

## Guidance Statement No. 14 – Financial reporting (Published 10 August 2018)

### 1. Introduction

#### 1.1. Who should read this Guidance Statement?

This Guidance Statement is for solicitors and law practices.

#### 1.2. What is the issue?

When receiving cash from clients, solicitors and law practices need to be aware of their ethical obligations and those under Commonwealth Financial Reporting legislation.

#### 1.3. Status of this Guidance Statement

This Guidance Statement is issued by Queensland Law Society ('QLS') for the use and benefit of solicitors.

This Guidance Statement does not have any legislative or statutory effect. By having regard to the content of this Guidance Statement it may be easier for you to account for your actions if a complaint is later made to the Legal Services Commission.

This Guidance Statement is not legal advice, nor will it necessarily provide a defence to complaints of unsatisfactory professional conduct or professional misconduct.

This Guidance Statement represents a standard of good practice and has been endorsed by the QLS Ethics Committee, following consultation with the QLS Criminal Law Committee.

### 2. Overview

Solicitors and firms, when receiving cash from clients or indeed from anyone, need to be aware of their ethical obligations and those under Commonwealth Financial Reporting legislation. An understanding of these important obligations is critical to avoid liability, which can include criminal conviction and imprisonment. This Guidance Statement seeks to provide an overview of the relevant provisions.

As well as understanding the relevant laws, the implementation of appropriate office procedures is a necessary safeguard against the risks and these are outlined below.

This Guidance Statement does not address the separate obligations which exist in relation to the operation of solicitors' trust accounts.

### 3. General ethical principles

Solicitors have a duty of honesty,<sup>1</sup> integrity and professional independence,<sup>2</sup> as well as an obligation to not do anything which would be prejudicial to, or diminish public confidence in, the administration of justice<sup>3</sup> or bring the profession into disrepute.<sup>4</sup> Solicitors have both a legal and ethical duty to comply with the law.<sup>5</sup>

For these reasons, solicitors should take great care to avoid the risk of participation, even unwitting, in money laundering activities. This risk may be reduced by following the recommendations in this Guidance Statement.

Solicitors can consider if rule 13 of the *Australian Solicitors Conduct Rules 2012* ('ASCR') applies. See also [Guidance Statement No. 8 – Termination of a retainer](#).

### 4. Financial Reporting

Under s 15A of the *Financial Transaction Reports Act 1988* (Cth) ('FTRA'), solicitors have a specific obligation to provide 'significant cash transaction' reports to AUSTRAC.

A 'cash transaction' under the FTRA is 'a transaction involving the physical transfer of currency from one person to another'.<sup>6</sup> 'Currency' under the FTRA:

*'means the coin and paper money of Australia or of a foreign country that:*

*(a) is designated as legal tender; and*

*(b) circulates as, and is customarily used and accepted as, a medium of exchange in the country of issue.'*<sup>7</sup>

This reporting obligation does not therefore apply to electronic bank transfers or to cheque or credit card transactions.

A 'significant cash transaction' is defined as a transfer of any currency equivalent to \$10,000 (AUD) or more.<sup>8</sup>

It is an offence not to comply with this reporting obligation. Upon conviction, up to a 2 year term of imprisonment can be imposed for failing to do so.<sup>9</sup> In circumstances where a solicitor knowingly provides incomplete information to AUSTRAC, up to five years imprisonment can be imposed.<sup>10</sup> Anti-avoidance offences exist as well, addressing such situations as where a transaction is conducted in a series of smaller amounts to avoid the reporting requirement (sometimes referred to as 'smurfing' or 'structuring').<sup>11</sup>

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<sup>1</sup> *Australian Solicitors Conduct Rules 2012*, r 4.1.2.

<sup>2</sup> *Ibid* r 4.1.4.

<sup>3</sup> *Ibid* r 5.1.1.

<sup>4</sup> *Ibid* r 5.1.2.

<sup>5</sup> *Ibid* r 4.1.5.

<sup>6</sup> *Financial Transaction Reports Act 1988* (Cth) s 3 (definition of 'cash transaction').

<sup>7</sup> *Ibid* (definition of 'currency').

<sup>8</sup> *Ibid* (definition of 'significant cash transaction').

<sup>9</sup> *Ibid* s 28(4).

<sup>10</sup> *Ibid* s 29(5).

<sup>11</sup> *Ibid* s 31.

Therefore, it is crucial that cash deposits of this nature received, are reported to AUSTRAC. A failure to comply with reporting obligations may lead to imprisonment under the FTRA. It has been held that the prosecution need only prove knowledge of the transaction and a failure to report and that it is immaterial whether the accused knew of their reporting obligations.<sup>12</sup> The UK has seen a series of cases where custodial sentences were given for non-reporting under similar provisions to the FTRA such as *R v Duff* [2002] EWCA Crim 2117.

The FTRA also contains other financial reporting obligations, which do not apply specifically to solicitors, but which could apply to a solicitor or law practice in a given case eg: if they are a 'cash dealer' under the FTRA.<sup>13</sup>

### Means of reporting

Solicitors and law practices can create an account with AUSTRAC Online to report any such transactions. Requests for lodgement of a paper compliance report will be considered on a case-by-case basis by contacting AUSTRAC.<sup>14</sup> The particular details required for a report under s 15A are detailed in sch 3A of the FTRA and include, for example, the amount of cash, the date of transaction and the client's name.

Under s 3 of the FTRA, significant cash transactions must be reported within 15 days after the day the transaction occurs. Solicitors and law practices should confirm their obligations and the means available to make the required reports for themselves, as these details may change.

### Confidentiality issues

Making a report to AUSTRAC with respect to a significant cash transaction is required by the legislation. This requirement would be a permitted exception under rule 9.2.2, ASCR which states that a solicitor may disclose confidential information if permitted or compelled by law to disclose.

For these reasons, solicitors should take great care to ensure that their office procedures require the automatic reporting of significant cash transactions. There is a strong argument for eliminating cash transactions completely.

Pursuant to s 40E of the FTRA, transaction and account records must be kept for a period of at least seven years.

## 5. More Information

Solicitors are also referred to:

- Queensland Law Society, *The Australian Solicitors Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners*, Queensland Law Society (2014).
- You can visit the AUSTRAC website to view the AUSTRAC compliance guide or to obtain more details about the obligations under the FTRA. See: <http://www.austrac.gov.au/businesses/obligations-and-compliance/austrac-compliance-guide>.

For further assistance please contact an Ethics Solicitor in the QLS Ethics and Practice Centre on **07 3842 5843** or [ethics@qls.com.au](mailto:ethics@qls.com.au).

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<sup>12</sup> *R v Taib; ex parte Director of Public Prosecutions (Cth)* [1999] 2 Qd R 649.

<sup>13</sup> See, eg, FTRA s 15.

<sup>14</sup> AUSTRAC, *Reporting Policy* (25 November 2014) <<http://www.austrac.gov.au/about-us/policies/reporting-policy>>.