

Modernising Australia's anti-money laundering and counter-terrorism financing regime

VLSB+C submission to the Attorney-General's consultation on reforms to simplify and modernise the regime and address risks in certain professions

Introduction

The Victorian Legal Services Board ("Board") and the Victorian Legal Services Commissioner ("Commissioner") are the independent statutory authorities responsible for regulating the legal profession in Victoria under the *Legal Profession Uniform Law* ("Uniform Law"). The Board and the Commissioner effectively operate as one body, the VLSB+C.

VLSB+C welcomes the opportunity to respond to the Attorney-General's Department ("AGD") consultation on modernising Australia's anti-money laundering and counter-terrorism financing ("AML/CTF") regime. We support efforts to simplify, modernise and improve the existing regime to ensure it is fit-for-purpose.

We also agree with the proposal to extend the regime to lawyers who provide designated services. Lawyers need to be alive to the risk that their expertise may be exploited by criminals seeking to conceal and launder illegally obtained money and, in our view, applying the AML/CTF regime to the profession is both reasonable and consistent with public expectations. However, we appreciate that doing so will impose a regulatory burden on the profession, and therefore encourage the AGD to consider ways to reduce this burden for smaller law practices, many of whom provide services that will be captured within the definition of 'designated services'.

Regulation of the Legal Profession – Overview of the Uniform Law regime

The legal profession has been regulated in Victoria for over a century. The current legislative framework – i.e. the Uniform Law – establishes a robust and effective framework for regulating lawyers, with a strong consumer protection focus.

The Uniform Law commenced on 1 July 2015 in Victoria and New South Wales, and 1 July 2022 in Western Australia. It establishes a 'uniform' framework for the regulation of the legal profession in these states – and any other states that may choose to join the Uniform Law – and is supported by Uniform Rules, including the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 ("Professional Conduct Rules") and the Legal Profession Uniform General Rules 2015 ("General Rules"). In Victoria, the Uniform Law forms Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (Vic) ("Application Act") and is implemented in Victoria through that Act.

Although VLSB+C operates as one entity, the Board and the Commissioner are allocated separate regulatory functions under the Application Act.

The Board is an independent skills-based Board consisting of a mix of lawyer and non-lawyer members, appointed by the Governor in Council on the Attorney-General's recommendation. Most relevantly for this submission, the Board is responsible for:

- making decisions about whether an applicant for a practising certificate is a fit and proper person to practice law;
- issuing, renewing, suspending, cancelling and imposing conditions on practising certificates;

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- maintaining the Victorian legal profession register and register of disciplinary action;
- monitoring, inspecting and conducting investigations of law practices' trust accounts, and prosecuting/ assisting police to prosecute law practice associates who engage in fraud or dishonesty with respect to those trust accounts;
- undertaking compliance audits of law practices;
- exercising functions relating to external interventions into law practices, which can range from appointing a supervisor of trust money through to the appointment of a receiver;
- maintaining and administering a statutory Fidelity Fund to compensate clients whose trust money has been misappropriated by a law practice associate(s);
- prosecuting individuals who engage in unqualified legal practice (i.e. hold themselves out as being able to provide legal services or who do provide legal services) without the relevant qualifications; and
- applying for removal of lawyers' names from the Supreme Court roll where necessary.

The Commissioner is an independent statutory office holder appointed by the Governor in Council, on the Attorney-General's recommendation. The Commissioner is also the CEO to the Board. The Commissioner's key role is to receive and handle complaints about the conduct of lawyers by members of the community, and to initiate her own complaints regarding a lawyer's conduct. The conduct in question can extend to a lawyer's behaviour outside of legal practice. An investigation may result in the Commissioner taking a variety of disciplinary actions, including the initiation of disciplinary proceedings for professional misconduct at the Victorian Civil and Administrative Tribunal, in addition to any other criminal or civil sanctions imposed on the lawyer.

Both the Commissioner and the Board are obliged to report suspected serious offences by a lawyer to the relevant prosecuting authority.¹

Application of the six key AML/CTF obligations to the legal profession

Question 25 in the AGD's consultation paper asks if there any existing practices within the legal sector that would duplicate the six key AML/CTF obligations, and if so, how these practices could be leveraged for the purpose of AML/CTF compliance. Key obligations 1, 2, 3, 5 and 6 all reflect a level of existing practice in the sector and accordingly are the focus of this section of our submission. We make further comments on key obligations 3 and 4 in the [Other Matters](#) section of this submission.

Our view is that there are synergies between the key AML/CTF obligations and existing requirements either explicitly imposed on lawyers as part of their regulatory obligations under the Uniform Law framework, or inherently required to ensure they acquit those obligations. Therefore, many of the requirements imposed by the AML/CTF framework will be familiar to lawyers.

However, it is important to be aware that significantly different policy rationales drive the different regimes and this should inform any discussion about the extent to which the Uniform Law framework could or should be leveraged for the purposes of AML/CTF compliance. As a legal regulator we are concerned with the conduct and actions of lawyers and ensuring they are suitable to provide legal services to the community. The conduct of lawyers' clients is beyond our legislative remit. Therefore, should the AGD wish to explore opportunities to avoid duplication of requirements or leverage the Uniform Law framework, we would signal that amendments to the Uniform Law and Uniform Rules are very likely to be required. We would welcome an opportunity to discuss these issues in further detail with the AGD.

¹ Uniform Law, section 465.

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Key obligations 1 and 2: customer due diligence and ongoing customer due diligence

Although we appreciate that key obligations 1 and 2 of the AML/CTF regime extend beyond client identity verification, our comments are limited to the issue of client identification.

VLSB+C's position is that, despite neither the Uniform Law nor Uniform Rules explicitly requiring lawyers to verify their clients' identities, lawyers are nonetheless inherently obliged to know who their clients are in order to acquit their paramount duty to the court and the administration of justice. Identifying their clients is also a necessity for lawyers who wish to comply with their duty to avoid any compromise to their integrity and professional independence, and to avoid engaging in dishonest or disreputable conduct.²

We note that law practices also have record-keeping obligations under the General Rules, e.g. in relation to client files and trust money transactions. The records required to be kept include records of the names and addresses of clients and we consider that, to properly comply with these requirements, lawyers would need to verify their clients' identities.

Some lawyers, operating in particular areas of law, have specific client identity verification obligations that may overlap with, or duplicate, client identification requirements under key obligations 1 and 2. For example, solicitors whose legal practice involves dealing with interests in land have existing obligations, under the Australian Registrars' National Electronic Conveyancing Council framework, to verify their clients' identities. The Registrar administering the titling system in each participating jurisdiction enforces these obligations.³ Client verification can be completed in line with the Verification of Identity Standard outlined in the Model Participation Rules, or by ensuring that reasonable steps have been taken to prove identity.⁴ The requirements in the Verification of Identity Standard appear to be similar to the customer identification and verification requirements in AUSTRAC's 'Know your customer' procedures.

VLSB+C would likely regard a lawyer's failure to verify a client's true identity when providing legal services – including trust account services – to be conduct capable of attracting disciplinary sanction. However, any investigation of such conduct would depend on VLSB+C receiving information about the failure. This may occur via a consumer complaint about the lawyer – although this is unlikely in the case of a client who is seeking to engage in criminal conduct. Alternatively we may receive an external examiner's end-of-year trust account audit report, or an authorised deposit-taking institution's ("ADI's") report, alerting us to irregularities in the recording of client names/the matter for which money was received into a trust account⁵.

Key obligation 3: reporting

Under key obligation 3 of the AML/CTF regime, we note that lawyers who provide designated services would be required to report certain transactions and other matters to AUSTRAC. Our comments regarding this obligation are limited to the requirement to report cash transactions over AUD10,000, as well as 'suspicious matters'.

Lawyers generally are already required to report cash transactions of AUD10,000 or more to AUSTRAC via solicitor 'significant cash transaction reports'.

In relation to the requirement to report 'suspicious matters' we note the existence of section 154 of Uniform Law. This section requires legal practitioners to give written notice of 'irregularities' and 'suspected irregularities' in a law practice's trust account to regulatory authorities such as VLSB+C. Because the Uniform Law does not

² Professional Conduct Rules 3, 4 and 5.

³ These are, relevantly, the Participation Rules for Victoria made by the Registrar of Titles under section 23 of the Electronic Conveyancing National Law, which implement the Model Participation Rules established by ARNECC.

⁴ Participation Rules for Victoria, Section 6.5: <https://www.arnecc.gov.au/wp-content/uploads/2021/08/victorian-participation-rules-version-6.pdf>.

⁵ Uniform Law section 154.

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define 'irregularity', we look to the surrounding provisions of the Uniform Law to interpret its meaning. In this respect, we note the relevance of section 148, which is the key criminal offence provision that prohibits a law practice, an Australian legal practitioner or any other person from causing a 'deficiency' in any trust account or trust ledger account without reasonable excuse. The use of 'deficiency' in section 148 and 'irregularity' in section 154 gives rise to an interpretation that the two concepts are linked (i.e. an irregularity as an incorrect record or mistake that would, on its face, cause a trust account deficiency). The word deficiency is also undefined in the Uniform Law, but was defined in predecessor legislation – and continues to be understood – as including 'the non-inclusion or exclusion of the whole or any part of an amount that is required to be included in the account'.

Accordingly, the term 'irregularity' is, in our view, highly unlikely to cover suspicious matters required to be reported under the AML/CTF regime. We further note that suspicious matters fall outside the objective of the trust money provisions of the Uniform Law, which are solely concerned with protecting the interests of the clients for whom lawyers hold money on trust – and assisting regulatory authorities to identify when such interests may have been compromised – rather than identifying potential money laundering or other criminal conduct.

Key obligation 5: record-keeping

We understand that key obligation 5 would require lawyers to make records to assist with the investigation of financial crime, retain those records for seven years, and ensure they are available to law enforcement, if required.

In this respect, we note that lawyers regulated under the Uniform Law are subject to broad record-keeping obligations in relation to various matters. The General Rules require law practices to maintain certain registers, including a *register of files opened* that records certain details about the clients for whom, and the matters in respect of which, a practice has agreed to act. Section 147 of the Uniform Law also requires law practices to keep trust records in accordance with the General Rules, in a way that enables them to be conveniently and properly investigated or externally examined, and to retain records for seven years.

Although information required under key obligation 5 – which we understand would include information about transactions, customer identify verification, and a practice's AML/CTF program – could be incorporated into lawyers' existing record-keeping obligations, this would require amendments to be made to the General Rules. These Rules are made by the Legal Services Council established under the Uniform Law, and approved by a Standing Committee comprising the Attorneys-General of Victoria, New South Wales and Western Australia.

Key obligation 6: enrolment and registration with AUSTRAC

The sixth key regulatory obligation for regulated entities who provide designated services is to enrol and – in certain situations – register with AUSTRAC.

Registration of law practices is a feature of the Uniform Law, to the extent that law practices are required to register with the Board before the lawyers they employ can commence providing legal services. However, law practices are not the primary focus of the Uniform Law. Rather, the primary focus of the Uniform Law is on issuing practising certificates to, and monitoring the ongoing conduct of, individual lawyers who engage in legal practice. The powers the Uniform Law confers on regulatory authorities in relation to law practices are limited to, and directed at, ensuring that we can enter law practices and undertake compliance audits⁶ to assess their principals' and employees' general compliance with regulatory and professional obligations. We can then issue management system directions⁷ to the law practice to rectify non-compliance, if required.

⁶ Uniform Law, section 256.

⁷ Uniform Law, section 257.

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Other matters

Supporting law practices to comply with the AML/CTF regime

VLSB+C supports the proposal to extend the AML/CTF regime to lawyers who provide designated services. The regime is particularly pertinent to legal practitioners, because individuals engaged in activities requiring the ‘washing’ of large amounts of cash are likely to require the services of a lawyer. That said, we are also cognisant that the application of the regime to lawyers will increase regulatory burden on the profession. To minimise that burden, we strongly recommend the development of legal profession-specific and detailed guidance to assist law practices to understand how to comply with the regime, in particular key obligations 3 and 4, i.e. reporting certain matters to AUSTRAC and developing and maintaining an AML/CTF program.

In Victoria, sole practitioner law practices (i.e. law practices run by one lawyer, who may employ other lawyers) are by far the most common type of law practice. Many of these practices provide legal services that are likely to be designated services, e.g. the purchase or sale of residential or commercial property. It cannot be assumed that these firms are well-placed – either in terms of expertise or resourcing – to understand how money laundering occurs in the legal sector, assess levels of risk posed by their clients and establish an appropriate risk management plan, or recognise ‘red flags’ or ‘suspicious matters’. We believe the profession requires and would welcome sector-specific guidance and templates produced by AUSTRAC to assist them to meet their obligations.

Continuing professional development (“CPD”) will also be an important tool in ensuring that lawyers understand AML/CTF obligations. Though VLSB+C does not have a general power to compel practitioners to undertake CPD on any topic⁸ we can and will encourage lawyers to undertake AML/CTF CPD, assuming that training of this type has been developed by training providers and is fit for purpose. As the cost of CPD is a matter of some concern to many smaller law practices, the AGD might consider commissioning the development of high-quality CPD that could be offered to the profession at minimal or no cost. This would likely increase uptake within the sector.

VLSB+C has a broad communications reach across the Victorian legal sector and would be happy to support AUSTRAC and AGD in disseminating information about sector-specific guidance and templates, or CPD, that will assist them to comply with new obligations.

Tipping-off offence

Questions 11 and 12 in the consultation paper ask whether the tipping-off offence in the current AML/CTF regime is workable, or requires amendment. We appreciate the opportunity to provide feedback on this offence because, as currently formulated, it has the potential to undermine a key reporting obligation in the Uniform Law and contribute to adverse consumer outcomes.

Section 154 of the Uniform Law is a civil penalty provision that requires various parties, including ADIs, to report irregularities in law practice trust accounts to the relevant regulatory authority. Unfortunately, we have recently become aware of ADIs declining to comply with section 154 on the basis that doing so would cause them to commit the ‘tipping-off’ offence.

Amendments to the tipping-off offence are required to clarify that it does not affect an ADI’s obligation to provide reports to VLSB+C and other Uniform Law regulators under section 154. The information ADIs are required to

⁸ In practice, the VLSB+C’s ability to mandate specific CPD for lawyers is limited. The Law Council of Australia develops CPD rules for solicitors and the Australian Bar Association develops CPD rules for barristers. As such, we do not have any legislative or regulatory authority over the content of the CPD rules for solicitors or barristers, and have no power to mandate them to undertake particular CPD, outside of disciplinary settings.

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provide under this provision is of crucial importance to legal regulators, as it gives us early notice of potentially serious problems within a law firm, which we can quickly investigate and address in order to mitigate consumer harm and reduce potential claims on our Fidelity Fund.

Information-sharing

VLSB+C and AUSTRAC have a joint interest in ensuring that lawyers do not knowingly or unwittingly facilitate money laundering or terrorism financing. From VLSB+C's perspective, a lawyer's involvement in such conduct demands the relevant legal regulator's immediate consideration of their continued fitness to hold a practising certificate and potential disciplinary action.

Part 9.4 of the Uniform Law permits VLSB+C to make arrangements with Australian authorities for exchanging, obtaining or disclosing information relevant to any of our functions,⁹ and to request information in cooperation with, or with the assistance of, any agency, and to use the information to exercise said functions.¹⁰ However, it does not require other authorities to enter into information-sharing arrangements, or supply information to us upon our request. Accordingly, we have no way identifying lawyers involved in money laundering.

We strongly suggest that, in addition to extending the AML/CTF regime to professions such as lawyers, the AGD consider establishing formal information-sharing provisions that enable regulators such as VLSB+C to be made aware when an individual they regulate is knowingly or unwittingly involved in illegal activities. Information provided should be capable of being used in evidence in regulatory investigations and disciplinary proceedings.

By having clear codified arrangements for information-sharing with AUSTRAC and the use of information provided by AUSTRAC in disciplinary proceedings, Uniform Law regulators can support AUSTRAC in its objective of detecting, deterring and disrupting criminal abuse of the financial system.

We would welcome the opportunity to discuss with AGD amendments that may be required to the Uniform Law framework to facilitate an effective partnership between AUSTRAC and Uniform Law legal regulators.

Conclusion

We thank the AGD for the opportunity to comment on the consultation paper and hope that our comments will be taken into consideration.

Yours faithfully

Fiona McLeay
Board Commissioner & CEO

⁹ Uniform Law section 436

¹⁰ Uniform Law section 441