

# Balancing Legal Professional Privilege and AML/CTF obligations

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## Introduction

The *Anti-Money Laundering and Counter-Terrorism Financing Act (AML/CTF Act)* requires lawyers who provide designated services under the Act to comply with certain reporting obligations.

Amongst such obligations is the requirement for lawyers to submit a Suspicious Matter Report (**SMR**) to AUSTRAC if they suspect on reasonable grounds that a customer is not who they claim to be, or the designated service relates to any one of the following: terrorism financing, money laundering, an offence against a Commonwealth, State or Territory law, proceeds of crime or tax evasion.

In light of these reporting obligations, the AML/CTF Act provides protections from the disclosure of documents and information that are subject to legal professional privilege (**LPP**). The Explanatory Memorandum to the AML/CTF Act further clarifies that where lawyers reasonably believe that documents or information are protected by LPP, they do not require disclosure. Instead, lawyers must submit an *LPP Form* in place of the information or document.<sup>1</sup> Where the practitioner believes that *all* information comprising the grounds on which they hold the suspicion is protected by LPP, they may refuse to make a report to AUSTRAC.<sup>2</sup>

It is contended that despite policy intentions in relation to the protection of LPP, the legislation may make it conceptually difficult to resolve

ethical dilemmas in practice, particularly because lawyers must form views about whether LPP applies or an exception is engaged in the SMR context, without the client's consent.

It is recommended that practitioners take special care when deciding to claim LPP or an exception and seek advice if they require assistance.

The LIV has released a separate information sheet: 'Ethical obligations in complying with the AML/CTF regime' which is recommended to be read in conjunction with this guideline.

## LPP

LPP is a substantive common law right that is well aligned with established legal principles.<sup>3</sup> It is further replicated as a rule of evidence.<sup>4</sup> In essence, LPP refers to confidential communications between a lawyer and client for the dominant purpose of providing legal advice or for the use of in existing or anticipated litigation. Communications include documents created by the solicitor or the client. LPP is essential to the lawyer-client relationship as it encourages frank disclosure without the fear of trusted and possibly sensitive information being divulged outside of the engagement. The principle serves a public interest purpose to foster trust in the profession, amongst other objectives.

The AML/CTF Act adopts the definition of LPP from Division 1 of Part 3.10 of the *Evidence Act 1995* (Cth), serving as a protective mechanism for LPP.

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<sup>1</sup> *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024*, Schedule 4, Section 5 – see LPP form.

<sup>2</sup> *Ibid* s 41(2A).

<sup>3</sup> *Baker v Campbell* (1983) 153 CLR 52 at 127, 129 (Dawson J).

<sup>4</sup> See definition of *legal professional privilege* under Division 1, Part 3.10 of the *Evidence Act 1995* (Cth).

## What is not protected by LPP?

There are examples of documents that AUSTRAC may request as part of the reporting process which are not protected by LPP.

It is commonly agreed that information such as a client's identity is typically not protected by LPP. As is the case with trust account records<sup>5</sup> and information about the source of client funds.

There are also exceptions to LPP, including the fraud exception. LPP does not apply to communications involving advice given or sought to further a criminal or fraudulent purpose.<sup>6</sup>

## Only the client has the right to waive LPP

The privilege belongs to the client. The effect of the AML/CTF Act is that lawyers who must lodge a SMR are obliged to make assertions about LPP without the approval of the client. The lawyer cannot take instructions from the client as to whether to assert LPP or whether it can be waived, as they will then fall foul of the tipping off offence.<sup>7</sup>

Fundamentally, LPP belongs to the client and not the lawyer, so it is vital that lawyers seek to protect that privilege.<sup>8</sup> There is also a concern that lawyers will inadvertently disclose privileged information in a SMR placing them at risk of breaching their professional ethical obligations.

## Managing LPP and AML/CTF Compliance

The AML/CTF Act creates two duties which may sit in tension: the duty to lodge SMRs and the duty to preserve LPP and therefore the client's interests.<sup>9</sup> In practice, the obligation to identify, interrogate and, where necessary, question the scope of LPP in order to meet SMR obligations, may create an ethical tension for practitioners.

SMR obligations require solicitors to actively consider the real purpose behind their client's activities and whether those activities might support or obscure any illegal or criminal purpose. This can appear inconsistent with a lawyer's duty

to act in their client's best interests, as it requires them to submit a report without their client's consent or knowledge and in a way that may disadvantage the client.<sup>10</sup> Rule 8 of the ASCR shapes the duty to advance the client's best interests by requiring a solicitor to only act on lawful, proper and competent instructions. A solicitor cannot act to advance interests through unlawful or improper means. Commentary to the ASCR observes that 'the nature and extent of the enquiries that ought to be made necessarily depends upon the facts and circumstances of the client and the matter to which the instructions relate'.<sup>11</sup>

Ultimately, the lawyer's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

Section 41(2A) creates an exception to submitting a SMR if the reporting entity reasonably believes that *all* the information forming the basis of the report is protected by LPP. Section 41(3)(a) also provides that where *some*, but not all, information required to be contained in the SMR is privileged, a LPP Form should accompany the SMR in lieu of such information. These provisions mean that, in practice, the key question for lawyers is whether information or documents are in fact protected by LPP and whether any exceptions apply.

## Protected by LPP or not?

As mentioned above, the point of concern for lawyers will be assessing if information or documents are, in fact, protected by LPP.

In relation to the duty to maintain confidentiality, rule 9.2.2 of the ASCRs provides an exception to confidentiality if the '*solicitor is permitted or is compelled by law to disclose*'. Given this exception, a lawyer can provide confidential information of the client to AUSTRAC, however, they must ensure that such information is not also protected by LPP.

Determining whether LPP applies is a question of fact that can be complex and highly dependent on the circumstances. Lawyers need to take special care in their assessment and seek independent guidance if they are not confident.

<sup>5</sup> G E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters (Professional) Australia Limited, 8<sup>th</sup> ed, 2025) [11.95].

<sup>6</sup> See the exception in general law - *Evidence Act 1995* (Cth) s 125.

<sup>7</sup> AML/CTF Act s123.

<sup>8</sup> See *Baker v Campbell* (1983) 153 CLR 52 at 85 per Murphy J.

<sup>9</sup> AML/CTF Act s 41.

<sup>10</sup> *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* 2015, rule 4 (ASCRs).

<sup>11</sup> See Law Council of Australia's 2024 ASCR Commentary at page 27: <https://lawcouncil.au/publicassets/e219b6df-9ff7-ee11-9494-005056be13b5/ASCR%20Commentary.pdf>.

As discussed, one exception of LPP is the “fraud exception”. This requires evidence supporting the allegation.<sup>12</sup> In *AWB Limited v Cole* (No 5) [2006] FCA 1234, Justice Young relied on the prima facie standard, that there must be “something to give colour to the charge” and that the allegations be “clear and definite”. A mere assertion or allegation is not enough. The general law exception also requires that the lawyer knew or ought reasonably to have known, of the fraud.

This standard, arguably, is a much higher threshold than the standard of ‘suspicion’ on reasonable grounds in the AML/CTF context. Suspicion, in its ordinary meaning, is generally understood as a subjective feeling that something might be true, without firm evidence. In criminal law, ‘suspicion’ and ‘reasonable grounds to suspect’ are concepts relevant to powers of arrest and search warrants. Authorities discussing suspicion in this context include, in *R v Rondo*<sup>13</sup> where the court described that “a reasonable suspicion involves less than a reasonable belief but more than a possibility”. Further, in *Commissioner of Police v Lovett-Steele* [2025] SASC 145 citing *Homes v Thorpe* [1925] SASR 286 at 291: Suspicion was described as a state of mind which “falls short of belief”.

Because the fraud exception demands prima facie evidence, and the SMR obligation only requires suspicion, lawyers may face a tension between their duty to report and duty to maintain LPP. Suspicion sufficient to trigger a SMR may fall well short of the prima facie evidence required to displace LPP through the fraud exception. These are precisely the circumstances in which a claim of LPP should be made when lodging a SMR. Lawyers should take special care if deciding to waive LPP too readily and ensure that any exception is properly supported. They should not assume that suspicion in the AML/CTF context of criminal behaviour triggers the fraud exception and treat communications as not privileged. The checklist at the end of this guideline may be of assistance.

## Ministerial guidelines and court resolution

The Minister may issue guidelines under section 242A of the AML/CTF Act relating to the review or

challenge of LPP claims. It is also important to note that the Addendum to the Explanatory Memorandum makes it clear that only a court, not AUSTRAC, can properly resolve disputes about LPP.

## LPP Checklist

The interplay between reporting obligations and LPP may present lawyers with significant challenges. To navigate these issues, lawyers should adopt a careful and methodical approach. It may assist to use the following checklist when faced with reporting requirements:

- ✓ Ensure your retainer is clear and precisely defined at the outset.
- ✓ Identify the client and confirm to whom your fiduciary obligations are owed.
- ✓ Consider what information forms the grounds of your relevant suspicion
- ✓ Consider what information you must disclose under the legislation.
- ✓ Carefully document your decision-making process, given the conceptual challenges involved.
- ✓ Assess whether any information is likely to be protected by LPP, which may involve scrutinising relevant case law authorities and consulting senior practitioners within your law practice.
- ✓ Seek independent advice in relation to LPP if an assessment is beyond your familiarity
- ✓ Be prepared to act swiftly. There is limited time to collect and review relevant information and documentation for submission to AUSTRAC.

There is a level of complexity when managing reporting obligations alongside LPP. If you are unsure about any aspect of your obligations, particularly around LPP, it is suggested that you seek independent legal advice to ensure compliance and safeguard your client’s interests.

### How can we help you?

Visit the LIV’s Ethics Hub at <https://www.liv.asn.au/Ethics>

These are guidelines only and do not have the force of law. A solicitor must comply with the *Legal Profession Uniform Law and Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* and any other applicable rules or legislation.

To discuss concerns about terminating client engagement, contact the Ethics & Practitioner Support Department on (03) 9607 9336.

<sup>12</sup> *Freeman v Health Insurance Commission* (1997) 78 FCR 91 at 96 (Finkelstein J); *Commissioner, Australian Federal Police*

*v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 514 (Brennan CJ), and at 547 (Gaudron J).

<sup>13</sup> [2001] NSWCCA 540.

