



Law Council
OF AUSTRALIA

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

Guidance Note No 7 – How Do I Mitigate and Manage My Risk?

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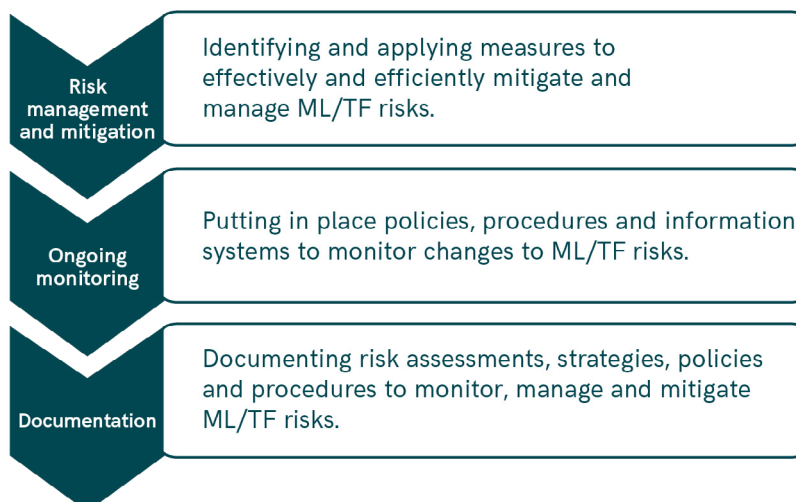
The suggestions and recommendations in this Guidance Note do not reflect or express legally binding obligations. Their adoption is voluntary and they are to be applied at the discretion of the individual legal practice.

The global anti-money laundering and counter terrorism financing watchdog, the Financial Action Task Force (**FATF**), encourages law practices, among others, to adopt a Risk-Based Approach to the threat of unwitting involvement in money laundering and terrorism financing.

The Risk-Based Approach means that the risk mitigation and management should be proportionate to risk and take into account the size and complexity of the law practice. Where possible, practices should leverage existing systems to mitigate and manage risk, as suggested below.

Practitioners will have read *Guidance Note 6 – How Do I Identify and Assess My Risk?*. Once you have identified the money laundering and terrorism financing risks to which your legal practice is exposed (Step One), you will need to mitigate and manage those risks.

FATF: Next Steps in Applying the Risk-Based Approach





Step Two: Risk Mitigation and Management

In the process of undertaking Step One (risk identification and assessment) you will have familiarised yourself with national and sector-specific threats and risks, and your own practice's particular risks of exposure to unwitting involvement in money laundering and terrorism financing. You are now in a position to stress-test your practice's existing systems (or 'controls') against those risks, to identify how you could augment those controls and further mitigate your risk if that is warranted.

The National Legal Profession Vulnerabilities Analysis Report¹ set out some of the more common vulnerabilities of legal practices in Australia as at September 2023, including:

- a lack of awareness of money laundering and terrorism financing risk; and
- in association with client due diligence systems (or 'know-your-client' (KYC) processes), not necessarily:
 - understanding who might be controlling the client entity;
 - identifying whether the client or person controlling the client entity (as applicable) is a politically exposed person (PEP); or
 - enquiring as to source of funds and source of wealth in higher risk scenarios.

It is clear that KYC is fundamental to risk mitigation. This means that assessing and augmenting your **client intake** system will be a vital part of your response to money laundering and terrorism financing risk. Other existing controls that you could examine when stress-testing your practice include your:

- file management systems;
- trust accounting processes;
- any conveyancing file management protocols;
- procedures for supervision;
- staff hiring practices; and
- staff training.

You might consider whether you could enhance these systems, as discussed below.

Augmenting Controls: Client Intake

Guidance Note No 8 – How Do I Undertake Client Due Diligence? sets out certain client information you may consider obtaining at the stage of client engagement, if a matter is likely to involve a transaction. The extent of the information sought can be adjusted depending on any risk variables associated with a matter or a client.

Consider incorporating at this early stage (at engagement) the information requests that would allow you to identify not only the client but the beneficial owner of the client and the true 'beneficiaries' of the transaction. You may also seek information that assists you to understand the source of wealth of the client and its beneficial owners, the source of funds for, and the purpose of, the proposed transaction.² This information will also assist you to decide whether you are willing to accept the instructions, and if so, to scope and draft the retainer.



Augmenting Controls: File Management Systems

You should already have file management protocols that help you keep track of critical timeframes such as limitation periods (for litigation matters). These ensure that legal services can be delivered in a competent, diligent and timely manner. Every legal practice should have an effective compliance management system, including file management, that incorporates:

- policies and procedures that all members of the legal practice must adhere to. It is recommended that legal practices have procedures relating to client engagement, file opening, conflict checking, costs disclosure, client meetings, approval of letters of advice, briefing counsel, court appearances, undertakings and billing; and
- appropriate training for staff members on the compliance obligations of the law practice.

Consider the flowchart in *Guidance Note No 4 – What Does Money Laundering Look Like?* p 3 and *Guidance Note No 5 – What Does Terrorism Financing Look Like?* p 2.

Consider incorporating into your existing management systems how you intend to monitor the file as steps are taken on the file toward completing the transaction, and how and when you will review elements of the transaction depending on the identification of red flags.

Consider how you will capture your thought process about risk indicators to help you assess and respond appropriately to red flags.

Augmenting Controls: Trust Accounting Processes

If your practice operates a trust account, you should already keep ledgers in which the practice records client information in accordance with legal profession statutory requirements.

You should already maintain your trust account records in a way that at all times discloses the true position in relation to trust money received for or on behalf of a client and in a way that enables the trust records to be conveniently and properly investigated or externally examined. The trust account receipts that you are required to issue as soon as practicable after the trust money is received should already contain at least the following particulars:

- the date the receipt is issued or made out and, if different, the date of receipt of the money;
- the amount of money received;
- the form in which the money is received;
- the name of the person from whom the money was received;
- details clearly identifying the name of the client in respect of whom the money was received and the matter description and matter reference; and
- particulars sufficient to identify the purpose for which the money was received and the matter description and matter reference and the name of the person who made out or issued the receipt.

You may wish to consider expanding the ledgers to enable recording of underlying source of funds information so that this information is directly linked to your accounting information within the practice rather than remaining, for example, on the primary file.



This could help you with your ongoing monitoring of a client or matter.

The ultimate responsibility for the trust account of course resides with the principals and directors of the legal practice despite any delegation of the account maintenance to internal or external accounting or bookkeeping units. Consider whether those exercising authority over your practice trust account are sufficiently aware of the nature of the risks of money laundering and terrorism financing. As awareness matures in the sector, targeted training is being (and will continue to be) made available to members of the legal and accounting sectors. Consider the need for training to increase awareness within the practice. This could be through internal continuing professional development using the material in these Guidance Notes to assist.

Augmenting Controls: Conveyancing File Management Protocols

If your practice undertakes conveyancing work, depending on the jurisdiction in which you practice, settlements are likely to be completed using an Electronic Lodgment Network. To be a registered user of the system (a 'subscriber') you are required to take reasonable steps to verify the identity of your client: Rule 6.5.1 of the Australian Registrars' National Electronic Conveyancing Council Model Participation Rules (**ARNECC Participation Rules**). Schedule 8 to the ARNECC Participation Rules sets out a Verification of Identity Standard. Applying that Standard is one way you can meet your obligation under Rule 6.5.1.

You may be using the stringent processes in Schedule 8 for KYC purposes, or you may have your own system in place that ensures you meet your obligation under Rule 6.5.1. Consider whether you can integrate the collection of ARNECC's required KYC information with information to mitigate and manage your money laundering and terrorism financing risk, within your own practice's KYC/verification of identity system.

For example, you could consider asking questions that seek to identify and verify the identity of the beneficial owner(s) of a client, as well as source of funds and source of wealth information, and any other enquiries to understand the nature and purpose of the engagement. You may wish to review *Guidance Note No 8 – How Do I Undertake Client Due Diligence?* for the types of information you might seek.

You should already be ensuring that for foreign clients, Foreign Investment Review Board approval is sought for residential, commercial or agricultural land purchases. In addition, for transactions to the value of \$750,000 or more, the Australian Taxation Office requires a Foreign Resident Capital Gains Withholding Certificate to be obtained. These applications require the provision of detailed client information.

Where the conveyancing arm of your practice is already collecting information to verify the client and, for foreign clients in the categories above to enable certain applications to be submitted, you should consider the areas of overlap with information that could mitigate and help you manage your risk of exposure to money laundering and terrorism financing. It would be prudent to streamline and concentrate your collection of information at a point prior to the engagement to allow early identification of red flags, so that you can apply increased due diligence accordingly and monitor the file more closely, if necessary.

Augmenting Controls: Procedures for Supervision

There needs to be appropriate supervision if a system is to be effective. If your practice is not a sole practice, consider whether you might appoint a senior member of staff as the 'go-to' person within the practice for all anti-money laundering and counter-terrorism financing matters.



While staff at all levels should be aware of the risk of exposure to money laundering and terrorism financing, ultimately it is the principals and directors of a legal practice who are responsible for the practice and who must exercise supervision over professional and non-professional staff.³

To ensure that appropriate supervision is in place, consider:

- regular 1:1 meetings between supervisors and the supervised practitioners to discuss the progress of matters. Supervisors could take the opportunity in these meetings to prompt supervised practitioners to raise and address any red flags they have identified and where these relate to the source of funds, to confer, and to identify the source and the purpose for which the funds are to be received before accepting payment of funds;
- regular file reviews. All fee earners should review their files on a regular basis. Supervisors should also be reviewing the files of those under their supervision; and
- where there is more than one principal solicitor in the law practice, possibly implementing a peer review system.

Augmenting Controls: Staff Hiring Practices

A legal practitioner can only be admitted to the practice of law if they are a 'fit and proper person'.⁴ They must make a declaration to this effect to their state or territory legal regulator, and declare any 'show cause' events to the regulator. Admissions standards operate to ensure that a practitioner will be disqualified if they are no longer a fit and proper person (and the requirement to meet this standard is an ongoing obligation). Non-lawyer members of a legal practice including employees (known, for example, as 'lay associates' in Uniform Law jurisdictions), are under an obligation to inform the legal practice of any convictions for a serious offence and (where relevant) if they have been disqualified from legal practice.⁵

Consider your practice's employment screening processes for non-lawyers. FATF emphasises that the degree to which you vet your employees ought to be proportionate to the level of money laundering and terrorism financing risk that your practice faces, and the role of the employee.⁶ The screening assessment may include:

- checking whether the employee has a criminal record; and
- other pre-employment screening such as background verification and credit reference checks.

Consider whether your hiring protocols should be augmented to mitigate and manage your money laundering and counter terrorism financing risk.



Augmenting Controls: Staff Training

As discussed, responsibility for anti-money laundering and counter-terrorism financing policies rests with the principal of a legal practice, but every member of a practice can have a role to play in detecting and deterring money laundering and terrorism financing. The Vulnerabilities Analysis Report⁷ found that overall, there was a low level of awareness of money laundering and terrorism financing risk in the Australian profession.

Yet risk mitigation is an active and ongoing process and requires a good level of awareness and alertness to risk. These are the ingredients that preclude systems (however impressive) from deteriorating into merely ticking boxes. Staff and principals will inevitably have questions, and depending upon the size of your practice, as mentioned above you may wish to appoint a designated anti-money laundering and counter-terrorism financing officer (a 'go-to' person) or someone whose responsibilities will include this role.

Staff training on anti-money laundering and counter-terrorism financing need not be costly, especially introductory training. It could mean organising a series of internal continuing professional development sessions where members of staff take turns presenting on one or more of the Guidance Notes in this series. More targeted training courses are being developed in Australia, and international materials (while specific to their originating jurisdictions) can supply useful insights. Online learning modules provided by the Australian Transaction Reports and Analysis Centre (**AUSTRAC**), while focused on compliance with the obligations of reporting entities under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (which legal practitioners are not), contain information that may also be useful for legal practices.⁸

The process of undertaking a risk assessment of your practice could also be an opportunity to collaborate with others across the entire practice and raise awareness of risk.



Test the Resilience of Your Systems

Whether it is at the stage of your initial risk assessment, or in the process of monitoring how your refreshed systems are operating, the following questions may help focus attention to potential vulnerabilities and areas of possible improvement:

- Do you have a standard client 'onboarding' (intake) process that appropriately reflects the money laundering risk associated with the category of client or service?
- Is that process well understood? Is documentation or training/ refresher training required? Have new staff been inducted?
- Do you accept cash in any circumstances? Are your reporting obligations to AUSTRAC and trust accounting compliance procedures adequate for money laundering risk mitigation where cash is accepted, or could your trust accounting and file management processes be augmented to record the underlying source of the funds?
- If you don't already have one, should you consider a no-cash rule, either absolutely or above a threshold, perhaps allowing for defined exceptions such as where access to justice is an issue?
- If you routinely require certain verification of identity information from the client at a particular stage of a service (such as during a conveyance), should you begin to require that information up-front rather than at a later stage, as part of your risk mitigation practice?
- Do your current practices involve carefully scrutinising the identity of prospective clients beyond ticking a box? Are staff active and alert to the risks?
- Are you alert to ascertaining whether the prospective client or client is acting for someone else? Can you improve your processes of enquiry?
- Does your practice actively and consistently seek to understand the ownership and control structure of the client entity for whom you act? Do you enquire as to whether there are beneficial owners of the client entity and verify their identity?
- If your client is a trust, do you use reliable means to identify and verify the identity of
 - the settlor;
 - the trustee/s;
 - the beneficiaries (ie individuals, or obtain information as to the class of beneficiaries); and
 - any other natural person exercising ultimate effective control over the trust including through a chain of control or ownership?
- How will you manage expectations? In appropriate circumstances, would you incorporate your identification and verification of identity needs in an email or other communicate that clients receive upon confirming an appointment with you?
- Does current practice include identifying red flags where further questions and/or additional documentation is warranted?
- What level of risk are you comfortable with (what is your risk appetite)? How is this expressed in the level to which you verify your clients'/prospective clients' identities? Do your processes and practices overall reflect your risk appetite?
- Who is the go-to person in the practice (if not a sole practice) on money laundering and counter-terrorism financing issues?
- How will you handle a situation where you have decided not to act?
- How will you ensure this engagement with risk remains relevant even as your clientele may change or the services you offer change?



Steps Three and Four: Ongoing Monitoring and Documentation

As your clientele evolves and methods of delivering legal services change, you will need to continue to monitor that your systems are fit for purpose. Even without dramatic shifts in the risk profile or changes in technology or service delivery, it is prudent to check that your systems are working effectively. Consider whether you might sample files on a regular basis, as appropriate for your practice, to monitor whether your systems are working well.

You may consider refreshing your risk assessment periodically, as appropriate for your practice.

It is worth documenting as much of your thought process, and as many of your decisions and the actions that you take, as possible. This includes the risk assessment process and the steps you take to mitigate your exposure to risk, as well as your client due diligence.

The Future

At the time of publication, the second phase of a Commonwealth Attorney-General's Department consultation has just concluded. Its various aims include ensuring legal practitioners' risk mitigation complies with FATF Recommendations. Legislation is envisaged which may entrench some of the practice processes above in law. The Attorney-General's Department second set of consultation papers (May 2024) is available to read:

Reforming Australia's anti-money laundering and counter-terrorism financing regime (May 2024)
<https://consultations.ag.gov.au/crime/reforming-aml-ctf-financing-regime/>

The Law Council of Australia's submission to the first round consultation is available to read:
<https://lawcouncil.au/resources/submissions/modernising-australia-s-anti-money-laundering-and-counter-terrorism-financing-regime>.

This Guidance Note follows on from Guidance Note No 6 and should be read together with:

Guidance Note No 8 – How Do I Undertake Client Due Diligence?
Guidance Note No 9 – How Do I Ascertain the Source of Funds?
Guidance Note No 10 – How Do I Check Whether Someone is a PEP?



References

1. Russ + Associates (2023) *Vulnerabilities Analysis: Money Laundering and Terrorism Financing – The Australian Legal Profession (Vulnerabilities Analysis Report)*, <https://lawcouncil.au/policy-agenda/regulation-of-the-profession-and-ethics/anti-money-laundering-vulnerabilities-analysis>.
2. FATF (2019) *Guidance for a Risk-Based Approach – Legal Professionals*, p 29.
3. See, for example, The Law Society of New South Wales (2023) *A Quick Guide to Supervised Legal Practice*.
4. Legal Profession Uniform Law (**Uniform Law**), s 17(c).
5. A 'lay associate' is an associate of the law practice (which includes a partner and an employee), or a consultant to the practice who provides services related to legal services to the law practice or who shares receipts, revenue or other income arising from the law practice: Uniform Law, s 6. 'Disqualified person' is also defined in the Uniform Law, s 6. The obligation to disclose is set out in s [s 122] of the Uniform Law.
6. FATF (2019) *Guidance for a Risk-Based Approach: Legal Professionals* at [143].
7. Russ + Associates (2023) *Vulnerabilities Analysis: Money Laundering and Terrorism Financing – The Australian Legal Profession*.
8. <https://www.austrac.gov.au/business/new-to-austrac/e-learning>.

This Guidance Note was produced on 28 June 2024 and is current at the time of publication.