SUBMISSION

MATTERS FOR CONSIDERATION CONCERNING EXTENTSION OF COMMONWEALTH ANTI-MONEY LAUNDERING AND COUNTER TERRORISM FINANCING MEASURES TO THE AUSTRALIAN LEGAL PROFESSION

INTRODUCTION

1. This is an initial submission in response to the Commonwealth's Consultation Paper *entitled: 'Legal practitioners and conveyancers: a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime'*, (the Consultation Paper) dated November 2016.

2. In the Consultation Paper, the Attorney General's Department of the Commonwealth (AGD) invited public submissions, by 31 January 2017. The Consultation Paper implements a recommendation made in April 2016, as a result of a review commenced in December 2013, concerning regulation of the legal profession. This was that:

   Recommendation 4.6: The Attorney-General's Department and AUSTRAC, in consultation with industry should:
   a) develop options for regulating lawyers, conveyancers, accountants, high-value dealers, real estate agents and trust and company service providers under the AML/CTF Act, and
   b) conduct a cost-benefit analysis of the regulatory options for regulating lawyers accountants, high-value dealers, real estate agents and trust and company service providers under the AML/CTF Act.

3. The Legal Services Council (the Council) was established in October 2014 and was not part of the consultations that took place as part of this statutory review. (I hold the position of Commissioner for Uniform Legal Services Regulation and as such am also CEO of the Council).

4. It is understood that the current *Consultation Paper* is intended as a starting point for a wider discussion on regulatory options to reduce the risk of Australian legal practitioners inadvertent or intentional facilitating of money-laundering (ML) and terrorist financing (TF) through the delivery of legal services in the normal course of business.

5. The Council is a relatively new body and its role under the Legal Profession Uniform Law (LPUL) and the reach of the existing system for regulating law practices in Victoria and NSW, may not be well known. The purpose of the submission is, therefore, to inform AGD about the role of the Council, and scope of the LPUL framework. It is submitted that these matters should be considered in any analysis of the existing legal profession regulatory system.

6. Regard must also be had to existing Commonwealth law, and, in particular, to provisions of the AML/CTF regime and the Criminal Code that apply to all legal practitioners in Australia. Existing Commonwealth law may already be able to bring about the kinds of results which the Commonwealth is seeking to be operating in conjunction with State law.

7. This submission therefore:

   I. explains the LPUL framework;

   II. summarises elements of the LPUL that mitigate against the risk of inadvertent or intentional involvement of legal practices in money laundering;

   III. notes Australia's existing anti money laundering regime, including broad criminal offences that apply to legal practitioners;

IV. puts forward some initial suggestions for how the Commonwealth's objectives might be advanced through existing legal profession regulation;

V. suggests that a further analysis of the existing legal profession regulatory system be undertaken, and

VI. requests that the Council be advised of any perceived gaps in that system, before the Commonwealth decides whether or not to directly regulate the legal profession for purpose of preventing AML/CTF.

8. This submission is an initial contribution to a dialogue on how the Commonwealth anti-money laundering and counter terrorism objectives may be met. It has been submitted in the week-ending 10 February 2016 with the agreement of AGD and may be supplemented by further submissions, at an appropriate time.

LEGAL PROFESSION UNIFORM LAW FRAMEWORK

9. Legal profession regulation has traditionally been regarded as a State matter, implemented through specialised legislation which aims to maintain high professional standards and to protect consumers, while preserving an appropriate level of independence of the profession from Executive Government. The LPUL Scheme is designed with that aim in mind so that it can be adopted and applied in each State and Territory. It provides a framework for a nationally consistent approach to legal profession regulation, to be overseen on a continuing basis by the Council and by the Commissioner for Uniform Legal Services Regulation (the Commissioner).

10. The LPUL implements a *Bi-Lateral Inter-Government Agreement on the Legal Profession Uniform Framework* between NSW and Victoria and builds on the work of the Council of Australian Governments (COAG) *National Partnership to Deliver a Seamless Economy*. Principal objectives of the LPUL framework are to: provide and promote uniformity in the law applying to the Australian legal profession; and promote regulation that is efficient, effective, targeted and proportionate, while ensuring that lawyers maintain high ethical and professional standards and protecting the clients of legal services and the public generally. These regulatory objectives are replicated in section 3 of the LPUL and provide legislative guidance to the Uniform Law bodies in the development and implementation of the law.

11. The LPUL commenced on 1 July 2015 and currently operates in NSW and Victoria. It is intended to expand Australia-wide and already covers approximately 70% of legal practitioners in Australia, effectively establishing a common legal services market in two of the largest Australian States. In effect, this means that all legal practitioners (solicitors and barristers) practising in NSW and Victoria now operate according to a uniform set of statutory provisions and Rules that govern all key aspects of the profession. The LPUL also applies to all legal practitioners based in the non-participating jurisdictions who engage in legal practice in NSW and Victoria.

12. An important aspect of the LPUL and of its underpinning Uniform Rules is that it is capable of being adjusted far more quickly for all participating jurisdictions than by more cumbersome separate processes in each individual State and Territory. Once made, an amendment or change to the Uniform Rules applies in all jurisdictions in which the LPUL has been adopted. This saves time and resources. Importantly, it also provides the assurance that regulatory challenges that cross State and Territory borders can be addressed quickly and consistently in multiple jurisdictions at the same time.

13. From the perspective of the Commonwealth, national adoption of the LPUL would mean that it would primarily only have to deal with one body, the Council, in the event that a new AML/CTF issue were to emerges that required a coordinated and timely response. The LPUL

is a co-operative and co-regulatory model, with processes for consultation across the profession and local regulators through a single coordinated agency, on key policy issues and amendments to Uniform Rules.

Role of the Legal Services Council and Uniform Law Bodies

14. The LPUL framework comprises the Attorneys General of NSW and Victoria (the Standing Committee) or of any other State which may join the scheme; there is an independent Legal Services Council, an independent Commissioner for Uniform Legal Services Regulation, and Designated Local Regulatory Authorities (DLRA's). The independence of the profession is preserved through its participation on the Council and by the specific responsibilities given to the profession in the process of formal making of Uniform Rules by the Council.

    - The Standing Committee has a general supervisory role, and works cooperatively to ensure that consistent policy is adopted for the regulation of the profession. The Standing Committee does not intervene in the day to day operations of the Council, or the Commissioner (or DLRA's). The Victorian Government is the host for the LPUL, but changes to the LPUL and Uniform Rules must be agreed to by the Standing Committee.

    - NSW is host for the Council and Commissioner.

    - The Council consists of five independent persons drawn from participating jurisdictions with relevant expertise appointed for a three year term. The Council is currently chaired by former Chief Justice of the Federal Court, The Hon Michael Black AC QC. The Council is responsible for higher level policy; ensuring inter-jurisdictional consistency and rule-making according to the statutory requirements of the LPUL.

    - The Council has a specific statutory responsibility to develop the Uniform General Rules that supplement the LPUL (see below). It has the power to issue binding Guidelines, and Directions to local regulatory authorities in respect of all aspects of the LPUL (except Chapter 5 Consumer Matters).

    - The Commissioner is also the CEO of the Council. The Commissioner has specific responsibilities to promote the LPUL and monitor and promote inter-jurisdictional consistency in respect to the consumer matters and disciplinary aspects of the LPUL (Chapter 5). The Commissioner also has the power to issue Guidelines and Directions to local regulatory authorities in respect to Chapter 5 matters.

    - The Law Council of Australia (LCA) and Australian Bar Association (ABA) have statutory responsibilities for the development of the Uniform Conduct, Uniform Practice and Uniform Continuing Professional Development Rules.

    - DLRAs regulate the profession at the State level. The jurisdiction and powers of the DLRAs are set out in the LPUL. In Victoria, this function is carried out by the Victorian Legal Services Board + Commissioner (VLSB+C) with some functions delegated to the Law Institute of Victoria (LIV). In NSW these functions are performed by the Office of the Legal Services Commissioner, the Law Society of NSW, and the NSW Bar Association.

15. The Uniform Law Bodies, as described above, collaborate closely on issues of common interest and concern and develop consistent responses to issues of practice, policy and law across the breadth of legal profession matters. If desirable, this approach is supplemented with Guidelines and Directions to ensure inter-jurisdictional consistency, and, in some cases to obtain data from local regulators.

    - In 2016 the Council developed the first stage of a shared data collection and analysis project. Over time this will provide trend data on consumer and disciplinary matters and support future regulatory and educational efforts. This project will be extended to other aspects of the LPUL to provide monitoring and evaluation of the LPUL scheme.

- The development of Uniform Rules involves all legal profession bodies and local regulators in a common endeavour to develop rules that protect the integrity of legal services. The Council has made extensive rules on business practice matters that are in operation, including on matters such as management of client files and management of trust, controlled and transit money.

- Through its rule making powers, the Council has upgraded the qualifications for independent External Examiners, and recently approved a single External Examiners Course for Victoria and NSW. This is a pre-requisite to appointment by a law practice for annual external examination of trust money and related records and registers which the law requires. There are common reporting tools, a common deadline and a more consistent approach to the mandatory annual external examination. This is done with the cooperation and involvement of the profession and local regulators.

EXISTING LEGAL PROFESSION REGULATION

16. The Council understands that Australia's role in combating money-laundering and terrorist financing is a matter of both national and international concern, and has been the subject of several international and domestic reviews.

17. Just as importantly the legal profession has a long history of regulation that preserves the independence and standards of the profession and protects consumers of legal services, and the public generally. This includes but is not limited to confidentiality and protecting legal professional privilege. We understand that the profession recognises that it has a collective interest in maintaining high professional and ethical standards. The result is that, under the LPUL framework, it is now successfully involved in the regulation of its own members. State based legal profession regulation embodies fundamental legal and ethical obligations that underpin the quality, standing and integrity of the profession.

18. In addition, management of law practices is appropriately regulated. We suspect that the existing LPUL provisions and Uniform Rules may be sufficient to meet the Commonwealth's objectives. In addition, through annual licensing fees, legal practitioners already bear the cost of regulating their own profession. It is important to bear in mind that the LPUL had its origins in a COAG project, and is an important contributor to efforts to reduce red tape and the cost of regulatory burdens. The additional cost of additional regulatory compliance could fall disproportionately on smaller businesses, which make up the majority of the legal services industry were there in future to be a separate Commonwealth regime for regulation of part only of the operation of the legal profession.

19. Key elements of the LPUL framework are listed below, and appear in more detail in the annexure attached. In summary, the LPUL and Uniform Rules include:

    - a paramount duty to the Court and the administration of justice, that requires a practitioner to only follow lawful instructions and prohibits them from engaging in illegal activity;
    - liability of principals and legal requirements for supervision and compliance with the LPUL and Rules;
    - prescriptive provisions on the receipt, management and use of trust, controlled and transit money, including a prohibition on cash withdrawals and requirements for detailed record keeping and clear audit trails;
    - requirements for the creation and management of client files, and related records;
    - registers of safe custody documents, financial interests, powers of attorney and estates that require the identification of the parties;
    - annual licensing requirements and strictly enforced criminal penalties for unqualified practice;
    - mandatory annual independent compliance audits carried out by persons designated by the DLRAs, who conduct an external examination of trust accounts and registers;
    - monitoring and inspection of law practices by qualified trust inspectors employed DLRAs;

- DLRA powers to conduct investigations and audits, with extensive search and seizure powers to access files and data and with penalties for non-compliance;
- DLRA powers to self-initiate and investigate complaints about the conduct of practitioners and the power to make findings of unsatisfactory professional conduct or professional misconduct;
- supervision of admission and disciplinary matters by the higher courts, with powers to deny admission, impose civil penalties for professional misconduct and deregister a practitioner where it is appropriate to do so.

20. In addition, the Council, Commissioner and DLRAs have a legal duty to report a reasonable suspicion of a criminal offence to appropriate law enforcement agencies (s465). This includes a reasonable suspicion that a practitioner has committed one or more of the broad money laundering or terrorist financing offences to which we refer in the next section.

The AML/CTF Regime

21. Australia's Anti-Money Laundering and Counter Terrorism Financing regime is established under the *Financial Transaction Reports Act 1988* (FTR Act) and the *Anti- Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act). The principal statutes are supplemented by the Financial Transaction Reports Regulations 20016 and the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007(No.1).

22. We note that the AML/CTF offences include for practical purposes, negligent dealing with money or property that are the proceeds of crime, or where there is a risk that the money or property will become an instrument of crime[1]. It is also an offence to deal with money or property where it is reasonable to suspect that the money or property is the proceeds of crime[2]. These offences carry significant penalties.

23. The Council is not aware of investigations or prosecutions of legal practitioners for these criminal offences or of penalties for non-compliance with reporting obligations under the AML/CTF regime. We reiterate that the LPUL already goes a considerable way toward mitigating the risk of inadvertent or knowing involvement in money laundering by members of the legal profession, when seen to be operating in conjunction with the offences described in the previous paragraph.

24. The AML/CTF regime also requires *regulated businesses* (financial services) that provide certain *designated services* to carry out customer due diligence procedures to ascertain the identity of the client; collect and retain verification documentation and make *suspicious transaction* and certain *threshold* reports to the regulator, AUSTRAC.

25. Law practices are not regulated business for the purposes of AML/CTF, and, in general are not subject to the obligations of *reporting entities* unless the law practice offers a 'designated service'. (Lawyers who provide mortgages or operate mortgage investment schemes, however, may be providing a 'designated service', and be a reporting entity under the AML/CTF Acts).

26. Nevertheless, legal practitioners are already subject to the *significant cash transaction* reporting requirements of the FTR Act. Under section 15A a 'solicitor' must already report a *significant cash transaction (*SCT) to AUSTRAC[3]. A SCT is a cash transaction involving the transfer currency of not less than $10,000 in value. The reporting obligation is triggered when a transaction is entered into by, or on behalf of, a 'solicitor'. A solicitor who refuses or fails to make a report under s 15A, or to comply with a notice issued under subsection 27E(3)

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1 S 400.3 (1)(2)(3)

2 S400.9 (1) (1A); This offence attracts a penalty of up to 3 years imprisonment where the value of the money or property is $100,000 and up to 2 years imprisonment if the value is less than $100,000.

3 Section 3 of the FTR Act defines 'solicitor' as a person who practises as a solicitor, whether by himself or herself, as a member of a solicitor corporation or as a member of a partnership of solicitors, and whether or not the person also practises as a barrister.

commits an offence punishable by imprisonment for up to 2 years or a fine (s 28 (3)(4) FTR; s 4B(2) Crimes Act 1914 (Cth)).

27. In addition to the administrative scheme, legal practitioners are, like other members of the community, subject to the Commonwealth Criminal Code. As mentioned above, the Criminal Code includes broad money laundering offences with significant penalties for a person who: intentionally, recklessly or negligently; deals with money or property that is the proceeds of crime; or, where there is a risk that money or property will become an instrument of crime[4]. The penalties are significant, increasing with the value of the money or property involved. It is also an offence for a person to deal with money or property where it is reasonable to suspect that the money or property is the proceeds of crime[5]. In addition, the Criminal Code contains ancillary offences with accessorial liability provisions.

28. We suspect that the existing Commonwealth provisions concerning AML/CTF, or which operate in aid of anti AML/CTF purposes, are not well known or understood in the legal profession. If that is correct it may provide sufficient justification to drive concerted education campaigns and, if necessary, changes to internal management practices to supplement existing legal profession regulation requirements. That could be perhaps a better alternative to new Commonwealth legislation.

OPTIONS FOR AN LPUL APPROACH

29. It is suggested that national concerns might be best addressed through existing legal profession regulation which is specialised and adapted to the nature of the industry. This would be consistent with achieving the objectives of the LPUL, which offers a single process for policy coordination and development for more than two thirds of the Australian legal profession.

30. Streamlining and integration of legal regulatory schemes is, in my view, preferable to a proliferation of regulatory schemes: it reduces red tape by refining existing rules; reduces confusion across a very diverse industry; would minimise the cost of the additional regulatory measures and increase the likelihood of successful compliance, especially by smaller law practices.

31. The LPUL is now an existing and well established regulatory system. It is accepted, effective and geared to provide: independent monitoring, compliance audits, investigation of business practices, and, if necessary, referral to law enforcement agencies where there is reasonable suspicion of a criminal offence. This regulatory scheme is adapted to the nature of the profession.

32. I would be happy to elaborate on these concepts if you wish. In the interim, I offer some initial ideas, expressed necessarily in broad terms as a basis for possible further discussion.

    - *Legal Profession Uniform Law and Uniform Rules* – amendments to the Uniform General Rules and Uniform Conduct Rules might perhaps be possible to address regulatory gaps to be identified by the Commonwealth on topics such as: client identification and verification, the receipt and handling of cash and cash transactions; and the development of risk mitigation strategies. A regulatory gaps analysis might also reveal a need for legislative amendment[6] or it may show, as I suspect, that the existing framework is adequate.

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4 S 400.3 (1)(2)(3), Criminal Code

5 S 400.9 (1) (1A), Criminal Code

6 The Federation of Law Societies of Canada relies on Model Rule on Cash Transaction (2004) and Model Rules on Client Identification and Verification Requirements (2008). It is notable that members of the legal profession are prohibited from accepting more than $7,500 CA in cash to ensure their trust accounts are not used for illegal activities.

- *External Examination* – additional indicators of illegal or high risk activity may be able to be built into external examination and trust inspection audit processes, if necessary. This would need to be done with the cooperation of DLRAs, or, if necessary, by Council Guidelines or Directions provided there is a clear rationale for the Council to do so. The External Examiners course, which is approved from time to time by the Council, may also be able to be adjusted to include a specific component on anti-money laundering and terrorist financing measures.

- *Role of DLRAs* - DLRAs already have a duty to refer suspected offences to police or other appropriate prosecuting authority.[7] The DLRA is not a specialist in identifying criminal conduct but has wide investigatory powers that may be exercised for legitimate regulatory purposes.

- *Education* - The DLRAs may be able to conduct compulsory CPD on money laundering and terrorist financing at the local level, provided there were sufficient resources to do this. This could be done with the cooperation and involvement of relevant Commonwealth authorities and would build on the work of the LCA, which issued guidance to the profession as early as 2009.

FURTHER ANALYSIS AND ADVICE ABOUT REGULATORY GAPS APPEAR TO BE NEEDED

33. I am aware that the profession has expressed legitimate concerns about fundamental obligations concerning the solicitor-client relationship, especially in relation to confidentiality and legal professional privilege. These legal and ethical obligations underpin the role of the profession in the administration of justice, are of significant practical importance in the client-solicitor relationship, and, are embodied in State law.

34. I am not aware of any data or analysis that identifies the profile of a law practice vulnerable to exploitation, or the prevalence of legal services in particular types of law practices that are in fact more likely to be involved in money laundering activities. This analysis, if it is available, would significantly assist in developing a targeted and more effective strategy.

National strategy and effective regulatory responses

35. I also note that at this stage the Council has not been informed as to how reform in this area will fit within a broader national strategy or other reforms to the AML/CTF regime that might be under consideration as a result of recent reviews. This raises questions that may influence the final outcome and shape of measures to be adopted.

36. How, for example, is a broad administrative approach to be coordinated alongside the existing jurisdiction and powers of Commonwealth and State law enforcement, intelligence agencies, the Australian Securities and Investment Commission (ASIC), the Australian Tax Office and the Foreign Investment Review Board? What is the typology of activities (as distinct from legal services) or sources of funds coming into Australia that might support a more targeted strategy? Is there a behavioural analysis on efficacy of criminal penalties that may work against compliance with reporting obligations? Does the Commonwealth, through AUSTRAC or other bodies, propose to develop and roll out an education campaign that targets other particular industries or professions?

CONCLUSION

37. I do suggest that if the profession as a whole is to effectively implement procedures and practices to combat money laundering that directly affect their business relationships (and

7 Section 465,LPUL

potentially conflict with legal and ethical duties) a close analysis of the issues and a precise identification of the regulatory gaps should be conducted.

38. I thank the Minister and the AGD for the opportunity to comment on an important policy issue. We look forward to participating in further discussion on how the LPUL and Uniform Rules probably already meet many of the Commonwealth's objectives in combating and preventing money laundering and terrorist financing, should that be desired.

Dale Boucher
Chief Executive Officer
Commissioner for Uniform Legal Services Regulation
Legal Services Council

9 February 2017

Attachment A

Summary of Relevant Provisions of the Legal Profession Uniform Law 2014 (LPUL)

Purpose

This attachment is intended to illustrate existing provisions of the LPUL relevant to anti-money laundering (AML) and counter terrorism financing (CTF) objectives of the Commonwealth. The LPUL currently operates in NSW and Victoria, and may be adopted and applied by other Australian States and Territories.

Entitlement to engage in legal practice

Section 10 of the LPUL prohibits entities (including but not limited to individuals) from engaging in legal practice unless they are qualified entities. There are extensive pre-requisites to becoming a 'qualified entity'. These include admission to the Australian legal profession as an Australian lawyer (requiring persons to be fit and proper, among other things) and to hold a practising certificate.

> ***'10 Prohibition on engaging in legal practice by unqualified entities***
>
> *(1) An entity must not engage in legal practice in this jurisdiction, unless it is a qualified entity.*
>
> *Penalty: 250 penalty units or imprisonment for 2 years, or both.*
>
> *(2) An entity is not entitled to recover any amount, and must repay any amount received, in respect of anything the entity did in contravention of subsection (1). Any amount so received may be recovered as a debt by the person who paid it.*
>
> *(3) Subsection (1) does not apply to an entity or class of entities declared by the Uniform Rules to be exempt from the operation of subsection (1), but only to the extent (if any) specified in the declaration.'*

Australian lawyers are officers of the Supreme Court, a status which carries with it special responsibilities to comply with and to uphold the law. Section 25 of the LPUL provides:

> ***'25 Australian lawyer is officer of Supreme Court***
>
> *An Australian lawyer is an officer of the Supreme Court of this jurisdiction for as long as his or her name remains on the Supreme Court roll for any jurisdiction'.*

Section 43 of the LPUL establishes the entitlement to practice, but makes that entitlement subject to subject to compliance with the law:

> ***'43 Entitlement to practise***
>
> *(1) An Australian legal practitioner is entitled to engage in legal practice in this jurisdiction.*
>
> *(2) That entitlement is subject to any requirements of this Law, the Uniform Rules and the conditions of the practitioner's Australian practising certificate.'*

Responsibility of Australian legal practitioners

The LPUL contains explicit obligations on all legal practitioners to comply with the LPUL and Uniform Rules, and imposes additional responsibilities on principals that include the obligations to take reasonable steps to ensure that the requirements of the LPUL and Uniform General Rules and other professional obligations are complied with.

> ***'33 Obligations not affected by nature of business structures***
>
> *An Australian legal practitioner must comply with this Law, the Uniform Rules and his or her other professional obligations, regardless of the business structure in which or in connection with which the practitioner provides legal services.*
>
> *A law practice must comply with this Law, the Uniform Rules and its other professional obligations, regardless of the business structure in which or in connection with which the law practice provides legal services.*
>
> ***'34 Responsibilities of principals***
>
> *(1) Each principal of a law practice is responsible for ensuring that reasonable steps are taken to ensure that—*
>
> *(a) all legal practitioner associates of the law practice comply with their obligations under this Law and the Uniform Rules and their other professional obligations; and*
>
> *(b) the legal services provided by the law practice are provided in accordance with this Law, the Uniform Rules and other professional obligations.*
>
> *(2) A failure to uphold that responsibility is capable of constituting unsatisfactory professional conduct or professional misconduct.'*

The responsibility of principals and senior solicitors includes the responsibility to supervise other solicitors and employees engaged in the provision of legal services. This ensures quality of the service. It is also intended to ensure that a person engaged in delivering a legal service does so according to law.

> ***'37 Supervision of legal services***
>
> *37.1 A solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter.'*

Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015

The Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (ASCR's) regulate the ethical duties of legal practitioners. Breaches may result in a finding of unsatisfactory conduct or unprofessional misconduct and lead to deregistration.

The ASCR's relevantly include:

> ***'3 Paramount duty to the court and the administration of justice***
>
> *3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.*
>
> ***4 Other fundamental ethical duties***
>
> *4.1 A solicitor must also:*
>
> *4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client,*
>
> *4.1.2 be honest and courteous in all dealings in the course of legal practice,*
>
> *4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible,*
>
> *4.1.4 avoid any compromise to their integrity and professional independence, and*
>
> *4.1.5 comply with these Rules and the law.*
>
> ***5 Dishonest and disreputable conduct***
>
> *5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:*
>
> *5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice, or*
>
> *5.1.2 bring the profession into disrepute.'*

While a solicitor must follow their client's instructions, this is subject to the fundamental requirement that the instructions are ***lawful***: that is, practitioners must consider the lawfulness of instructions, in conjunction with duties not to engage in criminal conduct.

> ***'Client instructions***
>
> *8.1 A solicitor must follow a client's lawful, proper and competent instructions.'*

LPUL, Uniform Rules and Conveyancing Rules

Chapter 4 of the LPUL governs business practice, and contains detailed, prescriptive obligations in relation to the maintenance of client records, and the receipt, handling and management of money. These provisions are supplemented by the Uniform General Rules 2015.

The objectives of Chapter 4 of the LPUL are to:

- ensure appropriate safeguards are in place for maintaining the integrity of legal services; and
- apply those safeguards regardless of the type of business structure used for the delivery of legal services (s 126).

The following references deal with customer identification, and the collection and retention of information about client details, money and property handled by a law practice in the course of delivering legal services.

Uniform General Rules 2015

Rule 93 Uniform General Rules (2015) requires that a law practice must maintain a register of files opened. This requirement applies irrespective of whether or not the law practice receives trust money:

> ***'93 Register of files opened***
>
> *(1) A law practice must maintain a register of files opened.*
>
> *(2) The register of files opened must, in respect of each matter for which the law practice receives instructions to provide legal services to a person, record the following:*
>
> *(a) the full name and address of the person,*
>
> *(b) the date of receipt of the instructions,*
>
> *(c) a short description of the services which the law practice has agreed to provide,*
>
> *(d) an identifier.*
>
> *(3) Sub-rules (1) and (2) do not apply to a barrister.'*

Conveyancing Rules applicable to Legal Practitioners

In addition to the LPUL, both NSW and Victoria have special rules for the verification of the identity of a person (individual or corporate) entering into a real estate transaction. The increasing incidence of identity theft and associated fraud, including mortgage fraud, means that all parties to land transactions and their agents must exercise due diligence in verifying the identity of persons claiming a right to deal in land. This approach fits with the related interest in mitigating the risk of money laundering, or other offences such as terrorist financing.

In Victoria, from November 2015 a person must comply with the new verification of identity requirements before paper instruments or dealings can be lodged at Land Victoria for registration. The new verification requirements fall under three categories:

- verification of your identity;
- verification that you are a legal person; and
- verification that you have the right to enter into the relevant instrument or dealing.

The verification of identity requirements must be satisfied before the solicitor can provide any duplicate certificate of title he or she holds on behalf of the client. The solicitor (either personally or through an authorised agent) must verify the client's identity in accordance with a standard procedure. This will involve a face-to-face interview at which the client is required to produce certain original identification documents, such as a passport, drivers licence, birth or citizenship certificate, or Medicare or Centrelink card. The solicitor must retain copies of these identification documents.

For corporate entities the solicitor must:

- conduct a search of the records of the relevant regulatory body (such as ASIC for companies);
- take reasonable steps to identify the person/s authorised to sign, or witness the affixing of any seal, on behalf of (the) corporate entity; and
- verify the identity of each person who will sign the paper registrable instrument or dealing on behalf of (the) corporate entity in accordance with the Standard Procedure.

Where an individual or corporate entity has appointed an attorney to execute a paper registrable instrument or dealing, the solicitor must review the power of attorney and carry out similar identity verification procedures in relation to that attorney.

Reasonable steps must also be taken to verify that the individual or company is a legal person. This will ordinarily be satisfied as part of the verification of identity process. Reasonable steps must be taken to verify that the person has the right to enter into the relevant instrument or dealing. For a corporate entity, this will entail providing relevant corporate and/or trust documents to the solicitor to enable this final form of verification to be completed.

In NSW, 2015 amendments introduced section12E into the *Real Property Act 1900 (NSW)* which authorises the making of Conveyancing Rules. The Conveyancing Rules came into force in 2016, and standardise formal verification of identity and authority to deal (procedures) including:

- requirements for verification of identity
- requirements for verifying authority
- supporting evidence requirements
- retention of verification evidence.

From 1 August 2016, a representative (solicitor or conveyancer) must take reasonable steps to verify the identity of clients or their agents, and persons to whom certificates of title are given (R 4.1). The Representative can either apply the Verification of Identity Standard; or verify the identity of a person in some other way that constitutes the taking of reasonable steps. The approach is consistent with the model in Victoria, described above. The solicitor (other representative) must take reasonable steps to verify that a client is a legal person and has the right to enter into a conveyancing transaction. Possession of a Certificate of Title for a parcel of land is not of itself sufficient to prove that a person is the owner of that land or is otherwise entitled to deal with it.

LPUL and Trust Money

If trust money is received by a law practice, the law practice has further requirements in regard to the establishment of the identity of the person on whose behalf the money is held. Section 147(3) of the LPUL requires:

‘(3) A law practice must not knowingly receive money or record receipt of money in the law practice’s trust records under a false name.
Civil penalty: 100 penalty units.
(4) If a law practice is aware that a person on whose behalf trust money is received by the law practice is commonly known by more than one name, the law practice must ensure that the law practice’s trust records record all names by which the person is known.
Penalty: 50 penalty units.’

Rule 47 of the Legal Profession Uniform General Rules (2015) governs the recording of transactions in a trust ledger:

‘(1) A law practice that maintains a general trust account must keep a trust account ledger containing separate trust ledger accounts in relation to each person in each matter for which trust money has been received by the practice.
(2) The following particulars must be recorded, and kept up to date, in the title of a trust ledger account:
(a) the name of the person for or on behalf of whom the trust money was paid,
(b) the person’s address,
(c) particulars sufficient to identify the matter in relation to which the trust money was received.
and for each entry to the ledger, the ledger must disclose:
(3) The following particulars must be recorded for each transaction in the trust ledger account:
(a) the date of the transaction,
(b) the appropriate reference number and transaction type,
(c) particulars sufficient to identify the reason for the transaction,
(d) the amount of money in the transaction,
(e) if the transaction type is:
(i) a receipt—the provider of the amount and the date the amount was received if that date is different from the date of receipt,
(ii) payment by cheque—the payee or, in the case of a cheque made payable to an ADI, the name or BSB number of the ADI and the name of the person receiving the benefit of the payment,
(iii) a payment by electronic funds transfer—the account name and number and the relevant BSB number of the ADI and the name of the person receiving the benefit of the payment,
(iv) a journal entry—the appropriate ledger reference, the name of the person on whose behalf the transfer was made and the matter description.’

Rule 36(1) requires:

‘(1) A law practice must make out a receipt as soon as practicable:
(a) after trust money is received, or
(b) in the case of trust money received by direct deposit, after the law practice receives or accesses notice or confirmation of the deposit from the ADI concerned.

The receipt must disclose
(2) The receipt must contain the following particulars:
(a) the date the receipt is made out and, if different, the date of receipt of the money,
(b) the number of the receipt,
(c) the amount of money received,
(d) the form in which the money was received,
(e) the name of the person from whom the money was received,

(f) details clearly identifying the name of the client in respect of whom the money was received and the matter description and matter reference,
(g) particulars sufficient to identify the reason for which the money was received,
(h) the name of the law practice or the business name under which the law practice engages in legal practice and the expression "trust account" or "trust a/c",
(i) the name of the person who made out the receipt.'

The LPUL also precludes certain transaction as being trust money and a law practice is precluded from receiving the money for these types of transactions. The transactions are defined in Section 139 which reads:

'(2) However, the following money is not trust money for the purposes of this Law—
(a) money received by a law practice for legal services that have been provided and in respect of which a bill has been given to the client;
(b) money entrusted to or held by a law practice for or in connection with—
(i) a managed investment scheme; or
(ii) mortgage financing; undertaken by the law practice;
(c) money received by a law practice for or in connection with a financial service it provides in circumstances where the law practice or an associate of the law practice—
(i) is required to hold an Australian financial services licence covering the provision of the service; or
(ii) provides the financial service as a representative of another person who carries on a financial services business;'

LPUL and Controlled Money

Section 128 of the LPUL defines controlled money as:

*' **"controlled money"** means money received or held by a law practice in respect of which the law practice has a written direction to deposit the money in an account (other than a general trust account) over which the law practice has or will have exclusive control;'*

This section is complemented by Uniform General Rule 62, which is in the following terms:

'62 Receipt of controlled money
(1) If a law practice receives controlled money, it must operate a single controlled money receipt system for the receipt of controlled money for all its controlled money accounts.

(2) A law practice must make out a receipt as soon as possible after receiving controlled money or, in relation to a direct deposit, after receiving notice or confirmation of the deposit from the relevant ADI.

(3) On request from the person from whom controlled money is received, the law practice must give that person a copy of the receipt.

(4) The receipt must be made out in duplicate, unless at the time the receipt is made out those particulars are recorded by a computerised accounting system in the register of controlled money, and must contain the following particulars:

(a) the date the receipt is made out and, if different, the date of receipt of the money,

(b) the amount of money received,

(c) the form in which the money was received,

(d) ***the name of the person from whom the money was received****,*

(e) ***details clearly identifying the name of the person on whose behalf the money was received and the matter description and matter reference****,*

(f) ***particulars sufficient to identify the reason*** *for which the money was received,*

(g) the name of, and other details clearly identifying, the controlled money account to be credited, unless the account has not been established by the time the receipt is made out,

(h) the name of the law practice, or the business name under which the law practice engages in legal practice, and the expression "controlled money receipt",

(i) the name of the person who made out the receipt,

(j) the number of the receipt.

(5) If the controlled money account to be credited has not been established by the time the receipt is made out, the name of, and other details clearly identifying, the account when established must be included on the duplicate receipt (if any).

(6) Receipts must be consecutively numbered and issued in consecutive sequence.

(7) If a receipt is cancelled or not delivered, the original receipt must be kept.

(8) A receipt is not required to be made out for any interest or other income received from the investment of controlled money and credited directly to a controlled money account. '

Other Related Provisions

Duty to report an irregularity

Section 154(1) of the LPUL provides that legal practitioner associates of a law practice, ADI's and external examiner must notify the designated local regulatory authority of any irregularity in any of the law practice's trust accounts or trust ledger accounts

Section 154(2) provides that if an Australian legal practitioner believes on reasonable grounds that there is an irregularity in connection with the receipt, recording or disbursement of any trust money received by a law practice of which the practitioner is not a legal practitioner associate, the practitioner must, as soon as practicable after forming the belief, give written notice of it to the designated local regulatory authority.

Designated Local Authorities Supervisory Role

Compliance audits

A law practice whether or not it receives trust money may be subject to a compliance audit pursuant to section 256, which reads;

'256 Compliance audits
(1) The designated local regulatory authority may conduct, or appoint a suitably qualified person to conduct, an audit of the compliance of a law practice with this Law, the Uniform Rules and other applicable professional obligations if the designated local regulatory authority considers there are reasonable grounds to do so, based on—
(a) the conduct of the law practice or one or more of its associates; or
(b) a complaint against the law practice or one or more of its associates.

(2) The appointment of a suitably qualified person may be made generally, or in relation to a particular law practice, or in relation to a particular compliance audit.

(3) A report of a compliance audit is to be provided to the law practice concerned and may be provided to the designated local regulatory authority.'

Investigation

A law practice whether it receives general trust money, controlled money, power money or investment of trust money may be subject of a routine trust account/trust verification investigation for general compliance or a specific investigation a result of a notification pursuant to section 154, complaint or notification by a client of an irregularity relating to trust money.

External Examination

A law practice that receives any of general trust money must have trust records externally examined by a person designated under the LPUL (S 155, s 156). The law practice must deal with trust money in accordance with the PUL and Uniform Rules, and not otherwise (s 135)). The examiner is required by General Rule 69, to provide to the DLRA within a specified time. The must advise the DLRA whether the records are maintained

- in accordance with the Uniform Rules; and
- in a way that at all times discloses the true position in relation to trust money received for or on behalf of any person; and
- in a way that enables the trust records to be conveniently and properly investigated or externally examined; and
- for a period of 7 years after the last transaction entry in the trust record, or the finalisation of the matter to which the trust record relates, whichever is the later.

Duty to Report suspected offences

There is a duty to report suspected offences to the appropriate law enforcement agency, this duty applies to the DLRAs and there delegates.

'465 Duty to report suspected offences
(1) This section applies if a relevant person suspects on reasonable grounds, after investigation or otherwise, that a person has committed a serious offence (except in the case of an offence against this Law for which the relevant person is the appropriate prosecuting authority).
(2) The relevant person must—

(a) report the suspected offence (if it has not already been reported) to the police or other appropriate investigating or prosecuting authority; and

(b) make available to the police or authority the information and documents relevant to the suspected offence in the possession of, or under the control of, the person (regardless of who reported it).

(3) The obligation under subsection (2)(b) to make available the information and documents continues while the relevant person holds the relevant suspicion.

(4) In this section—

***relevant person** means—*

(a) the Council or the Commissioner; or

(b) the Admissions Committee; or

(c) a local regulatory authority; or

(d) a delegate of the Council, the Commissioner or a local regulatory authority.

(e) (Repealed).'

Commissioner for Uniform Legal Services Regulation

9 February 2017