



Law Council
OF AUSTRALIA

The adequacy and efficacy of Australia's anti-money laundering and counter terrorism financing (AML/CTF) regime

Senate Legal and Constitutional Affairs References Committee

Responses to questions on notice, 3 December 2021

Table of Contents

About the Law Council of Australia 3

Responses to Questions taken on Notice..... 4

 Canada’s Path 4

 Numbers of Legal Practitioners Struck from the Roll 5

 New Zealand Tranche 2 Implementation Costs 5

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- 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 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
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Responses to Questions taken on Notice

Canada's Path

During the course of the Senate Committee hearing, Senator Scarr invited the Law Council to provide supplementary material assessing Canada's regulatory pathway and in particular, to compare the Model Rules, introduced voluntarily by the Canadian legal profession under the leadership of the Federation of Canadian Law Societies, with the professional responsibilities of Australian lawyers extant today.

Over a long period of time, the Canadian profession has undertaken consultation and assessment and the product is a tailored set of Model Rules to Fight Money Laundering and Terrorist Financing. The Law Council understands that the Model Rules have been adopted in British Columbia, Alberta, the Northwest Territories, the Yukon, Manitoba, Saskatchewan, New Brunswick, Nova Scotia, Newfoundland, Prince Edward Island, and in the largest jurisdiction in Canada, Ontario, where the Model Rules will come into effect on 1 January 2022.

On pages 7 – 12, we have compared the duties of Australian lawyers in the current regulatory environment with the obligations created by the Model Rules.

It is important in any comparison with another jurisdiction to bear in mind that the legal profession regulatory regime in Australia has long eschewed a prescriptive, black-letter approach to the statement of practitioners' ethical duties and professional obligations, in favour of a principles-based approach.

As a principles-based framework, the conduct rules for barristers and solicitors do not attempt to prescribe in detail how legal practitioners should act. Instead, the rules are intended to guide and assist practitioners to act ethically and in accordance with the principles of professional conduct established by the profession and the common law.

As many commentators have noted, to approach professional rules as if they were legislative rules carries the risk of 'legalising' ethical rules, shifting the focus of attention to an interpretation of the words, looking for specific exemptions or permissions, rather than focusing on whether a particular course of action would or would not be unprofessional because it offends the principle underlying the rule – leading to the potential abdication of professional judgment¹ and a 'spiritless compliance'² with ever more prescriptive rules.³

¹ Da Pont, *Lawyers' Professional Responsibility*, Lawbook Co, 7th ed. 2021 at [1.130]

² Sir Gerard Brennan, Ethics and Procedure conference speech, 1992, cited in Da Pont at [1.130], n 178

³ For detailed discussion and references see in Da Pont, [1.30] n 180. See also Law Council of Australia, Review of the Australian Solicitors Conduct Rules at n28, primary submissions on

Numbers of Legal Practitioners Struck from the Roll

As requested, please find the most recent numbers of legal practitioners that have been struck off, presented by state and territory (page 13).

These statistics are published annually by individual state and territory legal profession regulatory authorities as indicated in the notes to the table, and are available to the public and on the authorities' respective websites, and on request.

New Zealand Tranche 2 Implementation Costs

The Law Council has sought information from specialist AML/CTF practitioners in New Zealand in relation to costs incurred in New Zealand by legal practices, with a focus on small and medium-sized firms. All dollar amounts below represent New Zealand dollars.

Based on recent discussions, the Law Council believes that New Zealand's average per client costs for standard AML/CTF due diligence within legal practices can be reasonably estimated to be \$300–\$400 per regulated client.

However, for enhanced due diligence, costs can be still more onerous. For example, where the client is from a jurisdiction deemed high risk, conducting the necessary searches including to obtain evidence of source of funds can cost in the order of \$4,000–\$5,000.

The initial set-up cost for a client due diligence program for those heavily reliant on IT (for example, a medium-sized firm) is estimated to be at least \$80,000, and annual fees (including remuneration for tasks undertaken by a compliance officer, training, software, audit and record-keeping) for a medium-sized firm can be over \$300,000 per annum.

The costs to small law firms (1–5 solicitors) tend to be higher because these firms are more often than not undertaking client due diligence directly and with limited resources. The lawyers in small firms are already time-poor and they are often uncertain about how (and how much) to charge in relation to AML/CTF compliance activities. For some practitioners, the incremental costs are hard to recover in a competitive marketplace. The amount of time required satisfactorily to complete a complex enhanced CDD can easily exceed the time required to complete the legal work involved in the instructions.

The Law Council interrogated the question of whether implementation costs may have decreased relative to, say the Queensland Law Society survey results at Annexure A of the primary submission, thanks to evolutions in technology. This was an issue raised during the Senate hearings. The Law Council's consultations reveal that while there is a degree to which the costs in New Zealand may have decreased since 2018 for some practices thanks to certain improvements in technology, significantly, these savings are being enjoyed only by those firms who can afford the outlay. Verification processes have

been improved by software, such that client due diligence has become more efficient, and external providers, for a fee, can be engaged to verify documentation. However, of those who have been able to purchase these products and services, many legal practices have encountered significant unforeseen costs associated with integrating IT with existing systems.

The Law Council's discussions confirm closures of firms in New Zealand due to the cost of compliance with Tranche 2, with many practices having closed doors altogether and some electing to refrain from undertaking captured activities to avoid the high costs of compliance. The exits appear to typically have been experienced sole practitioners or small practices closing their doors. The prospect of having to undertake prescriptive client due diligence, maintain specific categories of records, establish and maintain a compliance program, report to the Financial Intelligence Unit and be audited for AML/CTF compliance have been a tipping point for many.

While the Law Council understands that AML/CFT compliance has not been a reason all by itself, it has been a decisive factor in these closures. Notably, and with implications for rural and remote communities, these closures have impacted smaller practices.

1. The regulatory framework for the Australian legal profession is set out comprehensively in Part I of the primary submission of the Law Council of Australia dated 15 September 2021. For ease of reference in this table the following will be used:
 - i. **Uniform Law and Uniform Rules** – pinpoint references to statutory duties under the state or territory legal profession legislation and subordinate legislation will be references to the Legal Profession Uniform Law (Uniform Law), and the Legal Profession Uniform General Rules (Uniform Rules) which apply to the profession in New South Wales and Victoria;
 - ii. **ASCR and Barristers' Rules** – pinpoint references to professional conduct rules will be to the Australian Solicitors' Conduct Rules (ASCR) and the Legal Profession Uniform Conduct (Barristers' Rules) 2015 (referred to here as Barristers' Rules). Paragraph [14] of the primary submission outlines the applicable state and territorial instruments.
2. References to Dal Pont are to the authoritative text by G E Dal Pont, *Lawyers' Professional Responsibility*, Lawbook Co, 7th ed. 2021.
3. The full text of the Model Rules to Fight Money Laundering and Terrorist Financing prepared by the Canadian Federation of Law Societies may be found at <https://flsc.ca/national-initiatives/model-rules-to-fight-money-laundering-and-terrorist-financing/>.

CANADIAN MODEL RULE	AUSTRALIAN DUTY
1. Cash transactions	
<p><i>Model Rule on Cash Transactions</i></p> <p>Subject to certain limited exceptions, the Rule restricts the aggregate amount that a lawyer may receive in cash with respect to a single client matter, to CAN\$7,500.</p> <p>The application of the Rule is limited to circumstances in which receipt, payment or transfer of funds, buying or selling securities, real property or business assets or entities occurs in connection with legal services.</p>	<p>Lawyers must report to AUSTRAC any receipt of cash or cash transactions entered into by them or on their behalf where the cash equals or exceeds AUS\$10,000 under s15A(1), <i>Financial Transaction Reports Act 1988</i> (Cth). See, eg, Qld Law Society Ethics Centre, Financial Reporting (Guidance Statement No 14, 10 August 2018).</p> <p>Any trust money received in cash must be banked into the general trust account or (subject to a written direction) into a controlled money account, regardless of anything to the contrary in instructions or a purported client direction: ss128, 137, 140, 143 Uniform Law. All trust accounts must be kept with an ADI and must be audited by an independent registered auditor: see item (4) below.</p> <p>The PEXA National Electronic Conveyancing system is now almost universal in Australia so that all funds for property transactions come from and go into banks and other ADIs which are under AML/CTF reporting obligations.</p>

CANADIAN MODEL RULE

AUSTRALIAN DUTY

2. Recording cash transactions

Model Rule on Recordkeeping Requirements for Cash Transactions

The Rule is ancillary to Model Rule at Item (1), above. Law practices must maintain a book of original entry showing the method of receipt for all money; a duplicate receipt book must be countersigned and file number and other client details must be recorded and kept for six years.

Trust account record-keeping rules are detailed and prescriptive and law practices with trust accounts are regularly audited, typically annually (as required by law). See Item (4), below, for applicable regulations. Trust account records must be kept for seven years: s147(2)(d) Uniform Law.

Reportable details for the \$10,000 significant cash transaction report to AUSTRAC are set out in Sch 3A, *Financial Transaction Reports Act 1988*.

3. Knowing your client

Model Rule on Client Identification and Verification

Inhouse lawyers are exempted from the application of this Rule, consistent with the FATF's definition of lawyers at (e) on p120 of *The FATF Recommendations*, June 2021.

The Model Rule does not apply to funds received by a legal practitioner from the trust account of another.

The Rule provides for and distinguishes between client identification and verification. All clients (subject to exemptions above, and limited others) are to be identified.

Professional conduct rules apply to all Australian legal practitioners with respect to all legal services: see [14] of primary submission.

Rule 8 ASCR requires that a solicitor must follow a client's lawful, proper and competent instructions. It applies equally whether the client is:

- an individual;
- a body corporate;
- a trustee or beneficiary of a trust;
- a government or public entity; or
- an agent of any of these entities.

The Rule embodies the requirement that a solicitor must take reasonable steps and make reasonable enquiries to establish both the bona fides of the client and the lawful purpose of the client's instructions to ensure that legal services are not unwittingly used as instruments of criminality, including money-laundering or terrorism financing.

CANADIAN MODEL RULE

Verification pursuant to the Model Rule is required in (and limited to) circumstances where funds are transferred in connection with a legal matter.

The Rule stipulates categories of government and other reliable source documents that must be used.

Specific provisions apply to children, the use of an agent to undertake verification and timing.

AUSTRALIAN DUTY

It is a fundamental and unequivocal requirement of Rule 8 that practitioners must satisfy themselves that they know enough about the identity of their client and the matter upon which their client has sought assistance to be able to demonstrate that they act *only* upon the client's lawful and proper instructions.

This is the work done by Rule 8 as a statement of ethical principle, in accordance with the long-established approach in Australia of applying a principles-based approach to regulation, to avoid the danger of box-checking outcomes to which step-by-step, prescriptive codification can lead.

According to Burnett J in *Ford v Financial Services Authority* [2012] 1 All ER 1238 at [39], lawyers are expected to "establish with clarity the identities of the persons to whom they are giving advice".

In addition, legal practitioners undertake client identification as an incident of the lawyer's duty under the general law to be competent ([4.10], [4.20], Dal Pont; r 4.1.3 ASCR); also as part of exhaustive trust account management rules (s 147 Uniform Law; Ch 4 Pt 4.2 Uniform Rules) and professional conduct rules that require conflict checks to be routinely undertaken (r 10,11 ASCR; r 114, 115 Barristers' Rules) and for which identity checking is vital.

Specific file management rules mandate the recording of a client's full name, address, date of receipt of instructions among other detailed provisions: r93 Uniform Rules. The failure to check the identity of the client or the authority of the person providing instructions directly with the client has been found to be likely to constitute unsatisfactory professional conduct: *Youssef v NSW Legal Services Commissioner* [2020] NSWCATOD 85; *Council of the Law Society of NSW v Webb* [2012] NSWADT 114.

CANADIAN MODEL RULE

Additional verification for organisations (except public bodies, financial institutions and 'reporting issuers') requires that

- names of directors be recorded; and
- reasonable efforts be made to obtain beneficial ownership information and information as to control and structure of the entity.

Sufficient enquiries are to be taken to obtain information to ascertain source of funds related to legal services

The practitioner must monitor the relationship and retain records.

Duty to withdraw if the practitioner knows or ought to know that they are or would be assisting in fraud or illegality.

AUSTRALIAN DUTY

Acting on the instructions of someone who does not themselves have an authority is likely to be both negligence and unsatisfactory professional conduct: s 296 Uniform Law. Further, the failure to verify the authenticity of an appointment for a person purporting to act on behalf of a client is likely to constitute professional negligence: *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694, [106]-[108]; (2007) 13 BPR 24,675; ANZ ConvR 481.

A specific regime of prescriptive client due diligence applies to buying and selling real property: [49]-[53], primary submission.

Verification of identity is not limited to circumstances where there is a transfer of funds but (in addition to Rule 8 ASCR) flows from requirements that a legal practitioner:

- provide clear and timely advice to assist a client understand relevant legal issues and to make informed choices about action to be taken during the course of a matter: r 7.1 ASCR; see also r 35-7 Barristers' Rules; and
- avoid any compromise to their professional integrity and professional independence: r 4.1.4 ASCR; r 8, Barristers' Rules.

Solicitors and barristers may only act for a lawful purpose, as their paramount duty, prevailing to the extent of any inconsistency with any other duty, is to the administration of justice: r3 ASCR, r4(a) Barristers' Rules.

By requiring practitioners to act only on proper and lawful instructions, Rule 8 ASCR imposes a positive mandatory requirement upon practitioners to assess and satisfy themselves that both the source and application of funds is lawful.

CANADIAN MODEL RULE

Duty to withdraw if the practitioner knows or ought to know that they are or would be assisting in fraud or illegality

AUSTRALIAN DUTY

That is, red flags about identity and source of funds, in the course of meeting requirements of this and other professional conduct rules and principles (as set out above), will necessitate further enquiries to be made and potentially require the practitioner to refuse to act as instructed, and potentially to terminate the retainer (see Dal Pont, [19.10]), consistent with the Canadian Model Rule.

Specific risk management guidance is offered where unusual or unexpected settlement requests are made or sources of funding used. The Law Council of Australia notes a red flag on the basis that “[r]elated transactions will often be funded and settled in similar ways – home purchases for instance might commonly be financed by a mix of mortgage, deposit and proceeds from the sale of a current property,” such that transactions funded through an unusual source or unusual mix of sources (among other noted scenarios) might raise a red flag. In this example, the Law Council advises that:

“Particular attention should be given to private funding, funds from an unrelated party, and/or direct payments between buyers & sellers. Consider whether there is a need to check the source of funds. Ask the client whether funds come from the client? Similarly with settlements: where is the money going and why? If unsatisfied consider whether you can continue to act for them.”

(See Law Council of Australia, ‘Anti-Money-Laundering Guide for Legal Practitioners’, 2016, p 19)

The range of sanctions under Australia’s legal profession regulatory regime for failure to observe Rule 8 and the range of conduct rules and professional obligations set out here includes loss of a practitioner’s practising certificate, removal from the roll of legal practitioners, and imprisonment: ss 10, 74-76, 119, 120, 148; Pt 5.4, Uniform Law.

4. Trust accounts limited to provision of legal services***Model Trust Accounting Rule***

Restricts the use of trust accounts to being directly related to matters or transactions for which the firm or practitioner is providing legal services.

It is not permissible to use trust accounts for any purpose unrelated to the provision of legal services: see meaning of trust money, s 129, Uniform Law (“in the course of or in connection with the provision of legal services”).

Historical exemptions for managed investments schemes have been phased out, with the exception of limited residual provisions, (see s 258, Uniform Law and r 41 ASCR) as a result of legislative changes in Australia requiring such schemes to be separately regulated as financial services.

Intermixing of trust money with other money is expressly prohibited: s 146, Uniform Law.

Trust account record-keeping is meticulously regulated by the Uniform Law and Rules, see s 147(2) Uniform Law, rules 36-49; 52, Uniform Rules. Yearly audit by an external examiner is mandatory under s 155(1) Uniform Law. A practitioner has a statutory duty to report any irregularity by written notice to the local regulatory authority: s 154(1). Trust accounts can only be opened with designated ADIs and these ADIs are also required to report any deficiency in a trust account to the legal regulator: s 154(1).

Legal Practitioners struck off in last 12 months by state/territory			
State	Year	Number of Barristers	Number of Solicitors
New South Wales	2020/21	1 ¹	2 ²
Victoria ³	2020/21	1	-
Queensland ⁴	2020/21	[-] ⁵	7 ⁶
Western Australia ⁷	2019/20	-	-
South Australia ⁸	2019/20	-	-
Tasmania ⁹	2020/21	-	-
ACT ¹⁰	2020/21	-	-
Northern Territory ¹¹	2019/20	-	-

Notes

1. See NSW Bar Assoc at on D sc p nary Cases at <https://nswbar.asn.au/bar-standards/d-sc-p-nary-cases>

2. See Annua Report of The Law Soc ety of New South Wa es 2021 at p17:
https://www.awsoc ety.com.au/sites/default/files/202109/Law_Soc ety_of_NSW_2021_%20Annua_Report.pdf

3. See V ctor an Lega Serv ces Board & Comm ss oner 2020/21 Annua Report at p 52:
<https://sbc.vic.gov.au/resources/2021-v-ctor-an-ega-serv-ces-board-and-comm-ss-oner-annua-report>

4. See Annua Report of the Lega Serv ces Comm ss on (Q d), 2020-2021 at p 21:
https://www.sc.qd.gov.au/_data/assets/pdf_file/0005/699602/Lega-Serv-ces-Comm-ss-on-Annua-Report-2020-21.pdf

5. The Lega Serv ces Comm ss on (Q d) f gures do not d st ngu sh between so c tors and barr sters: the combined tota of awyers removed from the ro s reported as 7 n the 2020/21 reporting per od.

6. See note 5

7. See Annua Report of the Lega Pract ce Board of Western Austra a 2019-2020 at p 15:
<https://www.pbwa.org.au/Documents/For-The-Pub c/Annua-Reports/LPB-Annua-Report-2019-2020.aspx>
and Annua Report of the Lega Profess on Comp a nts Comm ttee 2020 at p 95:
<https://www.pbwa.org.au/Documents/Comp a nts/Forms-and-Pub cat ons/Annua-Reports/LPCC-Annua-Report-2019-2020.aspx>

8. See Annua Report of the Lega Profess on Conduct Comm ss oner(SA) 2020, pp24-25:
https://pcc.sa.gov.au/files/44_annua_report_2019-2020.pdf?v=318

9. See Annua Report of the Lega Profess on Board of Tasman a 2020-2021, p 33:
<https://www.pbt.com.au/wp-content/uploads/2021/10/LPBT-Annua-Report-2021-DIGITAL-9-Sept-2021-ART.pdf>

10. See Annua Report of the ACT Law Soc ety 2020-2021, p 45:
<https://www.actawsoc ety.asn.au/getassets/4c98cd52-d415-ec11-90fe-00505687f2af/Annua%20Report%2020-21.pdf>

11. See Annua Report of the Law Soc ety Northern Terr tory 2019-2020, pp 12, 17, 26:
https://awsoc etynt.asn.au/images/stories/agm/AGM_2020/2020-Annua-Report-240920.pdf