



Law Council
OF AUSTRALIA

National Legal Profession Anti-Money Laundering & Counter-Terrorism Financing Guidance

Guidance Note No 2 – What Does the Criminal Law Currently Provide, and What Are My Cash Reporting Obligations?

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Overview

Legal practitioners fulfil a unique and essential function in Australia's system of justice and commercial life. The importance of this function is reflected in the professional, legal and ethical duties and obligations to which legal practitioners are subject (over and above those that are imposed on any other profession). At a fundamental level, these duties and obligations require practitioners to act at all times professionally and with integrity, to uphold the rule of law and to take care not to facilitate unlawful conduct including, of course, money laundering and financing terrorism.

For information about your professional ethical obligations in connection with your potential exposure to money laundering and terrorism financing risk, see *Guidance Note No 3 – What Are My Professional Obligations?*

Further, like everybody else, legal practitioners are subject to the criminal law. Money laundering and terrorism financing are serious offences and carry severe penalties. Each of the *Criminal Code Act 1995* (Cth) (**Criminal Code**), state and territory criminal and/or proceeds of crime statutes, criminalise money laundering and terrorism financing. The *Financial Transaction Reports Act 1988* (Cth) requires physical receipt of cash over AUD\$10,000 to be reported to the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) to prevent money laundering and terrorism financing.

More information about the Commonwealth criminal offences and reporting obligations is provided below.





Criminal Law – The Commonwealth Offences

Money Laundering

Part 10.2, Division 400 of the Criminal Code establishes the Commonwealth's money laundering offences. This includes offences for dealing (including recklessly or negligently) with money or property that is, or is likely to become, proceeds or an instrument of crime.

Dealing with money or other property is defined in s 400.2 (and see s 400.2A) as:

- receiving, possessing, concealing or disposing of money or other property; or
- importing money or other property into, or exporting money or other property from, Australia; or
- engaging in a banking transaction relating to money or other property,

where the money or other property (which is proceeds of crime, or could become an instrument of crime) relates to an indictable or other type of criminal offence.

For offences related to 'concealing or disguising', the term means concealing or disguising any or all of the nature, value, source, location, disposition or any movement of the money or property. Also included is concealing or disguising any rights and/or the identity of a person who has rights in respect of the money or property, and/or the identity of any person who has effective control of the money or property.

The penalties for Pt 10.2 Div 400 offences of dealing with the proceeds of crime are 'stepped' according to the level of knowledge and the value of the money or property involved. At the highest end, where the person dealing with the money or property believes that money or property is the proceeds of an indictable crime, or intends that they will become an instrument of crime, and the value is \$10,000,000 or more, the penalty is imprisonment for life: s 400.2B(1).

Part 10.2 Div 400 allows for the imposition of severe penalties where far lesser degrees of knowledge are involved, across a spectrum of types of dealings. Section 400.7(3), for example, provides for a maximum imprisonment of 12 months or 60 penalty units (\$16,500), or both, for negligently dealing with proceeds of crime of just \$1,000.

Notably, recklessness as to the nature of money or property is a sufficient degree of knowledge for the offence of attempting to commit an offence against a number of specified provisions in Pt 10.2 Div 400: s 400.14A. Also, custodial sentences may be imposed where the level of knowledge is that of a 'reasonable suspicion' that the money or property is proceeds of (indictable) crime. Factual scenarios that will be taken to create 'reasonable suspicion' are defined, inter alia, in s 400.9(2) to include where:

- there is 'structuring' (small payments to avoid reporting obligations): s 400.9(2)(a); or
- the defendant is handling the proceeds for another person but 'has not provided information enabling the other person to be identified and located': s 400.9(2)(e).



In summary, Pt 10.2 Div 400 of the Criminal Code is predicated on:

- the existence of money or property;
- an unlawful dealing (physical conduct such as receiving, possessing, concealing or disposing of the money or property, importing or exporting it, or engaging in banking transactions) in money or property (unlawful because the proceeds are proceeds of crime, or the proceeds are at risk of being used in the commission of or to facilitate a crime); and
- the person believing that the money or property was the proceeds of a crime, or being reckless or negligent about that fact.

That is, to be 'money laundering' the conduct:

- does not need to be the laundering itself, but could just be receiving, possessing, concealing or disposing of the proceeds of crime; and
- is undertaken with knowledge of the fact of the money or property being proceeds of crime, or being reckless or negligent to that fact.

Practitioners should of course review the current text of Pt 10.2 Div 400 for themselves.

Terrorism Financing

The offences of financing terrorism and financing a terrorist are set out in ss 103.1 and 103.2 of the Criminal Code, respectively. They are **appended** here for quick reference but please check for any updates between versions of this Guidance Note.

Criminal Law in the States and Territories

Each state and territory has its own terrorism financing offences and money laundering offences. Like terrorism financing, money laundering offences are usually found in the criminal statute or code for the jurisdiction, although specific money laundering offences can also be found in proceeds of crime legislation that empower the responsible authority to freeze and confiscate assets.

Variations in the Criminal Law Internationally

When reviewing money laundering and terrorism financing examples and material from overseas jurisdictions, note that offences vary subtly but with sometimes far-reaching consequences, especially as to the degree of knowledge that is required for a finding of culpability (particularly the formulation of legal tests that function to attribute knowledge to a defendant).

Reporting Cash Receipts \$10,000 ('Significant Cash Transactions')

Legal practitioners are required under s 15A of the *Financial Transaction Reports Act 1988* to report details of 'significant cash transactions' to AUSTRAC. A 'significant cash transaction' is where the cash transaction involves the physical transfer of cash from one person (or entity) to another of AUD\$10,000 (or foreign currency equivalent) or more in value.¹



Section 15A of the *Financial Transaction Reports Act* provides that when such a transaction is entered into 'in the course of practising as a solicitor' and 'entered into by, or on behalf of, a solicitor' an obligation to report is triggered. Examples include a client paying a sum above the threshold in cash to the solicitor, or another solicitor physically transferring such a sum to the counterparty solicitor on behalf of their client.

See Guidance Note No 4 – What Does Money Laundering Look Like?

The significant cash transaction reporting obligation is required by law. As such, it constitutes an exception to the solicitor's duty not to disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement: Rule 9, Australian Solicitors' Conduct Rules.

The reportable details for a significant cash transaction are set out in Schedule 3A to the *Financial Transaction Reports Act* and include:

- the nature of the transaction;
- the details for the solicitor or law practice;
- the name and address of any other party to the transaction; and
- the total amount of Australian and foreign funds involved in the transaction.

Failure to comply with the *Financial Transaction Reports Act* can result in a fine of up to 10 penalty units for incomplete information, up to two years' imprisonment for a failure to provide information, and up to five years' imprisonment for false or misleading information.² A failure to comply can result in a finding of unsatisfactory professional conduct or professional misconduct under the Legal Profession Uniform Law or the Legal Profession Act in force in your state or territory.³

Upon the conclusion of the Attorney-General's Department current consultation, *Reforming Australia's anti-money laundering and counter-terrorism financing regime*, the s 15A reporting obligation in the *Financial Transaction Reports Act* is expected to be transferred to the *Anti-Money Laundering and Counter-Terrorism Act 2006* (Cth) and the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No 1) (Cth).



Appendix – Commonwealth Criminal Code

Financing Terrorism and Financing a Terrorist

103.1 Financing Terrorism

- (1) A person commits an offence if:
- (a) the person provides or collects funds; and
 - (b) the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act.

Penalty: Imprisonment for life.

Note: Intention is the fault element for the conduct described in paragraph (1)(a). See subsection 5.6(1).

- (2) A person commits an offence under subsection (1) even if:
- (a) a terrorist act does not occur; or
 - (b) the funds will not be used to facilitate or engage in a specific terrorist act; or
 - (c) the funds will be used to facilitate or engage in more than one terrorist act.

103.2 Financing a Terrorist

- (1) A person commits an offence if:
- (a) the person intentionally:
 - (i) makes funds available to another person (whether directly or indirectly); or
 - (ii) collects funds for, or on behalf of, another person (whether directly or indirectly); and
 - (b) the first mentioned person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act.

Penalty: Imprisonment for life.

- (2) A person commits an offence under subsection (1) even if:
- (a) a terrorist act does not occur; or
 - (b) the funds will not be used to facilitate or engage in a specific terrorist act; or
 - (c) the funds will be used to facilitate or engage in more than one terrorist act.

References

1. Section 3, *Financial Transaction Reports Act 1988* (Cth).
2. Part V, *Financial Transaction Reports Act*.
3. Solicitors in New South Wales, Victoria and Western Australia are bound by the Legal Profession Uniform Law. Solicitors in the Australian Capital Territory are subject to the *Legal Profession Act 2006* (ACT); Northern Territory – *Legal Profession Act 2006* (NT); South Australia – *Legal Practitioners Act 1981* (SA); Queensland – *Legal Profession Act 2007* (Qld); Tasmania – *Legal Profession Act 2007* (Tas).

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