disguise, transfer or transaction of proceeds of crime (7%; n=29);
- the disguise, transfer or transaction of instruments of crime (2%; n=7); or
- the financing of a terrorist act or organisation (<1%; n=2).

Because so few respondents reported concerns of this nature, it was not possible to determine statistically the proportion of respondents who had chosen to act on their suspicions by refusing to continue their association with these clients.

A very small proportion of respondents indicated that in the preceding 12 months, they had refused to act for a client because of concerns that the client was involved in the following types of illegal behaviour:

- disguise, transfer or transaction of proceeds of crime (3%; n=14);
- disguise, transfer or transaction of instruments of crime (1%; n=4); and
- financing of a terrorist act or organisation (<1%; n=2).

Respondents were asked to describe the steps they took following the refusal to act for such clients. Only two respondents provided any detail, both of whom had refused to act for a client due to suspicions of the client's involvement in the financing of terrorism. One respondent indicated that the practice had notified other practices of what the client was proposing and both had refused to act for the client in all matters.

Conclusion

Legal professionals need to have an understanding of high-risk situations so that they are better equipped to exercise sound judgment in mitigating potential money laundering and terrorism financing risks. Although very few respondents reported having actually experienced situations potentially involving money laundering or financing of terrorism, the results of the present survey suggest that the great majority of legal professionals surveyed had a good understanding of the risks they face. However, some respondents may also have taken the view that the scenarios described were indicative of legitimate client behaviours and accordingly, did not pose any

risk. Arguably, more could be done to inform the legal profession about certain high-risk clients and client behaviours, as the present survey showed that more than a quarter of respondents were unsure about the levels of risk they were facing.

One way awareness of risks could be raised might be through the dissemination of additional information on methodologies to those in the currently unregulated sectors. As noted earlier, AUSTRAC and APG publishes annual typology reports relevant to the region as a whole but several survey respondents indicated that a continuing need exists for more educational materials, such as typology reports and actual case studies that relate specifically to this area of practice. In addition, the Law Council of Australia (2012, 2009) provides considerable information and advice to legal practitioners about AML/CTF—even though the profession has yet to come within the terms of the regulatory regime. Of course, if DNFBPs are included in the regime, it is to be expected that additional educative materials will be provided by AUSTRAC and professional associations, such as occurs overseas. In the United Kingdom where lawyers are subject to AML/CTF regulation, the UK Law Society (2009b: 6) has noted that:

the Society is concerned about the lack of information, particularly for those in the non-financial sector, in relation to warning signs of terrorist financing. The Society appreciate[s] the work being done by FATF to incorporate more terrorist financing methodologies within their typology reports, and encourages both the UK Government and the European Commission to look at ways to develop greater information on terrorist financing methodologies for those outside of the financial sector.

Most professional bodies have an important role in changing the practices of the professional people they represent and their actions are possibly the most effective way to disseminate information. State and territory law societies often organise compulsory continuing legal education for their members, and these and other training courses could provide effective avenues for raising the awareness of the profession about specific AML/CTF topics. In order to be effective

AML training should be included as a part of all induction programs, and should be repeated on a regular basis, with supporting guidance

or reference materials provided as required (Queensland Law Society 2008: 10)

In addition, the legal sector could consider implementing more rigorous measures and controls governing high-risk situations and clients. These might include:

- general training on money laundering and terrorism financing methodologies and risks relevant to legal professionals;
- targeted training to raise awareness among legal professionals providing specified activities to higher risk clients or to legal professionals undertaking higher risk work;
- increased levels of CDD or enhanced due diligence for higher risk situations;
- escalation or additional review and/or consultation by the legal professional or the firm at the establishment of a relationship;
- periodic review of the services offered by the legal professional and/or legal practice to determine whether the risk of money laundering and terrorist financing occurring has increased; and
- reviewing client relationships from time to time to determine whether the risk of money laundering

and terrorist financing occurring has increased.

These measures could address more than one of the risk criteria identified and it may not be necessary for an individual legal professional to establish specific controls targeting each risk criterion (FATF 2008a). The level of education provided to the profession should also take into consideration the risks of money laundering and financing of terrorism present in the legal profession as a whole. The AIC's review of the published literature found little evidence of legal practitioners' deliberate involvement in money laundering and financing of terrorism and no instances of unwitting involvement. It also found that legal practitioners were arguably subject to the most stringent regulation and scrutiny of the DNFBPs considered in the report. Finally, it found that the current self-regulatory procedures within the legal profession provide an acceptable means of locating instances of money laundering, should they arise with in connection with legal practice in Australia (Walters et al. 2013).



Risk management practices concerning new clients

The AML/CTF regulatory regime comprises both domestic legislative requirements, as well as supra-legal obligations such as best practice policies imposed by industry peak bodies and professional associations (Doyle 2007). At the core of the increased emphasis on AML/CTF risk management in Australia lies CDD. Rees, Fisher and Bogan (2008: 150) note that those

employed in the regulated sector of business [as defined in the AML/CTF regulation] are expected to exercise a greater degree of diligence in handling transactions than those employed in other businesses and, accordingly, an objective test of knowledge or belief of money laundering was applied to them.

CDD is the process of identifying customers and using information to identify transactions that may be suspicious by reason of specific customer profiles. In the financial services sector, this is commonly called KYC. FATF (2012: 20) Recommendation 22 deals with CDD for DNFBPs and makes the general customer due diligence and record-keeping requirements applicable when:

- buying and selling of real estate;
- managing of client money, securities or other assets;
- management of bank, savings or securities accounts;

- organisation of contributions for the creation, operation or management of companies; and/or
- creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

Pursuant to FATF (2012) Recommendation 10, CDD measures should include identifying and verifying the identity of customers when:

- establishing business relations;
- carrying out occasional transactions: (i) above the applicable designated threshold; or (ii) that are wire transfers in the circumstances covered by the Interpretative Note to Recommendation 16;
- there is a suspicion of money laundering or terrorist financing; or when
- the financial institution has doubts about the veracity or adequacy of previously-obtained customer identification data (FATF 2012: 14).

Actual CDD measures specified under FATF Recommendation 10 should include:

- Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information.
- Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner such that the financial institution is satisfied that it knows who the

beneficial owner is. For legal persons and arrangements this should include financial institutions taking reasonable measures to understand the ownership and control structure of the customer.

- Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship.
- Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds (FATF 2012: 14).

A risk-based approach was first introduced into the FATF Recommendations in 2003 and is maintained in the current FATF (2012: 11) recommendations, number 1 that provides:

Countries should identify, assess, and understand the money laundering and terrorist financing risks for the country, and should take action, including designating an authority or mechanism to coordinate actions to assess risks, and apply resources, aimed at ensuring the risks are mitigated effectively. Based on that assessment, countries should apply a risk-based approach... to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified. This approach should be an essential foundation to efficient allocation of resources across the anti-money laundering and countering the financing of terrorism (AML/CFT) regime and the implementation of risk based measures throughout the FATF Recommendations. Where countries identify higher risks, they should ensure that their AML/CFT regime adequately addresses such risks. Where countries identify lower risks, they may decide to allow simplified measures for some of the FATF Recommendations under certain conditions. Countries should require financial institutions and designated non-financial businesses and professions...to identify, assess and take effective action to mitigate their money laundering and terrorist financing risks.

Examples of higher risk situations that require enhanced CDD include dealings with politically exposed persons and correspondent banking. In lower risk situations, such as dealings with financial institutions that are subject to requirements consistent with the FATF Recommendations and listed public companies that are subject to regulatory disclosure requirements, CDD measures may be reduced or simplified, although not completely avoided. It should be noted that a risk-based approach does not necessarily mean a reduced burden, although it is likely to result in a more cost-effective use of resources (FATF 2012).

In keeping with most comparable regulatory regimes (such as those in Canada, the United States and the United Kingdom), the AML/CTF regime in Australia is risk based. The regime requires businesses supplying designated services to comply with the legislation but leaves it to the discretion of the affected parties as to how they meet some of these obligations. Businesses that provide designated services are referred to as reporting or regulated entities. These entities are given responsibility both for determining the level of risk represented by any customer and any transaction, and the appropriate response. The AML/CTF Rules (see Part 4.3 of Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)) require the reporting entity to include appropriate risk-based systems and controls that are designed to enable the reporting entity to be reasonably satisfied, where a customer is a company, that (1) the company exists and (2) in respect of certain companies, the name and address of any beneficial owner of the company has been provided. Other legal entities such as trusts, partnerships and associations are also subject to regulation and reporting entities need to assess the level of risks associated with their transactions.

The current survey asked respondents to describe the current CDD practices and the extent to which they were employed during the 12 months ending 30 June 2009 for specific client groups and services provided.

Use of customer due diligence

An effective CDD program enables the reporting entity to form a reasonable belief that it knows the true identity of each client and should include account opening procedures that specify the identifying information to be obtained from each new client. Entities undertaking due diligence procedures should also consider conducting a risk assessment of their client base and the types of services provided to them. CDD comprises the collection and verification of initial KYC information on client identification and ongoing monitoring of customers and their transactions (AUSTRAC 2009a). AUSTRAC's Regulatory Guide provides information for reporting entities on the various risks associated with different categories of customers and transactions (AUSTRAC 2009a). If legal practitioners are brought within the regime, further information will be needed to enable legal practitioners to assess levels of risk in relation to the specific clients for whom they act.

Overall, 60 percent of respondents (n=262) stated that their practice did not use CDD procedures at all, although many respondents did not practice in areas that entailed money laundering risks. Of the 178 respondents who stated that they had used CDD procedures during the 12 month period ending 30 June 2009:

- 39 percent (n=69) indicated that they accepted referrals from other trusted clients only;
- 26 percent (n=47) indicated that they undertook identification checks of their individual clients such as a 100 point check, conflict of interest check, credit check, referral check and checking against lists of proscribed individuals and organisations maintained by the Australian Government; and
- 12 percent (n=21) indicated that they undertook a corporate search (eg checking whether the client company is registered, checking the client against lists of proscribed individuals and organisations maintained by the Australian Government, and using freely available sources such as Google and ASIC databases to obtain further information).

For some respondents, a lack of resources prevented them from performing CDD procedures. For example, as one respondent explained:

I have a small practice that I run on the smell of an oily rag as most of my clients are poor, street people, homeless, victims of family violence, etc. I cannot afford any extra compliance costs. It will force me out of business. I perform a public service, do a huge amount of legal aid and pro bono work and you're going to shut me down due to your paranoia! No terrorists are interested in me!

There was a view expressed that CDD procedures were not necessary because the perceived risk to practices was small. This low risk was related to the size of practice, the practice's customer profile and/or the small number of new clients that the practice accepted. For example, one respondent explained that the size of their client base allowed them to personally know their existing customers, which significantly reduced the risk to the practice.

Since my clients are all known to me personally, the risk is so slight that any mandatory steps would have no benefit at all, only a cost.

In addition there was concern about the impact of due diligence measures on the relationships between legal practitioners/practices and their clients (see further discussion of this below).

I only act for nice people who buy or sell homes, make wills or act as executors to apply for probate. These measures would diminish my relationship with them.

Of course, clients may be adept at disguising their true intentions and activities in their dealings with their legal advisers and may, superficially, appear to be legitimate when in fact they may be seeking to act illegally or to implicate their advisers in illicit conduct. This makes the process of CDD demanding and requires extensive background information on risks and typologies of money laundering and financing of terrorism.

Use of client identification procedures

Client identification procedures represent a subset of core CDD procedures. Fifty-six percent of respondents (n=244) reported that they used client identification procedures when accepting a new client during the 12 month reporting period. Again, many respondents did not practice in areas identified by FATF as requiring AML/CTF regulation. Some 54

percent (n=132) of those who reported using client identification procedures when accepting a new client also reported using ongoing CDD procedures. None of the respondents offered reasons why their practice chose to use client identification procedures, although the following comments were made by several respondents to explain why they chose not to use any client identification procedures when accepting a new client.

- It will be a ‘feel-good’ exercise and achieve little.
- [There is a] mental weariness caused by the view that regulation of ‘everything’ and reliance on ‘paper’ procedures is getting to be rampant, clouding the benefits of more ‘direct’ procedures such as Judge-supervised surveillance.
- We are already over-regulated and have no leeway left for carrying out Government or Pseudo Government admin tasks for nothing.
- Very little likely benefit compared to cost involved. The cost/benefit is just not there.
- More bloody paperwork (not paid for) to keep politicians thinking how clever they are. If they want to spend money (other than mine) tell them to (a) Dramatically increase the relevant law enforcement agencies budgets for more

man(woman) power/technology/surveillance of criminals and terrorists (b) stop being so politically correct/call a spade a spade and if necessary ruffle a few diplomatic feathers/upset a few foreign countries by taking a tough stand (c) vet all air/sea port staff with correct security checks (d) get intelligence agencies to share info rather than keep it back to gain some kudos (e) recruit (via ASIO etc) intelligence ‘ordinary’ people to be active in collation and referral of info (eg drugs).

- Unnecessary administration for [a] majority matters that have no suspicious content at all.
- In small suburban legal practices if anything untoward was proposed by a client the alarm bells would immediately start ringing for the solicitor involved. Surely no solicitor is that stupid not to notice. The risk involving small firms would appear to [be] very minimal.

Survey respondents were also asked which of the core client identification procedures their practices undertook for particular client groups. Nearly half of the respondents who had clients who were natural persons (46%), incorporated entities (46%) or unincorporated entities (48%) indicated that they never or seldom verified the authenticity of a signature for new clients during the

Table 10 Extent of client identification procedures used to identify a new client who is a ‘natural person’												
Client identification procedures	Always		Often		Sometimes		Seldom		Never		Total ^a	
	n	%	n	%	n	%	n	%	n	%	n	%
Verifying the authenticity of a signature ^b	34	14	48	19	53	21	51	20	64	26	250	100
Sighting one or more pieces of photo identification ^c	59	23	98	39	62	24	15	6	20	8	254	100
Sighting evidence of identity that is not photo identification ^d	21	9	61	25	72	29	45	18	47	19	246	100
Checking against lists of proscribed individuals and organisations ^e	9	3	9	4	13	5	19	8	201	80	251	100

a: Totals differ due to some respondents not answering each question

b: Verifying the authenticity of a signature on an agreement to undertake legal services against an identification document containing the client's signature

c: This includes items such as driver's licences and passports

d: This might include items such as birth certificates, utilities bills, or Medicare cards

e: Checking for the presence of the client on lists of proscribed individuals and organisations maintained by the Australian Government

Note: Excludes respondents who did not have clients who were 'natural persons'. This Table presents data on responses to Question 8: *To what extent does your practice currently use any of the following procedures to identify new clients (who are natural persons)?*

Source: AIC Legal Professionals Survey [computer file]

Table 11 Extent of client identification procedures used to identify a new client that is an incorporated entity

Client identification procedures	Always		Often		Sometimes		Seldom		Never		Total ^a	
	n	%	n	%	n	%	n	%	n	%	n	%
Verifying the authenticity of a signature ^b	27	12	44	20	50	22	39	17	65	29	225	100
Sighting one or more pieces of photo identification ^c	36	16	57	25	60	26	33	15	41	18	227	100
Verifying the authority of representative of the legal entity	63	28	54	24	59	26	23	10	28	12	227	100
Verifying the ABN or ACN of the legal entity	123	54	55	24	27	12	9	4	15	7	229	100

a: Totals differ due to some respondents not answering each question

b: Verifying the authenticity of a signature of the representative of the legal entity on an agreement to undertake legal services against an identification document containing the representative's signature

c: Sighting one or more pieces of photo identification of representative of the legal entity

Note: Excludes respondents who did not have clients that were incorporated entities. This Table presents data on responses to Question 8: *To what extent does your practice currently use any of the following procedures to identify new clients (that are incorporated entities)?*

Source: AIC Legal Professionals Survey [computer file]

Table 12 Extent of client identification procedures used to identify a new client that is an unincorporated association

Client identification procedures	Always		Often		Sometimes		Seldom		Never		Total ^a	
	n	%	n	%	n	%	n	%	n	%	n	%
Verifying the authenticity of a signature ^b	20	14	26	18	28	20	19	13	50	35	143	100
Sighting one or more pieces of photo identification ^c	25	18	37	26	27	19	16	11	37	26	142	100
Verifying the authority of representative of the association	40	28	35	25	26	18	15	10	27	19	143	100
Verifying the Business Registration number or name	67	48	22	16	21	14	10	7	21	15	141	100

a: Totals differ due to some respondents not answering each question

b: Verifying the authenticity of a signature of the representative of the association on an agreement to undertake legal services against an identification document containing the representative's signature

c: Sighting one or more pieces of photo identification of representative of the association

Note: Excludes respondents who did not have clients that were unincorporated associations. This Table presents data on responses to Question 8: *To what extent does your practice currently use any of the following procedures to identify new clients (that are unincorporated associations)?*

Source: AIC Legal Professionals Survey [computer file]

12 month reporting period (see Tables 10 to 12). This was also the case for nearly three-quarters (73%) of respondents who had clients that were government bodies (see Table 13). The reported lack of verification of a signature's authenticity for new clients is an area of concern, as signature verification is generally an important component of an effective broad-based risk management program and can help to reconcile any discrepancies and other issues identified.

Manually verifying signatures for every individual document, however, can be an expensive exercise. To reduce the associated costs, respondents could consider verifying their clients' signature at the time of sighting their photo identification. Survey responses suggested that more respondents (if their clients were natural persons, incorporated entities or unincorporated associations) were sighting one or more pieces of photo identification as proof of a new client's identity than verifying the authenticity of that client's signature (see Tables 10–12). For example, 62 percent of respondents reported always or often sighting one or more pieces of photo identification when dealing with a new client who was a natural person, compared with 33 percent who often or always verified the authenticity of the signature.

While less than half of respondents from practices with new clients that were either incorporated entities and/or unincorporated associations regularly verified signatures or sighted photo identification, just over half did use procedures to verify the authority of a representative from the entity or association (see Tables 11 and 12). However, the most regularly used identification procedure in either case involved checking registration status. Over three-quarters (78%) of respondents with new clients that were incorporated entities always or often verified the entity's ABN or ACN (see Table 11) and 64 percent with clients who were unincorporated associations always or often verified the client's Business Registration number or name (see Table 12).

Legal practitioners with clients who are natural persons also have the option of checking their client's names against lists of proscribed individuals or organisations. The Australian Government maintains a number of publicly accessible sanctions lists including:

- The 'List of Terrorist Organisations', which

is maintained by the Australian Government Attorney-General's Department. Organisations that have been proscribed by the Australian Government as terrorist organisations under the Criminal Code are those that have advocated the doing of a terrorist act (regardless of whether or not a terrorist act occurs), or because they were directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act (regardless of whether or not a terrorist act occurs).

- The 'Consolidated List' of all persons and entities subject to targeted financial sanctions under United Nations Security Council decisions and maintained by the Australian Government Department of Foreign Affairs and Trade pursuant to Regulation 40 of the Charter of the United Nations (Dealing with Assets) Regulations 2008.

The Australian Government Department of Foreign Affairs and Trade also provides a free subscription service notifying changes to the Consolidated List and software which can assist users in matching clients names with persons listed on the Consolidated List (AUSTAC 2009a). While legal practitioners are not currently considered reporting entities under the existing AML/CTF regime, it is a criminal offence to use or deal with assets owned or controlled by an individual or entity listed by the Federal Minister for Foreign Affairs or by the UN 1267 Sanctions Committee, or to make assets available to that individual or entity, either directly or indirectly.

These lists and services provide DNFBPs—who may not have the resources to obtain a sufficient level of knowledge on new or existing customers most at risk—with at least some information to carry out client screening. Nonetheless, the vast majority of respondents (88%) who had new clients that were natural persons indicated that they never or seldom checked new clients against such lists (see Table 10).

The majority of respondents who had government bodies as clients indicated that they never or seldom used client identification procedures to identify new government clients (see Table 13). The most commonly used procedure was to verify the ABN or ACN of the government body, but still less than half (42%) of relevant respondents indicated they always or often did so. Clients who are a government

Table 13 Extent of client identification procedures used to identify a new client that is a government body

Client identification procedures	Always		Often		Sometimes		Seldom		Never		Total ^a	
	n	%	n	%	n	%	n	%	n	%	n	%
Verifying the authenticity of a signature ^b	6	9	3	4	9	13	10	14	41	59	69	100
Sighting one or more pieces of photo identification ^c	5	8	2	3	10	15	12	18	36	55	65	100
Verifying an instrument of delegation	11	17	4	6	10	15	7	11	34	52	66	100
Verifying the ABN or ACN	20	31	7	11	5	8	3	5	30	46	65	100

a: Totals differ due to some respondents not answering each question

b: Verifying the authenticity of a signature of the representative of a government body on an agreement to undertake legal services against an identification document containing the representative's signature

c: Sighting one or more pieces of photo identification of the departmental representative

Note: Excludes respondents who did not have clients which were government bodies. This Table presents data on responses to Question 8: *To what extent does your practice currently use any of the following procedures to identify new clients (that are government bodies)?*

Source: AIC Legal Professionals Survey [computer file]

Table 14 Extent of client identification procedures used to identify a new client that is a trustee

Client identification procedures	Always		Often		Sometimes		Seldom		Never		Total ^a	
	n	%	n	%	n	%	n	%	n	%	n	%
Verifying the authenticity of a signature ^b	42	23	37	20	35	19	22	12	49	27	185	100
Sighting one or more pieces of photo identification ^c	38	21	55	29	41	22	15	8	35	19	184	100
Verifying the authority of representative of the trust	73	39	50	27	28	15	16	9	18	10	185	100
Verifying the ABN or ACN	90	49	46	25	21	11	9	5	19	10	185	100

a: Totals differ due to some respondents not answering each question

b: Verifying the authenticity of a signature of a trustee on an agreement to undertake legal services against an identification document containing the trustee's signature

c: Sighting photo identification of trustee or representative

Note: Excludes respondents who did not have clients which were trustees. This Table presents data on responses to Question 8: *To what extent does your practice currently use any of the following procedures to identify new clients (who are trustees)?*

Source: AIC Legal Professionals Survey [computer file]

body may pose a lower risk than other clients, but they are not entirely risk free. Lack of client identification procedures used to identify a new client who is a government body could create a favourable situation for criminals and corrupted or rogue government employees who do not have to look far to infiltrate the global financial system.

A number of reports and studies have identified

trusts and company service providers as having potential for exploitation by money launderers (see FATF 2008a, 2006, 2004c). Of particular concern are trusts and company service providers including shell companies established in jurisdictions with strict banking secrecy legislation and/or in known tax havens (low-tax jurisdictions that may be exploited for tax avoidance and money laundering

activities). Money laundering techniques involving the exploitation of offshore shell companies include 'loan-back' schemes where the criminal transfers the criminal proceeds money to an offshore entity, such as a shell company owned by the criminal, before transferring the criminal proceeds back to the country disguised as a legitimate business transaction. There are also examples of disciplinary cases showing the use of trust accounts to engage in various kinds of fraud including legal practitioners stealing funds from clients and the practice.

Although professional rules governing the practice of lawyers in Australia do not require any formal identification requirements for new clients or beneficial owners of funds held in trust, it is encouraging that approximately half or more of survey respondents from practices that had trustees as clients indicated their practice always or often carried out three of the four listed client identification procedures (see Table 14). Consistent with responses from respondents who represented practices that had incorporated entities, unincorporated associations or government bodies, verifying the ABN or ACN was the most commonly used procedure to identify new clients who were trustees.

Customer due diligence procedures in relation to real estate

As noted above, the most common type of services offered by respondents during the 12 month period ending 30 June 2009 involved the buying or selling of real estate. Various reports and studies have made reference to the fact that the real-estate sector may be one of the many vehicles used by criminal organisations to launder their illicitly obtained money (FATF 2008b; Unger & Ferwerda 2011). For example, FATF's global money laundering and terrorist financing threat assessment report observed that 'the use of real estate transactions is one of the proven and most frequent methods of [money laundering] employed by organised crime (FATF 2010: 42). Further, the use of intermediaries such as real estate agents and legal practitioners provide criminals and terrorists with

an extra layer between the criminal and the transactions he undertakes [and] enables the criminal to achieve his objective more easily or

further distance himself from the activity (FATF 2010: 43).

In an intensive study of the money laundering risks evident in the real estate sector in the Netherlands, Unger and Ferwerda (2011) identified 17 characteristics of transactions most likely to be indicative of money laundering. Of 11,895 real estate objects (properties) examined, 150 seemed unusual. Major risks arose in connection with 'objects owned by foreigners, newly established companies and objects with unusual price fluctuations' (Unger & Ferwerda 2011: 151).

In the present survey, almost two-thirds (63%) of the 284 respondents who indicated that their practice often or always provided services that involved the buying or selling of real estate properties reported that they did not use any due diligence procedures before accepting a new client. However, the majority (58%) of these respondents reported that they did carry out client identification procedures on acceptance of a new client. Similarly, 33 percent of respondents whose practice provided services often or always involved in the buying or selling of business entities indicated they did not use CDD measures, although 55 percent stated they did use client identification measures.

Receiving or disbursing cash

In Australia, the requirements introduced under the AML/CTF Act for currently regulated sectors – excluding lawyers – exceed those enacted in several other countries (see Walters at al. 2012). While there are requirements in most countries to submit a suspicious financial activity report in some form or other, Australia is one of few countries that requires reports for each of the following—suspicious matter reports, threshold transaction reports, international funds transfer instruction, cross border movement of physical currency and bearer negotiable instruments. Australian regulated entities are required to submit a report of any transaction made using cash valued at \$10,000 or more. Solicitors are, at present, required to report cash transactions of \$10,000 or more under the *Financial Transaction Reports Act 1988* (Cth).

Table 15 Extent of receiving or disbursing cash worth over \$10,000 during the 12 months ending 30 June 2009

Occasions (n)	n	%
0	311	71
1	16	4
2	10	2
3–5	21	5
6–10	12	3
11 or more	70	15
Total	440	100

Note: This Table presents data on responses to Question 9: *On how many separate occasions did your practice receive or disburse cash worth over \$10,000 during the 12 months ending 30 June 2009?*

Source: AIC Legal Professionals Survey [computer file]

The majority of respondents to the current survey (71%) did not report having received or disbursing cash worth over \$10,000 in the 12 month period ending 30 June 2009 (see Table 15). Just under one-fifth (18%) of respondents reported receiving or disbursing cash worth over \$10,000 six or more times during the 12 month reporting period.

Cash has heightened risks for legal practitioners, including immediate risks of theft of cash kept on the practice premises and proceeds of crime considerations. For example, trust accounts can be abused as a means of entering cash into the financial system. In addition, it is possible for clients to pay cash to legal practitioners in anticipation of a transaction going ahead and then request for a refund (minus the administration/consultation fee) as a cheque when the client cancels the instructions. Alternatively, professional fees of legal practitioners may be paid with the proceeds of crime, particularly for legal practitioners involved in criminal defence cases. It has been argued by the Queensland Law Society (2008) and the Law Council of Australia (2009) that legal practitioners should consider developing policies on handling cash and placing a limit on how much cash can be accepted. In the United Kingdom, the Law Society has provided the following advice to practitioners concerning the handling of cash.

Large payments made in actual cash may be a sign of money laundering. Although the Law Society has not set a cash limit, the Law Society advises that as a matter of good practice you establish a policy

on not accepting cash payments above a certain limit either at your office or into your bank account. The Law Society has steered clear of setting limits because cash tolerance will be different for every firm depending on the type of work done. Cash in itself is legal tender and should not necessitate an automatic report to the Serious Organised Crime Agency (SOCA – now the National Crime Authority) but depending on the circumstances you may need to undertake further checks and customer due diligence for example, by asking for evidence to support the statement provided, in order to satisfy yourself that there are no grounds for making a report to SOCA. Just because money comes from a bank account does not in itself indicate that the funds are clean (The Law Society 2011).

Conclusion


Identifying and understanding client demographics is crucial in determining the exposure that a legal practice might experience to money laundering or terrorist financing risks. While the current survey respondents represent only a small proportion of the profession as a whole, the findings show that there is variability in the uptake of CDD procedures by legal practitioners at present. More than half of the legal practitioners surveyed frequently employed client identification procedures before accepting a new client but less than half maintained OCDD commitments. Varying reliance on client identification procedures was also apparent depending on the

client group in question, with a tendency to use KYC procedures if the client was a trustee, incorporated entity or unincorporated association. FATF (2008a) listed the circumstances in which legal professionals should use CDD, such as when providing services related to the buying and selling of real estate, but even among this group, only a third undertook CDD, although the majority did regularly employ client identification procedures. FATF (2008a) also indicated that legal professionals may apply reduced or simplified measures where the risk of money laundering or terrorist financing is lower. The risk-based guidance to legal practitioners from FATF is as follows:

Some form of monitoring is required in order to detect unusual and hence possibly suspicious transactions. Even in the case of lower risk clients, monitoring is needed to verify that transactions match the initial low risk profile and if not, trigger a process for appropriately revising the client's risk rating. Equally, risks for some clients may only become evident once a relationship with a client has begun. This makes appropriate and reasonable monitoring of client transactions an essential component of a properly designed risk-based approach; however, within this context it should be understood that not all transactions or clients will be monitored in exactly the same way. Moreover, where there is an actual suspicion of money laundering or terrorist financing, this could be regarded as a higher risk scenario, and enhanced due diligence should be applied regardless of any threshold or exemption. Given the relationship between a legal professional and his/her client, the most effective form of ongoing monitoring will often be continued observance and awareness of a client's activities by the legal professional. This requires legal professionals to be alert to this basis of monitoring and for training of legal professionals to take this feature into account (FATF 2008a: 13).

Some of this variation might reflect customary practice, available resources and/or the risk profile of clients or activities undertaken. Minimal risk, resource constraints, familiarity with clients and potential impacts on professional/client relationships were all cited as reasons why CDD procedures were not, or only occasionally, used by legal practitioners and there was some opposition to mandating these obligations. The benefits of an effective CDD program can extend beyond preventing money laundering and the financing of terrorism, and the present results suggest that there is a continuing need for educational campaigns to explain the importance and/or benefits of having in place client identification procedures when accepting a new client. For businesses subject to new or enhanced CDD requirements, effective KYC measures can minimise exposure to the risks of financial crime and identity-related fraud, promote good governance practices and reduce reputational damage businesses may face from having customers who engage in identity fraud, financial crimes, tax fraud or other offences. As the Law Society in the United Kingdom explains:

If you know your client well and understand your instructions thoroughly, you will be better placed to assess risks and spot suspicious activities...an effective, risk-based approach and documented, risk-based judgements on individual clients and retainers will enable your firm to justify your position on managing the risk to law enforcement, courts and professional supervisors (oversight bodies). The risk-based approach means that you focus your resources on the areas of greatest risk. The resulting benefits of this approach include: more efficient and effective use of resources proportionate to the risks faced; minimising compliance costs and burdens on clients; and greater flexibility to respond to emerging risks as laundering and terrorist financing methods change (The Law Society 2009a: np).



Benefits and concerns regarding anti-money laundering/counter-terrorism financing procedures

With the possibility of new or additional regulatory obligations concerning AML/CTF in Australia come concerns about the impact of those obligations on regulated businesses. Even where there is general support for the purpose of enhanced regulation, there is often concern from the regulated sector as to the associated cost burden (eg see Gill & Taylor 2004). For the legal sector, there is the additional concern that regulation may damage client confidentiality and legal professional privilege. This section presents the views of survey respondents regarding the potential benefits of the proposed regulatory regime alongside the concerns that they, as representatives of the legal sector, hold regarding the potential negative outcomes of being compelled to comply with the AML/CTF regime.

Benefits

AML/CTF procedures can play a critical role in detecting suspicious financial activity in business contexts and in providing useful information to law enforcement (FinCEN 2010). Among the standard group of AML/CTF compliance procedures described in Table 16, respondents considered suspicious matter reporting, client identification and staff training as the three most 'useful' AML/CTF procedures. Usefulness was defined as providing a very high

or high benefit. This appraisal, however, was less than unanimous since only half of the respondents nominated suspicious matter reporting as highly beneficial, 43 percent nominated client identification as highly beneficial and 36 percent nominated staff training as highly beneficial. Indeed, similar proportions of respondents rated client identification (37%) and staff training (37%) as providing little or no benefit. The three least useful procedures (defined as providing some or no benefit) were considered to be the appointment of an AML/CTF compliance officer (68% of respondents), annual compliance reporting (66%) and conducting periodic auditing (63%) – periodic auditing is not a formal requirement under the legislation.

Costs

The difficulty in accurately estimating the cost of compliance has been highlighted in a number of studies and surveys (eg see Doyle 2007; Harrington, Morgenstern & Nelson 2000). Compliance costs will vary across sectors and across organisations within those sectors, depending in part upon:

- the nature of the business undertaken;
- the volume of trade involved;
- whether or not organisations have ever been placed under regulatory scrutiny;

Table 16 Perceived benefits of anti-money laundering/counter-terrorism financing procedures^a

AML/CTF compliance procedures	Very high		High		Moderate		Some		None	
	n	%	n	%	n	%	n	%	n	%
Client identification	66	15	122	28	90	20	113	26	49	11
Conducting risk-based assessments of clients and services	29	7	74	17	107	24	128	29	102	23
Record keeping for seven years	38	7	67	17	127	24	118	29	90	23
Conducting periodic auditing	22	5	40	9	104	24	131	30	143	33
Staff training	45	10	114	26	118	27	114	26	49	11
Appointing an AML/CTF compliance officer	20	5	37	8	84	19	116	26	183	42
Ongoing transaction monitoring	25	6	87	20	98	22	136	31	94	21
Suspicious matter reporting	73	17	151	34	83	19	93	21	40	9
Annual compliance reporting	22	5	43	10	83	19	111	25	181	41

a: Percentages may not total 100 due to rounding

Note: This Table presents data on responses to Question 17: *What level of benefit do you think each of the following existing AML/CTF compliance procedures (if applied to legal practices) would have in minimising risks of inadvertent money laundering or financing of terrorism in legal practice?*

Source: AIC Legal Professionals Survey [computer file]

- whether such scrutiny will increase significantly under the AML/CTF regime; and/or
- whether such organisations have ever endeavoured to become ‘money laundering aware’ irrespective of legislation, regulations or sector specific codes and/or guidelines requiring or urging them to do so.

The 2009 annual review of regulatory burden undertaken by the Productivity Commission (2009: 16–17) concluded that:

there were significant challenges associated with quantitative approaches to measuring and assessing whether the regulatory burden on [Australian] businesses was ‘excessive’. Many participants were unable to provide information on the pecuniary cost of regulation, and even where data were provided, this was for the overall costs of regulation, often from all tiers of government, rather than the specific cost from unnecessary burden.

Harvey (2008a: 192) further explained that this could be due to ‘limited information available in the public arena concerning the amounts being spent by firms on compliance’. The 2009 submission to the Select Committee on the European Union — Sub-Committee F (Home Affairs) Inquiry into Money Laundering and the Financing of Terrorism by the UK Law Society explained that various cost components are able to be quantified with relative ease. These include the number of staff employed to undertake CDD and checks, the cost of subscriptions for e-verification services, the cost of new case management systems to record due diligence and ongoing monitoring, fees incurred for training programmes and the cost of providing internal training. Other hidden costs are more difficult to quantify. Examples include the time spent by individual staff members across the firm in assessing the risks of clients, chasing up due diligence material, monitoring clients and transactions for warning signs, and in discussing suspicions and internal reports with money laundering reporting

officers and deciding whether or not a suspicious activity report is required to be made (The Law Society 2009b). Although there are no accurate measurements of AML/CTF compliance costs, researchers and practitioners have indicated that AML/CTF compliance is expensive and complicated (Gill & Taylor 2004; Harvey 2008a, 2008b) as the risk-based AML/CTF approach requires resources and expertise to gather and interpret information on risks (both at the country and institutional levels), to develop procedures and systems, and to train personnel on an ongoing basis.

In an online survey undertaken by the UK Law Society, only a very small percentage (5%) of the 197 respondents reported having not updated their AML policies and procedures within six months of the new Money Laundering Regulations 2007 coming into force, but of this group, all had less than four partners (The Law Society 2008). As a percentage of profit, compliance burdens may be more significant for smaller, local institutions owing to the fact that CDD procedures and reporting requirements tend to be less automated in smaller organisations (Tsingou 2005) and available resources do not permit such practices to always keep abreast of complicated and changing regulatory practices (Spence cited in Doyle 2007). It is, therefore, unsurprising that the majority

of survey respondents highlighted compliance and related costs as their major concern regarding the implementation of AML/CTF compliance measures (see Table 17). Three-quarters of respondents expressed high or very high concerns about the costs of ongoing monitoring and 71 percent had high or very high concerns about the costs associated with introducing and implementing AML/CTF compliance measures. This level of concern is, perhaps, influenced by the fact that the majority of respondents are sole practitioners for whom cost considerations are likely to be important. It should also be noted that the perceived costs of compliance may have changed since this survey was undertaken in 2008–09.

Comments from respondents, particularly those from smaller practices that make up the vast bulk of legal practices in Australia (ABS 2009; Walters et al. 2013), reflect these concerns. One respondent explained that ‘since my clients are all known to me personally, the risk is so slight that any mandatory steps would have no benefit at all, only a cost’. Another stated:

As a sole practitioner I can't afford the time or money for extra compliance. It will not be viable to practice as a sole practitioner as either income will be low or the cost of services will be too high or non-competitive—this may mean certain

Table 17 Concerns regarding implementation of anti-money laundering/counter-terrorism financing procedures^a

	Very high		High		Moderate		Some		None	
	n	%	n	%	n	%	n	%	n	%
Costs of introduction/implementation	182	41	130	30	68	15	32	7	28	6
Costs of ongoing compliance ^b	203	46	131	30	58	13	28	6	20	5
Need to increase minimum charge-out rates or raise additional disbursements to meet compliance costs	172	39	142	32	67	15	34	8	25	6
Impact on solicitor/client relationships	117	27	106	24	109	25	62	14	46	10
Application of legal professional privilege	156	35	114	26	93	21	49	11	28	6
Impact on legal practice generally	129	29	128	29	105	24	41	9	37	8
Liability under Division 400 of the Criminal Code	139	32	95	22	93	21	53	12	60	14

a: Percentages may not total 100 due to rounding

b: Includes training, monitoring, record keeping, reporting, auditing, client and service assessment

Note: This Table presents data on responses to Question 19: *Please indicate the level of concern for your practice from implementation of the compliance measures described in Question 17 in relation to each of the following*

Source: AIC Legal Professionals Survey [computer file]

types of case[s] that are only taken on by sole practitioners/small firms will no longer be taken on.

A respondent who identified their practice as having five or less full-time equivalent legal practitioners also indicated that:

the costs of any additional government compliance/red tape is absurd for our type of small practice. As a principal with five staff I virtually no longer practice law but spend my days dealing with all the other red tape eg staff compliance issues, changing awards, PAYG, super, my PATG tax, GST, trust compliance etc. The red tape is crippling enough for the small law practice without more being added, when all that is required is common sense (which I hope most of the profession would have).

If concerns about high compliance-related costs are realised, then legal practices may be compelled to offset these pressures by increasing legal costs to the public. Arguably, this occurs at present in respect of current reporting entities, many of which are large corporations that can absorb some compliance costs better than small and micro-businesses. The possibility of increasing costs for legal services was considered by some respondents—71 percent had high or very high concerns about the need to increase minimum charge-out rates or raise additional disbursements to meet compliance costs. For one respondent, the transfer of compliance costs to the client was a matter of course:

If this regime is implemented, the costs of compliance should be borne by the potential/actual client whether or not the client is formally engaged or by the general Australian population, not the legal practice.

However, for another respondent, the longer term outcome might be the denial of legal assistance to persons who cannot afford the increased rates.

There is already adequate regulation in place. Further regulation will only serve to drive up the cost of legal practice and reduce access to legal services. But that is OK because you can then conduct an inquiry into the reasons for the cost of legal practice and the reduction into the access to justice and the lack of government funding for legal aid.

Rising costs could also limit the ability of some practices to provide pro bono services to clients. These unintended consequences of the proposed extension of the AML/CTF regime to legal professionals need further consideration and ongoing monitoring.

Regulatory burden and impact on practice

Associated with compliance costs is the regulatory burden that legal practitioners would potentially face if they were brought within the AML/CTF regime. Implementing the requirements of AML/CTF legislation, regulated and prospective regulated entities are required to change their internal procedures, policies and systems in a number of directions. Various overseas studies have highlighted the concerns raised by newly regulated sectors in terms, inter alia, of the cost and inconvenience of implementing, and ensuring ongoing, compliance with AML/CTF regime requirements, particularly in the context of its actual importance in the fight against money laundering. In a 2008 UK Law Society survey of legal practitioners in England and Wales, the 'vast majority' of the 197 survey respondents reported that the burden of compliance had increased under the new regulations, although some practices had embraced the new risk-based approach permitted under the regulations on the basis that it provided them with greater flexibility (The Law Society 2008). Fifty-seven percent of respondents in the UK study reported having difficulty conducting enhanced due diligence for non-face-to-face clients. The respondents indicated that this was due to cultural difficulties with overseas clients, the variability of results from some electronic verification providers and a reluctance of other professionals to be relied upon to certify identity documents.

Comments made by survey respondents indicate that Australian legal practitioners were similarly wary of the regulatory burden AML/CTF compliance may bring. Legal practitioners are, and perceive themselves as, a strictly regulated profession that is 'bound by...specific professional rules and regulations' and ethical codes of conduct (FATF 2008a: 5–6). In Australia, all legal practitioners operating a private practice, including notaries,

are subject to licensing requirements and ongoing accreditation. They are also subject to statutory requirements and professional conduct rules that govern different aspects of legal practice, some of which could be used to control AML/CTF risks within the profession, particularly as the profession moves towards national regulation (AGD 2012).

Adding an additional layer or form of regulation may be perceived by the legal profession as simply increasing existing regulatory burdens if the view (from a number of respondents) that 'legal practitioners [were] already over-regulated' is a universal one. Increased regulatory burden may have a particularly 'disproportionate impact' on smaller sized practices since they are 'unlikely to have well-developed compliance mechanisms' (Rees, Fisher & Bogan 2008: 153). Smaller-sized practices, which make up the bulk of the legal profession, may not have the capability to operate a risk-based approach effectively. A number of survey respondents, particularly those from smaller sized practices, questioned the benefits and effectiveness of extending AML/CTF compliance to the sector. They said in response to questions concerning the effectiveness of the regime if applied to legal practitioners:

The risk of money laundering and financing terrorism occurring through some practices is incredibly low but the costs of compliance measures applied across the board without being specifically targeted to particular transactions undertaken by some firms seems particularly onerous when legal practices must already undergo onerous and rigorous trust account auditing each year.

I am concerned that proposals have been made without regard to the nature of many small legal practices such as our own. I am concerned that the regulatory burden will require additional administrative work without any benefit.

I doubt that the proposed regime and unnecessary technical regulation would catch any real money launderers and would impose another level of senseless bureaucracy on an already over stressed profession.

[The proposed measures are] a disproportionate response for small to medium practices.

Concerns about the benefits and effectiveness of the compliance measures have been raised elsewhere. For example, in their submission to the Select Committee on the European Union—Sub-Committee F (Home Affairs) Inquiry into Money Laundering and the Financing of Terrorism, the Law Society of England and Wales argued:

These hidden costs are felt more keenly by those parts of the regulated sector where transactions are not mere numbers and ongoing monitoring is not susceptible to automated processes. What is clear is that the private sector is investing more in the UK's anti-money laundering regime than the UK government is recovering because of it (The Law Society 2009b: 13).

The Australian legal sector might concur if the following statement is reflective of the majority viewpoint:

The whole thrust of this obsession with terrorism and for money laundering is misplaced. Once again we see a government initiative designed to shift the focus (and the funding) away from the correct bodies (ie state police, AFP, ATO, etc.) and translates it into the business community and professional bodies.

Client confidentiality and legal professional privilege

Respondents were also concerned about the broader impact that the obligation to comply with AML/CTF measures might have on their practice and their relations with their clients. Half of the survey respondents reported a high or very high concern about the potential impact on the relationship between solicitor and client, 61 percent had high or very high concerns about the impact on legal professional privilege and 58 percent had high or very high concerns that there would be an impact on the practice more generally (see Table 17). As one respondent commented 'it's using a sledgehammer to crack a nut...it undermines the essence of a free and independent legal profession'.

A related concern is the effect AML/CTF obligations, specifically mandatory reporting of suspicious transactions but more broadly other reporting requirements, may bear on legal professional privilege and the duty of confidentiality to the client

more broadly. FATF (2012) Recommendation 23 states that lawyers, notaries, other independent legal professionals should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in paragraph (d) of Recommendation 22 (see above).

Certain professional bodies, including bodies representing legal practitioners citing lawyer/client confidentiality and the right to defence, have lobbied (sometimes successfully) to exempt themselves from the AML/CTF regime (eg see ECLS 2007; Gallant 2009). Canadian lawyers were originally subject to suspicious and prescribed reporting, client identification, record keeping and internal compliance measures when counsel were carrying out various activities on behalf of a client or entity pursuant to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act 2000*. However, in March 2003, legal practitioners and Quebec notaries (who provide legal advice under the Quebec civil code) were exempted from complying with the regulatory provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act 2000* when the government revoked the regulatory provisions as they applied to legal counsel. This decision was made as the result of a legal challenge by the profession after the government had initially proceeded to mandate suspicious and prescribed reporting, client identification, record keeping and internal compliance measures when counsel were carrying out various activities on behalf of a client or entity. These activities included receiving or paying funds (other than those relating to professional fees, disbursements, expenses or bail), purchasing or selling securities, real properties, business assets or entities, or transferring funds or securities by any means (Walters et al. 2012).

There is currently no suspicious matter reporting requirement on Japanese lawyers, following vigorous opposition by legal practitioners and the Japanese Federation of Bar Associations. However, a limited self-regulation model applies under which the Japanese Federation of Bar Associations has implemented rules for the verification of clients' identity and record keeping, which are designed to address AML concerns.

A similar situation exists in Hong Kong where AML/CTF obligations (CDD and record-keeping guidelines) for legal practitioners are issued by the Law Society of Hong Kong. The Law Society has issued a circular, including practice directions governing CDD and record keeping, with mandatory requirements from July 2008.

At the core of the legal profession's argument is the view that the duty to report imposed by AML/CTF legislation infringes a lawyer's duty to maintain professional secrecy and has a negative impact upon professional independence that, arguably, could jeopardise a client's right to a fair trial. A number of jurisdictions have considered the potential conflicts that might arise for legal practitioners between the duty to maintain confidentiality and obligations in the AML/CTF regime to provide information. Singapore includes legal practitioners within the full scope of its AML/CTF regime, while legal practitioners in the United Kingdom, Germany, Belgium and France have obligations only when dealing with customers in financial transactions or the settlement of real estate transactions. Practitioners in the United States and Taiwan have not been included (Walters et al. 2012). The requirements for legal practitioners in the United Kingdom, France, Belgium, Germany and Singapore are further complicated by legal professional privilege. Legal professionals in these countries, who would otherwise have AML/CTF obligations for at least some transactions, are exempt from the obligation to report suspicious transactions under some circumstances. Where the information was gained in circumstances protected by legal privilege, the lawyer involved is not required to submit a report (Walters et al. 2012). In the case of *Michaud v France* (ECtHR, Application no. 12323/11, 6 December 2012), the European Court of Human Rights unanimously held that the obligation on French lawyers to report suspicions in the context of the fight against money laundering does not interfere disproportionately with professional privilege. The case was brought by a French member of the Paris Bar who argued that the obligation to report suspicions was incompatible with the principles of protection of lawyer–client relations and respect for professional confidentiality. The court considered that the obligation to report suspicions was necessary in pursuit of the legitimate aim of

prevention of disorder or crime, since it was intended to combat money laundering and related criminal offences. The court gave careful consideration to the European money laundering directives, article 8 of the European Convention on Human Rights and the importance of the confidentiality of lawyer–client relations and of legal professional privilege. The court held that the obligation to report, as implemented in France, did not interfere disproportionately with legal professional privilege since lawyers were not subject to the requirement when defending litigants and there is a filter put in place by the legislation ensuring that the lawyers submit their reports to the President of their Bar Association and not to the authorities (Matthews 2012). In Australia, where reporting obligations are likely to be directly to AUSTRAC, the position may be different, even if legal professionals are brought within the AML/CTF regime.

Overall, 62 percent of respondents reported having high or very high concerns about their ability to apply legal professional privilege following the implementation of AML/CTF compliance measures. One respondent, who was concerned about the impact of implementing the compliance measures, made the comment:

The profession must be educated to appreciate the balance between legal professional privilege, client confidentiality and AML/CTF requirements, especially suspicious transaction reporting and that the profession is not acting as policeman but as non-judgmental data collector.

Several other survey respondents also raised concerns that requiring legal practitioners to report suspicious transactions and comply with other AML/CTF measures would be an intrusion on the confidential relationship between legal practitioners and their clients.

You are compelling us to become part of the forensic process which in my opinion would be better undertaken by trained police and security service personnel. I am concerned that the procedures that will be imposed on us will expose us to potential breaches of legal professional privilege and client confidentiality.

Having to treat every client, including ordinary law abiding citizens, friends and close personal acquaintances as potential money launderers

and supporters of terrorism will interfere with the relationship of trust and confidence that should exist between a legal practitioner and his or her client. The government's security agencies should attend to identifying credible risks themselves without attempting to turn the legal profession into a network of informers.

Conclusion

In general, regulated entities are unlikely to oppose government attempts to prevent illegal behaviour as they have an interest in not being associated with criminal activity and are already motivated in preventing criminal activity so to limit their own financial losses. Regulated and prospective regulated entities, however, might 'object to the imposition of reporting requirements that they believe are intrusive, costly and whose effectiveness is not clearly supported by factual data' (Sica 2000: 59).

The Australian legal professionals surveyed for this study are no exception. There was acceptance among some in the legal fraternity that AML/CTF procedures would provide a benefit in minimising risk of inadvertent money laundering or terrorism financing in legal practice, although that acceptance was limited to half or less of survey respondents. Concern about the associated costs and impact of AML/CTF obligations was much more pronounced. Many of the respondents represented small practices (ie comprising 5 or less full-time equivalent legal practitioners) and trepidation about what Gallant (2009) has designated the public (resources) and private (regulatory compliance burden) costs of regulation is not an unexpected response. Given that small practices are the dominant model for legal practices in Australia (ABS 2003), the concerns expressed by survey respondents, particularly about costs and regulatory burden, are likely representative of the sector as a whole.

The Law Council of Australia (personal communication 2011) has also expressed concern with the imposition of a suspicious matter reporting obligation on legal practitioners, viewing it as being fundamentally at odds with, and inevitably undermining, the important relationship of trust and confidence between lawyer and client. The Law Council of Australia argues

that it is a central tenet of the rule of the law, that people should be able to obtain independent and skilled advice about the application of the law to both themselves and their affairs. This necessarily requires that a person be free to communicate fully and frankly with their legal adviser, which in turn requires a guarantee of confidentiality. Although this guarantee of confidentiality has never been absolute and has always been subject to legitimate and carefully defined exceptions, the encroachment on the duty of confidentiality, which is anticipated by the extension of the AML/CTF regime to lawyers is, in the view of the Law Council of Australia (personal communication 2011), unprecedented.

The Law Council of Australia (personal communication 2011) is also of opinion that Australian legal professionals are rarely exposed to money laundering and terrorism financing risks and that very few professionals are involved, or have been implicated, in this kind of criminal activity. While some legal professionals consulted by the AIC (Walters et al. 2012: 81) suggested that a small proportion of their peers could be involved in money laundering activities, most viewed the tendered evidence (in the form of case

studies, typologies and disciplinary proceedings) as 'isolated, rare and unrepresentative'. Further, representatives from professional associations stated that they had seen little evidence for practitioner involvement in criminal enterprise, let alone money laundering activity.

The response from government to concerns that regulated sectors perceive risks of money laundering and financing of terrorism to be low has been the implementation of risk-based AML/CTF regimes, here and overseas, which require compliance with the legislation but leaves it to the discretion of the affected parties as to how they meet some of these obligations based on their assessment of risk. Regulated entities are, in effect, given responsibility for both determining the level of risk represented by any customer and any transaction, and the appropriate response to it under the regime. Risk assessment of this nature requires, however, sufficient evidence upon which to base a judgment. The present survey shows that there is still a degree of uncertainty from those who responded about how best to measure risks of money laundering and financing of terrorism within the legal sector.



Conclusion

At present, legal practitioners are subject to extensive regulatory controls that include standards of training, financial management, professional practice and ethical standards. In addition, incorporated practices must comply with corporate laws and business regulations that apply within each of the jurisdictions in which they operate. If legal practitioners are brought within the AML/CTF regime, they would be obliged to implement a variety of compliance measures which, for some practices, may require simple extension of current corporate governance and risk management procedures, while for other small practices, may require considerable preparation, training and investment.

Similarities already exist between aspects of regulation specific to legal practitioners and those that comprise 'standard' AML/CTF regimes. For example, Walters et al.'s (2012) comparison of the NSW model of regulation (for funds held in trusts) with components of Australian AML/CTF regulation found that some mechanisms prescribed in the former regarding the tracking of funds were either comparable to those prescribed in the latter, or could serve a similar function. These include requirements for the recording of names and addresses for funds held in trusts, prohibitions against moving funds in trusts that cannot be traced electronically, mandatory reporting by practitioners if they identify suspicious movement of trust funds in their practice or another legal practice and annual

auditing requirements. Walters et al. (2012) also identified significant differences between existing requirements and those that might be required under the AML/CTF Act, notably in the absence of recommendations for verifying the identity of clients placing funds in trust accounts and ongoing monitoring of trusts to detect irregularities. Professional rules governing the practice of lawyers in Australia do not require any formal identification requirements for new clients or beneficial owners of funds held in trust.

Legal practitioners, along with real estate agents, dealers in precious metals, and trust and company service providers, have been identified by the FATF (2012) recommendations as providers of services that should be regulated for AML/CTF purposes. The findings of the present survey of Australian legal professionals provide an indication of the extent of risk management practices already adopted by respondents from the profession/sector and how this relates to perceptions of money laundering and terrorism financing risks within that sector. The present survey findings also provide a summary of the perceived benefits of core due diligence measures that would form the basis of AML/CTF compliance arrangements for regulated services and concerns that the profession holds concerning the impact of AML/CTF obligations on their practice and the profession as a whole.

Understanding risks

In general, legal practitioners surveyed showed a sound understanding of client behaviours and situations that could be interpreted as suspicious and that could be indicative of risks of money laundering or terrorism financing activity. A large proportion of survey respondents were sure about the level of risk associated with many of the situations presented to them (see Table 6), such as where a client has unusual or unexpected sources of funding or a client insists that the legal practice facilitate transactions involving large quantities of cash for an unexplained purpose. They were less certain or convinced about the risk posed by certain categories of client (described in Table 8) such as politically exposed persons, some of whom may not regularly make use of small legal practices in Australia.

Most survey respondents reported that their practice had not experienced any of the risk-related situations or client behaviours during the previous 12 months. Further, the group considered to be at heightened risk of exploitation—defined as having experienced at least one of the risk situations/client behaviours yet holding an ambivalent interpretation of these as indicators of risk—were very much in the minority. Alternatively, it could be argued that these respondents knew that the potentially high-risk situations they had encountered had a legitimate explanation, thus taking them out of the high-risk category. While respondents were not asked about the level of risk that they felt their profession was exposed to, representatives from the legal profession consulted for Walters et al.'s (2012) study were mostly in agreement that if illegal behaviour was occurring, only a small proportion of legal practitioners were involved. Although only dealing with publicly reported matters, the allegations, charges and disciplinary proceedings involving legal practitioners in Australia collected by Walters et al. (2013) found little evidence of practitioners (wittingly or unwittingly) assisting their clients in entering illicit funds into the financial system or disguising the origin of such funds.

Use of client identification and ongoing customer due diligence measures

FATF's (2008a: 13) advice to legal professionals in 2008 was that

monitoring is required in order to detect unusual and possibly suspicious transactions and client behaviour, even in the case of lower risk clients. Given the relationship between a legal professional and his/her client, the most effective form of ongoing monitoring will often be continued observance and awareness of a client's activities by the legal professional. This requires legal professionals to be alert to this basis of monitoring and for training of legal professionals to take this feature into account.

FATF (2008a) notes, however, that these procedures are only essential for lawyers, notaries and other legal professionals when preparing or carrying out transactions for high-risk activities such as the buying and selling of real estate or the management of client money, securities or other assets. Among respondents who always or often provided services defined as high risk, more than half performed client identification procedures but again, the majority did not undertake any form of OCDD.

Legal practitioners invariably conduct risk assessments when receiving instructions from new clients in order to understand the risks that might arise from such clients and to prevent potential reputational damage and civil liability should their client have a criminal association, or later be found to be involved in criminal activities. Risk assessment is also important to guard against financial risks that some clients might have in terms of ability to settle costs. Although core client identification and ongoing CDD procedures are not perfect, they can help to reduce greatly the vulnerability of the sector to both complicit and unwitting money laundering/terrorism financing and to provide a basis upon which associated risk-management policies and procedures can be developed.

Just over half of the respondents to the present survey reported that they regularly used client

identification procedures when accepting a new client but only 40 percent stated that they always or often undertook OCDD procedures. Respondents did not offer reasons why they used these procedures but the apparently greater reliance on client identification procedures is probably not so surprising if it represents a relatively routine activity for legal practitioners when accepting new clients. Notaries, for example, often perform functions that include witnessing signatures and verifying identity. Practitioners who chose not to use client identification and/or OCDD procedures did not do so because they knew and trusted their clients, resources did not permit their undertaking KYC or related due diligence measures, or the level of risk their clients apparently posed did not warrant using such procedures. The benefits of having an adequate CDD system in place can, of course, extend beyond preventing money laundering and the financing of terrorism although of course, such additional benefits do not provide a justification for the imposition of wide-scale AML/CTF reforms. As the Queensland Law Society (2008: 10) pointed out:

The introduction of client due diligence requirements is likely to contribute significantly to the general risk management strategies of law practices. Data from legal insurers shows that high percentages of claims and complaints could have been avoided if practices had more robust client selection and acceptance policies. In addition to conflicts of interest considerations, a number of claims arise out of failing to adequately define the identity of the client, and from failing to identify the risks associated with specific clients and transactions.

Assessment of benefits versus costs

There will inevitably be costs and inconvenience associated with establishing effective counter-measures to guard against money laundering and terrorist financing. However, commitment to regulatory compliance will be seen as less onerous if there is the perception or an assessment that the benefits of obligations outweigh the associated costs. This will be especially important if the cost and complexity of AML/CTF compliance efforts is as expensive as some have predicted (Sathye 2008).

Survey responses suggested that sector concerns currently overshadow perceived benefits. This is not an unexpected finding but differences in the proportions of respondents who expressed high or very high concern about cost and other impacts with those who accepted the benefits of AML/CTF procedures were considerable. Cost was the primary issue. Given that smaller sized legal practices comprised the majority of the survey respondents, much of this concern would have been driven by the uncertainty about how fewer or already over-stretched resources could be found to meet unavoidable increases in the cost of business. An unsustainable increase in the cost of business may undermine the viability or profitability of the practices and consequently drive up legal costs for the public. It may also result in the unintended consequence of driving the small players underground or providers of designated services to less restrictive and less costly jurisdictions (regulatory arbitrage).

In addition to concerns regarding potential compliance costs, respondents were also apprehensive that ongoing monitoring of clients may impact negatively on solicitor/client relationships, particularly in relation to mandatory suspicious transaction reporting, and interfere with the application of legal professional privilege. Section 242 of the AML/CTF Act specifically states that the Act does not affect the law relating to legal professional privilege (ie legal practitioners are not required to make reports that are based on information that is subject to legal professional privilege) but some survey respondents were not convinced that this would occur in practice.

Awareness raising within the profession

If legal practitioners in Australia are included within the AML/CTF regime, there will be a need for further and extensive investment in education and training by both the regulator as well as reporting entities. Education and outreach activities are crucial for preparing and supporting prospective reporting entities. Building expertise can be achieved, in part, by ongoing training, recruitment, taking professional advice and 'learning by doing' (FATF 2008a: 10). It is therefore essential that the legal practitioners and

other DNFBPs are kept abreast of the latest trends in money laundering and financing of terrorism in connection with higher risk clients and services.

Survey respondents themselves expressed a need for more frequent collation and dissemination of relevant typologies and case studies to improve their comprehension of money laundering and terrorism financing risks within the sector.

Generally, if legal practitioners are brought within the AML/CTF regulatory framework, there will arguably be an ongoing need for information to be provided by the regulator on the nature of relevant risk factors through the dissemination of typologies, red-flag indicators and sanitised case studies, all reported in sufficient depth to enable legal practitioners to undertake effective and relevant risk appraisal of their own practice circumstances. AUSTRAC (2007: np) has already noted that nurturing good collaborative and trust relationships between the public and private sectors is desirable and that 'by building stronger and more cooperative relationships with the reporting entities it regulates and by nurturing a culture of voluntary compliance with the law', the effectiveness of the AML/CTF regime in Australia will be maximised.

FATF (2010, 2008a) has also identified the need for reporting entities to have strong codes of conduct and ethical standards, supported by supervisory and regulatory bodies, which will include aspects of AML/CTF compliance. Regulatory authorities should also seek to establish an atmosphere in which legal professionals need not be afraid of regulatory sanctions where they have acted responsibly and implemented adequate internal systems and controls.

Future directions for research

The absorption of the legal sector into the AML/CTF regime is arguably a less straightforward undertaking compared with the inclusion of those organisations already subject to regulation. Whether or not legal practitioners in Australia should be included within the regime will be dependant, in part, on the current

differential use of CDD procedures that lawyers perform and the professions' concern regarding how mandatory reporting will be accommodated within the sector's commitment to independence and confidentiality. If the sector does indeed become regulated under the AML/CTF Act, then future research could consider whether (if at all) attitudes have changed among legal professionals. A follow-up survey would allow researchers to revisit some of the assumptions and observations made by legal professionals around the benefits of AML/CTF procedures and the extent to which AML/CTF obligations have been adapted to routine compliance procedures. This would enable any deficiencies in procedures or misunderstandings concerning obligations to be identified and addressed.

A second area of research worthy of further exploration would entail the documentation in greater detail of the nature and extent of deliberate and unwitting involvement in money laundering and terrorism financing and more generally, fraud and financial crime. The majority of case studies reviewed by Walters et al. (2012), for example, indicated that most detected incidents involved deliberate illegal behaviour on the part of the legal practitioner, rather than practitioners unwittingly becoming involved in illegal conduct. An analysis of techniques employed in individual cases could assist in understanding the diversification and evolution of criminal exploitation in this context, where weak controls exist and if indeed the sector is at heightened risk of misuse for money laundering and terrorism financing purposes in the first place.

Finally, comprehensive evaluative research is needed to assess the actual levels of cost and benefits that the inclusion of the legal profession within the AML/CTF regime might entail. Further, it is important that any legislative changes are assessed not only in relation to their regulatory impact but also in terms of the benefits that have actually been derived for law enforcement as well through general deterrence that minimises money laundering and the financing of terrorism in Australia.



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All URLs were correct at December 2012

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Appendices

Appendix 1 Covering letter template

LAW SOCIETY LETTERHEAD

Date

Address block

Dear *****,

Anti-Money Laundering / Counter Terrorism Financing Survey of Legal Practices

In Australia, a comprehensive regulatory framework is in place to respond to risks of money laundering and the financing of terrorism. This includes obligations on certain regulated businesses, such as financial institutions, to have a risk-based anti-money laundering and counter-terrorism financing (AML/CTF) program in place which includes customer/client identification procedures, transaction monitoring, and reporting suspicious and threshold matters to the regulator, AUSTRAC.

At present, these obligations are principally confined to the financial services sector. As part of Australia's international obligations to respond to money laundering and the financing of terrorism, the Australian government is considering extending these requirements to specified transactions undertaken within certain professions, potentially including legal practitioners, accountants, and others. A process of consultation is underway which includes research and discussion with those likely to be affected by the changes.

In order to assist in this process of policy development, the Australian Institute of Criminology (AIC) is undertaking research into the risks associated with money laundering and the financing of terrorism that legal practitioners in Australia may face when acting for their clients in connection with certain types of matters. By understanding the level of risk which exists, the AIC will be able to provide important factual information to inform the policy development process. This is in addition to other consultations with the professions that the government is undertaking.

A principal element of this research is a survey of the legal profession in selected jurisdictions which has been developed by the AIC in conjunction with the Law Council of Australia and its constituent bodies. The survey seeks to:

elicit information on how legal practices perceive the money laundering and financing of terrorism risks posed by their clients and their clients' transactions;

identify the risk management tools currently employed by legal practices; and

assess the value of applying anti-money laundering and counter-terrorism financing (AML/CTF) legislative regimes to legal practices in Australia.

The survey is being distributed to all legal practices by the Law Society of New South Wales, the ACT Law Society, the Queensland Law Society, and the Law Institute of Victoria and one response from each practice

is being requested. Responses will be entirely anonymous and sent directly to the AIC which will analyse the results and prepare a report of the findings. Individuals and practices will not be identifiable or named in any way and the survey results will be presented in aggregate form only.

We strongly endorse the AICs research and are seeking your assistance to nominate a senior legal practitioner or anti-money laundering/compliance officer (if one exists) within your practice to complete this survey. Your practice's participation in this research is important and necessary to ensure that the AIC obtains accurate and representative information of the legal sector that will enable the development of an effective and appropriate response to the problems of money laundering and financing of terrorism within Australia.

I attach a copy of the survey which contains instructions for completion along with a glossary of terms used in the survey. This short survey will take approximately 15 minutes to complete and you can respond by printing out the email attachment and sending it to the AIC, or by completing the questions on the secure internet site at:

<https://secure.aic.gov.au/surveymanager/login.asp?anom=33x2x1>

Your assistance is greatly appreciated.

Yours sincerely

Name

Position in Law Society

Appendix 2 Survey instrument

Anti-Money Laundering and Counter-Terrorism Financing Survey of Legal Practices

PLEASE READ THIS FIRST

The Australian Institute of Criminology (AIC) is undertaking a survey of legal practices in Victoria, New South Wales, Queensland and the ACT.

The survey has been developed with the assistance of the Law Council of Australia and seeks to:

- elicit information on how legal practices perceive the money laundering and financing of terrorism risks posed by their clients and their clients' transactions;
- identify the risk management tools currently employed by legal practices; and
- assess the value of applying existing anti-money laundering and counter-terrorism financing (AML/CTF) legislative regimes to legal practices in Australia.

The survey is being sent to legal practices in these four jurisdictions by the constituent bodies of the Law Council of Australia. The AIC will not know the identity of the practices or individuals who receive and respond to the survey and, accordingly, your answers will be **completely anonymous**.

Your input is important as the Australian government is currently considering reforms to the AML/CTF legislative regime which may include extension of the regime to certain specified transactions in the legal and other professional sectors (see question 5, below). Your responses will help to inform policy-making by allowing us to determine your views as to the level of perceived risk of money laundering and financing of terrorism faced by Australian legal practitioners, and to enable an appropriate regulatory response to be developed that meets international obligations but that is proportionate to the level of risk that is present in Australia. Completion of this survey will provide you with an opportunity to communicate your views in an independent and anonymous way to the government.

One response to the questionnaire is being sought from **each separate practice**.

It is suggested that the person in your practice with the **most relevant expertise** on risk management, which may specifically include AML/CTF, responds to the survey questions. It may be necessary for that person to canvass the views of others within the practice **prior to answering the questions**.

The questions relate to your practice's **operations within Australia** as well as any partner firms, associates, or transactions or services conducted internationally on behalf of your clients. **Only one response** is requested from practices with offices in multiple locations in Australian states or territories or in overseas jurisdictions.

Unless otherwise stated, the questions relate to the **2008-09 financial year** (1 July 2008 to 30 June 2009).

If you have any general queries or concerns regarding this survey, please refer to the privacy and confidentiality statement and frequently asked questions provided as part of the survey pack, or you may click on the following secure links: (www.FAQ) (www.INFO)

If you wish to confirm the legitimacy of this survey or require assistance in completing the survey, please contact the Australian Institute of Criminology's toll free number 1800 XXX XXX or email legalpracticesurvey@aic.gov.au. Further information is available on the AICs website (www.aic.gov.au/research/geec.html).

HOW TO FILL OUT THIS FORM

- The survey may be completed electronically by going to (www.aic.gov.au/legalpracticesurvey) and following the instructions on that page.
- **Alternatively**, you may complete the survey on the paper form provided, or print out the Word document which has been sent to you by email and respond as follows:

- Please cross boxes like this: Yes ☒

- Correct mistakes like this: ☐ ☒

(If you make a mistake, simply scribble it out and mark the correct answer with a cross).

- Use a ballpoint blue or black pen (do not use a felt tipped pen).
- Where exact information is not known, please give the best answer you can
- Where a written answer is required, please write clearly.
- You should return any **paper surveys** (including a print-out of your responses on the Word document) in the pre-paid, addressed envelope provided, or to:

Legal Practice Survey
c/- Australian Institute of Criminology
GPO Box 2944, Canberra ACT 2601.

- In order to ensure anonymity of your responses, **please DO NOT send any responses by email** to the AIC. **Electronic responses** can only be received by using the Internet version of the survey at www.aic.gov.au/legalpracticesurvey

TERMINOLOGY USED IN THE SURVEY

Some of the terms in the survey may seem quite technical. A full glossary of terms is provided below, and online. The [Refer to glossary](#) box indicates those questions where the terminology is defined in the glossary.

Terms and expressions used in this survey correspond with definitions contained in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) as amended. In the survey, this legislation is referred to as **AML/CTF Act**

[Refer to glossary](#)

Some questions seek your perceptions of a situation or issue and therefore a subjective interpretation of terms is anticipated. Alternatively, some questions ask for more precise information. If you cannot provide an exact answer from your practice's records, an estimate is acceptable. Please provide the best estimate that you can.

You should answer questions where possible, by reference to your personal/individual understanding as it relates to the firm in which you practice. Where questions ask about the situation in your legal practice, you should provide the best response that you can concerning the whole legal practice. It might be necessary to consult with your practice colleagues prior to answering some questions.

CONFIDENTIALITY

All information you will provide will be completely anonymous and no mention of participant names, legal practice names or the names of third parties will be made in any subsequent reports or publications resulting from this survey. All information gathered by this survey complies with the Information Privacy Principles of the *Privacy Act 1998* (Cth). Any information that may result in the identification of responding legal practices will be withheld from all publications and reports.

The survey was approved by the AIC's Human Research Ethics Committee (No PO-0146) on 1 September 2009).

Please now answer the following questions

PRACTICE INFORMATION

Q1 Please select the types of business models which most closely represent your legal practice.

(tick all that apply)

- ☐ sole practitioner
- ☐ partnership
- ☐ incorporated practice
- ☐ multi-disciplinary practice
- ☐ community legal centre [**Note:** *If you have selected this response, you may choose NOT to answer any further questions, although you may do so if you wish. To finish the survey now, please click [here](#)*]

Q2 Please select the geographical scope which most closely represents your legal practice.

(tick all that apply)

- ☐ single location practice within one state/territory
- ☐ multiple location practice within one state/territory
- ☐ practice with one or more regional offices
- ☐ practice with one or more interstate offices
- ☐ practice with one or more international offices

Q3 How many full-time equivalent legal practitioners with a current practising certificate did your practice have on 30 June 2009?

(tick one box only)

- ☐ 1-5
- ☐ 6-10
- ☐ 11-20
- ☐ 21-99
- ☐ 100 or more

Q4. Which of the following best describes your primary role?

(tick one box only)

- ☐ Proprietor/partner/principal/director
- ☐ Practice manager
- ☐ Practitioner
- ☐ Risk manager
- ☐ AML/CTF compliance officer
- ☐ Other *(please specify)* _____

Q5. To what extent did your practice provide each of the following services during the 12 months ending 30 June 2009? [Refer to glossary](#)

(please tick all that apply on each line)

1 – Never 2 – Seldom 3 – Sometimes 4 – Often 5 – All the time

a. Managing your clients' money, securities, and other assets

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

(This includes managing your clients' money, securities, and other assets and investing clients' monies as instructed. This does not include merely making payments to or from the trust account of the legal practice)

b. Managing your clients' banking and other accounts 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

(This includes managing your clients' accounts and being a signatory to clients' bank accounts)

c. Creating, operating, or managing legal entities and arrangements

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

(This includes arranging incorporation of companies, preparing trust deeds and instruments, preparing joint venture and partnership deeds and agreements)

d. Organising the financial contributions for creating, operating, or managing companies 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

(This includes making arrangements or preparations for equity finance or debt finance for a company or advising a company on equity finance or debt finance)

e. Buying or selling business entities 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

(This includes making arrangements or preparations on behalf of a person for the sale or purchase of a business, advising on the sale or purchase of a business, and reviewing the contract of sale, conducting related searches and arranging settlement)

f. Buying or selling real estate 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

(This includes making arrangement or preparations on behalf of a person for the sale or purchase of real estate, advising on the sale or purchase of a business, and reviewing the contract of sale, conducting related searches and arranging settlement.)

RISK MANAGEMENT PRACTICES CONCERNING NEW CLIENTS

Q6. Does your practice use any due diligence procedures before accepting a new client?

(Some examples of due diligence procedures include undertaking a credit check; only accepting new clients that have come as referrals from trusted individuals; or using external checks such as checking the lists of proscribed individuals and organisations maintained by the Australian Government)

[Refer to glossary](#)

☐ No – (please go to question 7)

☐ Yes – if so, please describe these briefly, and then go to question 7

Q7. Does your practice carry out any client identification procedures for new clients? [Refer to glossary](#)

☐ Yes – (please go to question 8)

☐ No – (please go to question 9)

Q8. To what extent does your practice currently use any of the following procedures to identify new clients? [Refer to glossary](#)

(please answer **each line** in **each part A to E**)

1 – Never 2 – Seldom 3 – Sometimes 4 – Often 5 – All the time

A – Clients who are natural persons

N/A - I don't have any clients who are natural persons ☐

Verifying the authenticity of a signature on an agreement to undertake legal services against an identification document containing the client's signature

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Sighting one or more pieces of photo identification: 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

(This includes items such as driver's licences and passports)

Sighting evidence of identity that is not photo identification:

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

(This might include items such as birth certificates, utilities bills, ~~medicare~~ [medicare](#) cards, or student cards)

Checking for the presence of the client on lists of proscribed individuals and organisations maintained by the Australian Government [Refer to glossary](#)

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Other procedures (please specify)

B- Clients that are incorporated entities

N/A - I don't have clients that are incorporated entities ☐

Verifying the authenticity of a signature of the representative of the legal entity on an agreement to undertake legal services against an identification document containing the representative's signature

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Sighting one or more pieces of photo identification of representative of the legal entity

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Verifying the authority of representative of the legal entity

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Verifying the ABN or ACN of the legal entity

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Other procedures (specify)

C – Clients that are unincorporated associations

N/A - I don't have clients that are unincorporated associations ☐

Verifying the authenticity of a signature of the representative of the association on an agreement to undertake legal services against an identification document containing the representative's signature 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Sighting one or more pieces of photo identification of representative of the association 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Verifying the authority of the representative of the association 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Verifying the Business Registration number or name 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Other procedures (specify)

D – Clients that are government bodies

N/A - I don't have clients that are government bodies ☐

Verifying the authenticity of a signature of the representative of the government body on an agreement to undertake legal services against an identification document containing the representative's signature 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Sighting one or more pieces of photo identification of departmental representative 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Verifying an instrument of delegation 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Verifying the ABN or ACN 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Other procedures (specify)

E – Clients that are trustees

N/A - I don't have clients that are trustees ☐

Checking the authenticity of a signature of a trustee on an agreement to undertake legal services against an identification document containing the trustee's signature 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Sighting photo identification of representative 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Verifying the authority of representative of the trust 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Verifying the ABN or ACN 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Other procedures (specify)

Q9 On how many separate occasions did your practice receive or disburse cash worth over \$10,000 during the 12 months ending 30 June 2009?

(tick one box only)

☐ 0

- ☐ 1
- ☐ 2
- ☐ 3-5
- ☐ 6-10
- ☐ 11 or more

PERCEPTIONS OF RISK

Q10 The following situations have been identified as potentially involving a high risk of money laundering (ML) or financing of terrorism (TF) in circumstances in which there is no reasonable justification evident. Please indicate (1) your agreement or otherwise that the situation could potentially involve such a risk, and (2) if your practice has ever had experience of each situation.

[Refer to glossary](#)

(please respond to each part)

a. Client requests that the legal practice act as merely an intermediary by receiving and transmitting funds when closing a business transaction

(1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐

(2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐

b. Client insists that the legal practice offer services to a client outside of the area of its expertise or its normal geographic area

(1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐

(2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐

c. Client has unusual or unexpected sources of funding (that remain unexplained)

(1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐

(2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐

d. Client insists on the creation of unnecessarily complicated business structures

(1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐

(2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐

e. Client insists on the creation of unnecessarily complicated transaction paths

(1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐

(2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐

f. Client activity involves undervaluing transactions

(1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐

- (2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐
- g. Client requests transactions involving suspect countries (e.g. tax havens) for unexplained purposes
- (1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐
- (2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐
- h. Client makes regular or unexplained changes to the legal practice's instructions
- (1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐
- (2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐
- i. Client makes regular or unexplained changes to its business entities
- (1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐
- (2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐
- j. Client insists that the legal practice conduct transactions between parties in unusually limited time frames for no evident legal, tax, business economic or other legitimate reasons
- (1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐
- (2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐
- k. Client insists that the legal practice deal with the trustee of a trust without identifying the existence of the beneficiaries
- (1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐
- (2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐
- l. Client insists that the legal practice facilitate large international funds transfers
- (1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐
- (2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐
- m. Client insists that the legal practice facilitate transactions involving large quantities of cash for an unexplained purpose
- (1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐
- (2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐
- n. Client requests that the legal practice facilitate multiple deposits made to the same overseas account by different entities or individuals
- (1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐
- (2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐
- o. Client makes a request to the legal practice for services that are outside of the client's normal business activities or market
- (1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐
- (2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐

Q11 In addition to the situations listed in Q-10, what other types of requested services do you believe may carry a risk of money laundering or financing of terrorism?

(please describe briefly)

Q12 The following types of clients, and client behaviours, have been identified as potentially involving a high risk of money laundering (ML) or financing of terrorism (TF) in circumstances in which there is no reasonable justification evident. Please indicate (1) your agreement or otherwise that these circumstances could potentially involve such a risk, and (2) if your practice has ever had experience of each.

(please respond to each part)

a. Client is inappropriately secretive

(1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐

(2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐

b. Client's litigation matters are settled too easily and on uncommercial terms

(1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐

(2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐

c. Client offers to pay additional fees or a bonus to legal practitioner without due reason

(1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐

(2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐

d. Client insists on the use of short cuts or foregoing standard processes

(1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐

(2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐

e. Client insists that the legal practitioner receive payment for fees from an unknown or unassociated third party

(1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐

(2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐

f. Client asks the legal practice to receive payment for fees in cash where this is an atypical method of payment

- (1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐
- (2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐
- g. Client makes unusual or unexpected settlement requests (e.g. direction of settlement funds to an unknown third party)
- (1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐
- (2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐
- h. Client insists on services that appear to protect, allow, or depend on, more client anonymity than is normal under the circumstances
- (1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐
- (2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐
- i. Client is a politically exposed person [Refer to glossary](#)
- (1) Does this potentially involve a risk of ML or TF? Yes ☐ No ☐ Unsure ☐
- (2) Has your practice encountered this? Yes ☐ No ☐ Unsure ☐

Q13 In addition to the circumstances listed in Q-12, what other types of client or client behaviours do you believe may carry a risk of money laundering or financing of terrorism?

(please describe briefly)

Q14 Has your practice, to your knowledge, ever had concerns that a client is involved in any of the following money laundering or financing of terrorism activities: [Refer to glossary](#)

- a. Disguising, transferring, or transacting with, the proceeds of crime
☐ Yes (go to question 14b) ☐ No (go to question 14b)
- b. Disguising, transferring, or transacting with, the instruments of crime
☐ Yes (go to question 14c) ☐ No (go to question 14c)
- c. The financing of a terrorist act or a terrorist organisation
☐ Yes (go to question 15) ☐ No (go to question 17)

Q15 Has your practice, to your knowledge, ever refused to act for a client because of concerns that the client was involved in any of the following money laundering or financing of terrorism activities:

[Refer to glossary](#)

- a. Disguising, transferring, or transacting with, the proceeds of crime
☐ Yes (go to question 15b) ☐ No (go to question 15b)

b. Disguising, transferring, or transacting with, the instruments of crime

☐ Yes (go to question 15c) ☐ No (go to question 15c)

c. The financing of a terrorist act or a terrorist organisation

☐ Yes (go to question 16) ☐ No (go to question 17)

Q16 If your practice has refused to act for a client due to the circumstances in Q15, did you take any of the following steps?

(please tick all that apply)

- ☐ Refused to act for that client in any matters
- ☐ Notified other practices of what the client was proposing
- ☐ Notified the Law Society / Institute
- ☐ Notified the law enforcement or security community officially or unofficially
- ☐ None of the above
- ☐ I would rather not say
- ☐ Other (please specify)
-

BENEFITS OF AML/CTF PROCEDURES

Q17 What level of benefit do you think each of the following existing AML/CTF compliance procedures (if applied to legal practices) would have in minimising risks of inadvertent money laundering or financing of terrorism in legal practice? [Refer to glossary](#)

(please respond to each)

1 – No benefit 2 – Some benefit 3 – Moderate benefit 4 – High benefit 5 – Very high benefit

- | | | | | | | | | | | |
|-----------------------------------------------------------|---|--------------------------|---|--------------------------|---|--------------------------|---|--------------------------|---|--------------------------|
| Client identification | 1 | <input type="checkbox"/> | 2 | <input type="checkbox"/> | 3 | <input type="checkbox"/> | 4 | <input type="checkbox"/> | 5 | <input type="checkbox"/> |
| Conducting risk-based assessments of clients and services | 1 | <input type="checkbox"/> | 2 | <input type="checkbox"/> | 3 | <input type="checkbox"/> | 4 | <input type="checkbox"/> | 5 | <input type="checkbox"/> |
| Record keeping for seven years | 1 | <input type="checkbox"/> | 2 | <input type="checkbox"/> | 3 | <input type="checkbox"/> | 4 | <input type="checkbox"/> | 5 | <input type="checkbox"/> |
| Conducting periodic auditing | 1 | <input type="checkbox"/> | 2 | <input type="checkbox"/> | 3 | <input type="checkbox"/> | 4 | <input type="checkbox"/> | 5 | <input type="checkbox"/> |
| Staff training | 1 | <input type="checkbox"/> | 2 | <input type="checkbox"/> | 3 | <input type="checkbox"/> | 4 | <input type="checkbox"/> | 5 | <input type="checkbox"/> |
| Appointing an AML/CTF compliance officer | 1 | <input type="checkbox"/> | 2 | <input type="checkbox"/> | 3 | <input type="checkbox"/> | 4 | <input type="checkbox"/> | 5 | <input type="checkbox"/> |
| Ongoing transaction monitoring | 1 | <input type="checkbox"/> | 2 | <input type="checkbox"/> | 3 | <input type="checkbox"/> | 4 | <input type="checkbox"/> | 5 | <input type="checkbox"/> |
| Suspicious matter reporting | 1 | <input type="checkbox"/> | 2 | <input type="checkbox"/> | 3 | <input type="checkbox"/> | 4 | <input type="checkbox"/> | 5 | <input type="checkbox"/> |
| Annual compliance reporting | 1 | <input type="checkbox"/> | 2 | <input type="checkbox"/> | 3 | <input type="checkbox"/> | 4 | <input type="checkbox"/> | 5 | <input type="checkbox"/> |

Q18 In addition to the procedures listed in Q-17, what other procedures do you believe would be beneficial in minimising risks of inadvertent money laundering or financing of terrorism in legal practice?

(please describe briefly)

CONCERNS REGARDING AML/CTF PROCEDURES

Q19 Please indicate the level of concern for your practice from implementation of the compliance measures described in Question 17 in relation to each of the following.

(please respond to each)

1 – No concern 2 – Some concern 3 – Moderate concern 4 – High concern 5 – Very high concern

Costs of introduction/implementation 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Costs of ongoing compliance (including training, monitoring, recordkeeping, reporting, auditing, client & service assessment) 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Need to increase minimum charge-out rates or raise additional disbursements to meet compliance costs 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Impact on solicitor/client relationship generally 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Application of legal professional privilege 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Impact on legal practice generally 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Liability under Division 400 of the Criminal Code (refer 400.9 in particular)

[Refer to glossary](#)

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Q20 Please describe any other concerns which you believe might arise for your legal practice from the implementation of the compliance measures described in Question 17 to legal practices in Australia.

(please describe briefly)

This image shows a blank sheet of white paper with horizontal blue or grey ruling lines, typical of notebook paper. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Thank you for completing this survey. The results will be available from the Law Council of Australia and the AIC

Appendix 3 Glossary of terms

Terms used in the survey marked as

Australia's AML/CTF Act and Rules

AML/CTF Act

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) covers the financial sector, gambling sector, bullion dealers and other professionals or businesses (reporting entities) that provide designated services.

The government is considering extending this regime to the precious stones and jewellery sector, real estate sector, some accounting and legal professions for some transactions, and trust and company service providers. The reforms may potentially include legal practitioners.

The AML/CTF Act imposes a number of obligations on reporting entities when they provide designated services. These obligations include:

- client identification and verification
- record keeping (content details & retention period)
- establishing and maintaining an AML/CTF program
- ongoing client due diligence
- reporting (suspicious matters, threshold transactions, international funds transfer instructions, and AML/CTF compliance reports)

Refer to the "Overview of the Acts" module of AUSTRAC e-learning courses (<http://www.austrac.gov.au/courses.html>) for more information.

The AML/CTF Act in full is available from ComLaw <http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200627290?OpenDocument>

AML/CTF Rules

Under section 229 of the AML/CTF Act, the AUSTRAC CEO may make AML/CTF Rules containing the further details of the obligations of reporting entities, or exempt services, under that Act. The AML/CTF Rules are legislative instruments and are therefore binding. Registered AML/CTF Rules are available from AUSTRAC at http://www.austrac.gov.au/aml_ctf_rules.html

Reporting entities

Reporting entities are defined under section 5 of the AML/CTF Act. Reporting entities are financial institutions, or other persons, who provide a designated service listed in section 6 of the AML/CTF Act. Reporting entities have money laundering preventative obligations under the AML/CTF Act. The obligations include client identification and verification, record-keeping, and financial transaction and compliance reporting.

Refer to the AML/CTF Act in full is available from ComLaw (<http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200627290?OpenDocument>) for more information.

Proposed services to be regulated (Q-5)

The Financial Action Task Force (FATF-GAFI) Recommendation 12 suggests countries extend customer due diligence and record keeping requirements to lawyers, notaries, and other independent legal professionals. Recommendation 16 suggests extending suspicious transaction reporting, tipping off, and AML/CTF program requirements to lawyers, notaries, and other legal professionals. Recommendations 12 and 16 apply only to some transactions and services that may be performed by a legal practitioner. These are:

- 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 of legal persons or arrangements, and buying and selling of business entities.

Recommendation 16 notes that lawyers, notaries, other independent legal professionals are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.

The FATF-GAFI Recommendations may be found [here](#).

Client due diligence (CDD) (Q6)

Under AML/CTF legislation, reporting entities must monitor their clients with a view to identifying, mitigating; and managing the risk the reporting entity may reasonably face in providing the client with a designated service.

Refer to AUSTRAC guidance notes on “Ongoing client due diligence” (http://www.austrac.gov.au/guidance_notes.html) for more information.

Client identification (Q7)

Client identification (or Know Your Client) policy refers to the documentation which sets out a business's approach to ensuring that it can effectively identify its clients, and monitor their financial transactions, relative to the risk each poses of money laundering and terrorism financing.

Refer to the “Know Your Client” module of AUSTRAC e-learning courses (<http://www.austrac.gov.au/courses.html>) for more information.

Lists of proscribed individuals and entities (Q6, Q8)

The Department of Foreign Affairs and Trade maintains lists of proscribed individuals and entities (including countries) which set out details regarding these individuals and entities and explains what sort of transactions are prohibited. See the attached link for more information. (http://www.dfat.gov.au/icat/UNSC_financial_sanctions.html)

The Attorney-General's Department also maintains a list of terrorist organisations and it is an offence to get funds to, from, for or provide support to a listed organisation. See the attached link for more information. http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity_Terroristorganisations

Refer to the "Terrorism Financing" module of AUSTRAC e-learning courses (<http://www.austrac.gov.au/courses.html>) for more information.

Risk-based assessments of clients and services (Q7)

Reporting entities determine the way in which they meet their obligations based on their assessment of the risk of whether providing a designated service to a client may facilitate money laundering or terrorism financing.

Money laundering (Q10 to Q14, Q16)

Money laundering is the process of legitimising, hiding, or disguising the source of funds generated from illegal activities. Money laundering is often described as a three stage process. The stages are placement (where proceeds obtained from criminal activity are physically placed in the financial system), layering (where a series of transactions are used to disguise the source and ownership of these funds), and integration (where the funds are re-introduced into the financial system).

The AML/CTF Act defines "money laundering" as conduct that amounts to an offence against Division 400 of the Criminal Code (Cth), or a corresponding offence against State/Territory or foreign law.

The *Criminal Code Act 1995* (Cth) (the Criminal Code) (Division 400) contains multiple federal money laundering offences. Division 400 criminalises dealing with money or property that is the proceeds of crime. Division 400 also criminalises dealing with money or property where if there is a risk that it will become the instrument of a crime. The proceeds of crime are any money or property generated directly or indirectly from an indictable offence. The Criminal Code defines an instrument of crime as money or property used to commission or to facilitate an indictable offence.

The offences extend beyond knowingly dealing with the proceeds or instruments of crime to negligently or recklessly dealing with this money or property. Money laundering is a secondary crime because it is predicated upon the commission of another offence (known as the predicate offence). All indictable offences may be considered predicated crimes for money laundering offences in Australia.

Refer to the "Money Laundering" module of AUSTRAC e-learning courses (<http://www.austrac.gov.au/courses.html>) for more information.

Financing of terrorism (Q10 to Q17)

Terrorism

A 'terrorist act' is defined under section 100.1 of the Criminal Code as an act done, or a threat made, with the intention of advancing a political, religious, or ideological cause. A terrorist act is done with the further intention of coercing, or influencing by intimidation, whole or part of the Government of the Commonwealth, that of a State or Territory, or of a foreign country; or intimidating the public or a section of the public.

Terrorism financing

The financing of terrorism may include the provision of any kind of asset in any form, including bank credits, traveller's cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit and cash.

Under the Criminal Code it is an offence for a person to provide to, or collect funds for, another person when the second person will use the funds to facilitate or engage in a terrorist act. An offence is committed even if the terrorist act does not occur; threatening such an act is sufficient. The required minimum fault element for this offence is recklessness and the maximum penalty is life imprisonment.

It is also an offence to receive funds from, make funds available to, or collect funds for a terrorist organisation. The required fault element is either knowledge (the relevant penalty is 25 years) or recklessness (the relevant penalty is 15 years).

Politically exposed persons (PEPs) (Q13)

These are individuals who are or have been entrusted with prominent public functions in a foreign country including Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, or important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories. The definition also does not include individuals, or their family members and associates, holding these roles domestically. (FATF, Glossary to the 40 Recommendations.).

Staff training (Q16 and Q18)

Every reporting entity must implement and maintain an AML/CTF program. The purpose of such a program is to identify, mitigate and manage the money-laundering and terrorism-financing risks reasonably faced by the reporting entity. An important component of such a program is the training of staff in how to recognise and deal with situations that may involve AML/CTF risks

The AML/CTF Act provides for three variations of AML/CTF program. Each reporting entity must select the one that is most suitable to their respective business. The three types of AML/CTF programs are:

- a **standard AML/CTF program**, which applies to an individual reporting entity. It must include all the components set out in Chapters 4 and 8 of the AML/CTF Rules
- a **joint AML/CTF program**, which applies to each reporting entity that is a member of a designated business group (DBG), where each reporting entity member elects to have a joint AML/CTF program
- a **special AML/CTF program**, which applies where a reporting entity provides only designated services covered by item 54 of table 1 in section 6 of the AML/CTF Act. Item 54 of table 1 covers a holder of an Australian financial services licence who arranges for a person to receive a designated service, for example a financial planner who makes arrangements for one of his clients to receive a designated service.

Standard and joint AML/CTF programs are divided into Part A (general) and Part B (client identification). The primary purpose of a special AML/CTF program is to set out the applicable client identification procedure and only consists of Part B.

The core purpose of an AML/CTF program's Part A is to identify, mitigate and manage the ML/TF risk that a reporting entity may reasonable face in the provision of designated services. Refer to AUSTRAC elearning course regarding this issue.

http://www.austrac.gov.au/elearning_amlctf_programcourse/mod1/module_1_fundamentals.html

Transaction monitoring (Q16 and Q18)

This is part of client due diligence and involves having systems in place to monitor client transactions with the aim of detecting anomalous transactions that are anomalous with the client's profile.

Suspicious matters (Q16 and Q18)

Transaction

A transaction can be constituted by any business dealing between a reporting entity and a client. It includes negotiations or discussions that may not result in an actual dealing but does not include mere inquiries. For more information, refer to AUSTRAC guideline on "Suspicious Matter Reporting" (<http://www.austrac.gov.au/guidelines.html>).

Suspicious matters

A "suspicious matter reporting obligation" is defined in section 41(1) of the AML/CTF Act. Briefly the obligation may arise if doubt exists in relation to a person's identity or concern exists that provision of a service by a reporting entity may be connected to an indictable offence.

A transaction that causes a reporting entity to have a feeling of apprehension or mistrust about the transaction considering:

- its unusual nature or circumstances or,
- the person or group of persons with whom they are dealing,
- and based on the bringing together of all relevant factors including knowledge of the person's or persons' business or background (as well as behavioural factors) should be reported as a suspicious matter. For more information, refer to AUSTRAC guideline on "Suspicious Matter Reporting" (<http://www.austrac.gov.au/guidelines.html>).

Annual compliance reporting (Q16 and Q18)

An AML/CTF compliance report provides AUSTRAC with information about a reporting entity's compliance with the AML/CTF Act, and the AML/CTF Rules. All reporting entities (except those that only provide designated services under item 54 of table 1 of section 6 of the AML/CTF Act) are required to submit AML/CTF compliance reports to the AUSTRAC CEO.

AIC Reports

Research and Public Policy Series 122 part 1

Australia's national research and
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