Guidance Statement No. 13 – Proceeds of crime compliance and Anti-Money Laundering (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 funds from clients, especially in cash or where there may be doubt as to the source of the funds being legitimate, solicitors and law practices need to be aware of their ethical obligations and those under anti-money laundering and proceeds of crime 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 criminal charges or 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 funds from clients, need to be aware of their ethical obligations and those under anti-money laundering and proceeds of crime 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.

2.1. General ethical principles

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

For these reasons, solicitors should take great care to avoid the risk of participation, even unwitting, in money laundering activities or receiving the proceeds of crime. This risk may be reduced by following the recommendations proposed in clause 2.5 of 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.

2.2. Proceeds of Crime

Under the *Criminal Proceeds Confiscation Act 2002* (Qld) ('CPCA'), it is an offence to engage in money laundering. Section 250(2) of the CPCA provides that:

> *'A person engages in money laundering if the person knowingly or recklessly—*
>
> *(a) engages, directly or indirectly, in a transaction involving money or other property that is tainted property; or*
>
> *(b) receives, possesses, disposes of or brings into Queensland money or other property that is tainted property; or*
>
> *(c) conceals or disguises the source, existence, nature, location, ownership or control of tainted property.'*

The CPCA defines 'money' as 'money in the form of cash',[6] so this provision concerns transactions involving legal tender, such as notes and coins. The offence also includes the broad term of 'property'.[7] Funds received by electronic bank transfers are included in this definition.

In s 250(2A), a person acts 'knowingly' when they know, or ought reasonably to know, that the property is 'tainted property'[8] or is derived from some form of unlawful activity.

Similarly, in s 250(2B), a person 'recklessly' does an act if they are aware there is a substantial risk the property is tainted property or derived from some form of criminal activity and that

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[1] *Australian Solicitors Conduct Rules 2012*, r 4.1.2.
[2] Ibid r 4.1.4.
[3] Ibid r 5.1.1.
[4] Ibid r 5.1.2.
[5] Ibid r 4.1.5.
[6] *Criminal Proceeds Confiscation Act 2002* (Qld) sch 6 (definition of 'money') ('*CPCA*').
[7] This means any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action (*Acts Interpretation Act 1954* (Qld) sch 1 (definition of 'property) (emphasis added).
[8] *CPCA,* s 104.

having regard to the circumstances known to the person, it is unjustifiable for the person to take the risk.

These provisions are similar, but not identical, to the corresponding sections of the *Criminal Code Act 1995* (Cth) div 400.

Under the CPCA, a person who knowingly engages in money laundering can face up to 20 years imprisonment. For recklessly engaging in money laundering, up to 10 years imprisonment can be imposed. The Queensland Crime and Corruption Commission has the power to investigate legal practitioners even where criminal charges have not been laid.

In most cases, a solicitor would not knowingly receive tainted property. The more common risk is that solicitor might be reckless in their receipt of money. Where a client wishes to pay or deposit large amounts of physical currency, however, this should be a warning sign for the solicitor, especially where a legitimate reason for doing so is not immediately apparent. The recommended steps referred to in clause 2.5 below offer some guidance to help safeguard against allegations of recklessness.

Section 252 of the CPCA covers a similar offence being the possession of property suspected of being tainted property. That section provides (emphasis added):

> *'(1) A person must not receive, possess, dispose of, bring into Queensland, conceal or disguise property that may reasonably be suspected of being tainted property.*
>
> *Maximum penalty—100 penalty units or 2 years imprisonment.*
>
> *(2) If a person is charged with an offence against this section, it is a defence to the charge if the person satisfies the court that the person had no reasonable grounds for suspecting that the property mentioned in the charge was either tainted property or derived from any form of unlawful activity.*
>
> *(3) In applying this section to a financial institution, the fact that the financial institution is, or has been, subject to a monitoring order or a suspension order must be disregarded.*
>
> *(4) In this section—*
>
> ***tainted property** includes property that is tainted property[9] because of an interstate confiscation offence.'*

Importantly, proof of this offence does not require proof of knowledge, nor even recklessness. The offence will be proved if a solicitor receives or possesses property, and there is objective evidence which gives the Court reasonable grounds to suspect the property is tainted property. If a Court finds that there are reasonable grounds for the suspicion, a reverse onus is placed upon the solicitor. It is a defence for the solicitor to prove that the solicitor personally had no reasonable grounds to suspect that the property was tainted property. This offence carries a

[9] *CPCA* s 104.

maximum penalty of 2 years imprisonment. The recommended steps referred to in clause 2.5 below offer some guidance to help safeguard against this allegation.

Partners, directors and principals should also be aware of the potential extension of criminal liability to them for the actions or omissions of their employees.[10]

2.3. Future developments

***Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ('AML/CTF')**

The AML/CTF provisions work on a framework of 'designated services'. Generally, the majority of this Act does not relate to legal services or legal providers. However, legal practitioners may have obligations if they offer any of the 'designated services' covered by the Act. For example, legal practitioners involved in mortgages may be providing designated services, and therefore be considered 'reporting entities' under the Act. A list of designated services is outlined in s 6 on the AML/CTF. Common examples are account / deposit-taking services, cash carrying / payroll services, currency exchange services, factoring a receivable, loan services, remittance services and investment services.

If carrying out a 'designated service', a solicitor will need to report 'threshold transactions' and 'suspicious matters'.[11] 'Threshold transactions' are defined in s 5 as those transactions involving the transfer of physical (or, notably, e-currency) where the total amount is not less than $10,000 (AUD).

A 'suspicious matter' will arise where there is suspicion on reasonable grounds that the provision of that service may be in relation to an investigation of that person's potential tax evasion or an offence against State or Commonwealth laws. It is important to remember that even if one of these transactions is not completed or finalised, reporting obligations may still arise.

When providing designated services, solicitors, as 'reporting entities' under the AML/CTF, are required to collect and verify information about customers / clients. The actual methods and processes for these checks remain at the discretion of the entity. They will also need to comply with annual reporting requirements via AUSTRAC Online. Requests for lodgement of a paper compliance report will be considered on a case-by-case basis by contacting AUSTRAC.[12]

Note, however, that solicitors who happen to be 'reporting entities' do not also need to comply with s 15A of the *Financial Transaction Reports Act 1988* (Cth) ('FTRA') in respect of a transaction that is a 'designated service' transaction covered by the AML/CTF.[13]

The AML/CTF did not originally intend to deal with lawyers generally as designated service providers, given the expectation a second tranche of provisions would later be introduced to deal with the profession specifically. These provisions were never enacted but indicate a growing concern that lawyers are increasingly being considered as 'gatekeepers'. It is not

[10] Ibid s 253.
[11] *AML/CTF,* ss 41, 43.
[12] AUSTRAC, *Reporting Policy* (25 November 2014) <http://www.austrac.gov.au/about-us/policies/reporting-policy>.
[13] *Financial Transaction Reports Act 1988* (Cth) s 15A(3A).

unlikely future reforms may see greater obligations imposed and therefore potential liability for legal practitioners.

2.4. Foreign transactions

It is crucial solicitors consider the risks associated with international transactions. Caution should be exercised when dealing, in particular, with funds coming from jurisdictions with limited anti-money laundering legislation or safeguards.

The Financial Action Taskforce has produced a list of jurisdictions identified as high risk or non-cooperative with these laws: http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions.

2.5. Recommended steps to prevent money laundering and the receipt of crime proceeds

It is recommended that solicitors create policies within their teams and offices in order to ensure compliance with reporting obligations and to minimise the risk of contributing to a situation of money laundering or other criminal activity through recklessness. The following steps are recommended but do not represent an exhaustive list of what might be required in a given situation:

- Always carry out client due diligence by establishing and verifying client identity[14], as appropriate for the matter, both initially and throughout the period of service.
- Establish additional due diligence requirements in relation to clients who are 'politically exposed persons' (or PEPs).[15]
- Have strict and clear policies in place for instances where it becomes apparent money laundering or the receipt of tainted property may be a risk, such as when you will terminate the retainer.
- Always assess risk carefully and require a clear explanation for the source of the funds, especially for clients facing confiscation proceedings.
- Request documentary evidence of funding sources from clients facing confiscation proceedings or criminal proceedings that involve allegations of illegitimate income, substantial legal fees or in cases involving high risk clients.
- Minimise or eliminate any cash transactions.
- Consider and confirm the identity and legitimacy of third party funders as an alternative.
- Maintain full transaction and financial records for at least seven years to enable reporting and investigation obligations.
- Develop policies for the internal control of funds, ongoing staff training and audit reviews.
- If circumstances arise where you have reasonable grounds to doubt the legality of funds received you should make appropriate enquiries with your client regarding the source of the funds. If as a result of your enquiries you remain unsatisfied with the response then you will need to consider whether you can continue to act for the client.

[14] Lexon Insurance, *New Verification of Identity Checklist* (15 November 2018) <http://www.lexoninsurance.com.au/Managing_your_Risk/Bulletins/New_Verification_of_Identity_Checklist>.
[15] *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (Cth) ch 15.

3. 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).
- The Law Council of Australia has produced a detailed publication, *Anti-Money Laundering Guide for Legal Practitioners* (2016).
- You can also visit the AUSTRAC website for more details about obligations under the FTRA (http://www.austrac.gov.au).
- The Financial Action Taskforce (an inter-governmental body) has a website includes a list of jurisdictions identified as high risk or non-cooperative with these laws (http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions).

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