

12 June 2026

Dr James Popple
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Dear Dr Popple

Anti Money Laundering and Counter Terrorism Financing (AML / CTF) Consultation: Draft Legal Professional Privilege Guidelines

1. I refer to correspondence from the Law Council dated 29 May 2026 seeking feedback on consultation by the Department of Home Affairs and AUSTRAC on draft Legal Professional Privilege ('LPP') Guidelines for AML / CTF.
2. We note that in July 2025 AUSTRAC consulted on a previous version of the LPP Guidelines. At that time the Law Council provided a comprehensive submission in response to the consultation. The Society provided a submission dated 22 July 2025.
3. We also note that the AML / CTF regime is due to commence on 1 July 2026 and the legal profession has struggled with lack of clarity on significant issues, with less than a month to commencement.
4. This submission has been prepared with the assistance of the Society's Civil Litigation, Alternative Dispute Resolution, International Legal Practice and Family Law Committees, along with senior staff of the Society.
5. The Society considers that the draft Guidelines are a considerable improvement on the earlier version. The Society acknowledges that a number of concerns raised previously in the Law Council's 2025 submission ('the 2025 submission') have been addressed and that the current draft Guidelines provide a stronger and more workable framework in several respects. These changes are welcome and materially improve the draft. However, the Society also notes that some significant issues remain unresolved and should be addressed before the Guidelines are finalised.

The position of third-party claimants remains unaddressed

6. The central concern of the 2025 Submission was that a single process applying equally to direct claimants and third-party claimants is unfair and unworkable for third-party claimants. This concern is particularly severe for legal practitioners who are required to assert privilege on behalf of a client or former client, but are prevented by the tipping off provisions from notifying that client or obtaining instructions. For that reason, the 2025 Submission recommended tailored guidance for third-party claimants.
7. The Society notes that recommendation has not been adopted. While the draft Guidelines define 'third party LPP' in the glossary and refer to third-party claims in the examination context, the claim, assessment and dispute resolution processes remain largely universal. The tipping off offence is also referred to only in the glossary. The draft Guidelines therefore do not address the practical difficulty of how a practitioner who has lodged a suspicious matter report is expected to

participate in direct engagement, negotiate an alternate agreed approach, or consent to arbitration, when that practitioner cannot contact the client, cannot obtain instructions, cannot make enquiries about waiver or dominant purpose, cannot concede or negotiate any degree of disclosure, cannot charge for the work, and remains duty-bound to maintain the claim in the absence of instructions.

8. As a result, the concerns identified in the 2025 Submission remain. Practitioners may be placed in the position of having to participate, at their own expense and without recourse to the client, in a dispute process they cannot meaningfully conduct or resolve. They would be doing so in defence of a privilege that is not theirs to waive, while the person best placed to give instructions about the privilege, the client, may know nothing of the dispute. The Society repeats the Law Council's view that this would produce substantial injustice and create a serious risk that privilege may be inadvertently compromised. That concern is heightened by the fact that the threshold for lodging a suspicious matter report is low, and the client may ultimately have done nothing wrong.
9. In circumstances where AUSTRAC wishes to challenge a third-party privilege claim and the practitioner is constrained by the tipping off provisions, the only workable courses remain those identified in the 2025 Submission. AUSTRAC should either engage directly with the privilege holder, or commence proceedings in a court, where the documents can be dealt with under appropriate confidentiality orders and the question of privilege determined according to law.

Arbitration and binding determinations

10. Paragraph 54 of the draft Guidelines continues to identify arbitration as 'the preferred alternative dispute resolution mechanism'. This remains of concern. The 2025 Submission objected to the preference for arbitration on the basis that no single form of ADR should be elevated above others, that arbitration can be expensive, and that the draft Guidelines did not explain how arbitrators would be funded or what qualifications they would be required to hold. Those concerns have not been addressed. Although paragraph 55 refers to accreditation from 'a relevant professional body', the current draft still does not provide sufficient clarity about the cost, funding or legal expertise required for the proposed process.
11. Paragraph 56 also goes further than the previous draft by stating that AUSTRAC will seek the claimant's agreement that the arbitrator's determination be legally binding. In the context of third-party claims, this is untenable. A practitioner asserting privilege on behalf of a client who cannot be contacted has no authority to submit that client's privilege to a binding private determination. It is also doubtful whether an arbitral determination could bind a privilege holder who is not a party to the process and has not had an opportunity to give instructions or be heard.
12. Even where the claimant is the privilege holder, arbitration should not be presented in a way that places pressure on the claimant to participate in ADR or to agree to a binding outcome. A claimant should be fully informed of the option of judicial determination, and the Guidelines should make clear that proceeding directly to court remains available. ADR may be appropriate in some cases, but it should be voluntary, informed and assessed according to the circumstances of the particular claim.

Absence of timeframes and the effect of paragraph 33

13. The 2025 Submission asked that the Guidelines specify the period within which AUSTRAC may challenge a privilege claim, as well as the timeframe within which AUSTRAC may request further information. Neither timeframe has been included in the current draft. While paragraph 23 requires AUSTRAC to specify a timeframe for the claimant to respond to a request, no equivalent obligation is imposed on AUSTRAC to assess the claim, request further information, or indicate whether the claim will be challenged.
14. Paragraph 33 compounds this difficulty. It provides that AUSTRAC's assessment of a claim, if undertaken at all, may not occur until the underlying material has been analysed, which may be some time later. It also states that a failure to assess or challenge a claim does not indicate that

the claim has been accepted. The result is that a claimant may be left with no certainty as to whether the claim has been accepted, whether further information will be requested, or whether the claim may be challenged at some later point.

15. This creates a particular practical difficulty for legal practitioners who have lodged a suspicious matter report. In many cases, the practitioner will have ceased to act and returned the file to the client or passed it to the client's new advisers. If AUSTRAC seeks to challenge the claim months or years later, the practitioner may no longer hold the relevant material, may have limited access to the surrounding context, and may be unable to obtain instructions or provide further information. The absence of a clear timeframe therefore leaves practitioners exposed for an indefinite period in circumstances where their ability to substantiate the claim may diminish over time.

Paragraph 44: the consequences of 'non-cooperation' at law firm premises

16. Paragraph 44 provides that, where a law firm 'refuses to co-operate' with officers executing a monitoring warrant, the search will proceed in any event. It also states that officers may need to undertake a broader examination of the firm's records and systems, and that the firm will then be dealt with under the procedure that applies to premises other than law firm premises. That procedure permits officers to briefly examine each record to assess its relevance and apparent privilege.
17. The Society is concerned that this approach may undermine the specific protections that the draft Guidelines otherwise provide for law firm premises. The provision does not define what amounts to a refusal to co-operate. In the absence of clear guidance, there is a risk that the legitimate and careful assertion of privilege claims, which the procedures in paragraphs 41 to 43 appear to contemplate, could be characterised as obstruction and result in the firm being moved into a less protective process (as outlined in paragraph 45). A firm that asserts claims over broad categories of files, that seeks its own legal advice before permitting officers to proceed, that disputes the scope of the warrant, or whose principal is absent (for example, at court) such that no person on site has authority to engage, is in each case acting consistently with its professional obligations, yet each could be characterised on the spot as a refusal to co-operate by the very officers executing the warrant. There is no threshold, no requirement that the characterisation be made by a senior officer, and no mechanism for review. For sole practitioners and small firms, an inability to immediately resource the process is not a refusal to co-operate, but paragraph 44 draws no such distinction.
18. This is particularly concerning in the context of a legal practice. Records held by a law firm will often include privileged and confidential material belonging to clients who are not the subject of any investigation. A broader examination of those records and systems, even if described as brief or limited, may therefore engage third-party privilege and confidentiality on a significant scale. That is a very different context from the examination of ordinary business records and requires a more cautious approach.
19. The structure of paragraph 44 also risks operating as a penalty for asserting rights. The protections that apply to law firm premises should not depend on whether the firm's conduct meets an undefined standard of cooperation. Those protections should apply at law firm premises in all cases, particularly where the firm is seeking to identify and preserve claims of legal professional privilege.

Section 242(2) and the risk of inadvertent waiver

20. Paragraph 19 describes the protection in section 242(2) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ('the Act'). Under that provision, providing a description of information or documents that may be privileged does not, of itself, amount to a waiver of privilege. That protection is important, but it is not complete. As the 2025 Submission noted, waiver may still arise from the content of the description itself, particularly where the description reveals the substance, effect or conclusion of privileged advice.

21. The draft Guidelines do not explain that limitation. On the contrary, paragraph 19 suggests that section 242(2) of the Act will assist claims to be resolved in an efficient and effective manner. Without further guidance, that framing may encourage claimants to provide more detailed descriptions than are necessary or safe. This increases the risk that a claimant, in attempting to support a privilege claim, may inadvertently disclose the substance of the privileged communication and compromise the privilege.
22. The Society recommends that the Guidelines expressly set out the limits of section 242(2) of the Act. The Guidelines should also explain that claimants should describe privileged material at a level of generality sufficient to identify the nature of the claim, without disclosing the substance of the privileged advice or communication.

Recognition of professional and ethical obligations

23. Paragraph 12 of the draft Guidelines acknowledges that legal practitioners have professional duties to maintain privilege. That acknowledgement is welcome, but it does not go far enough. The 2025 Submission sought a clearer statement, modelled on the Australian Taxation Office's LPP protocol, that AUSTRAC recognises and expects legal practitioners to comply with their ethical duties and professional obligations to maintain client privilege and confidentiality.
24. The Guidelines should also make clear that AUSTRAC does not expect practitioners to breach those obligations where a conflict arises between the Guidelines and a practitioner's professional duties. That assurance is particularly important given paragraph 17, which moves from acknowledging practitioners' confidentiality obligations to observing that confidentiality, unlike LPP, may be overridden by disclosure obligations under the Act.
25. Without a stronger statement of this kind, practitioners may be left uncertain about how AUSTRAC expects them to act where compliance with the Guidelines appears to conflict with their duties to the client. The Society therefore repeats its request that the Guidelines include a statement based on the Australian Taxation Office's LPP protocol, expressly recognising practitioners' ethical and professional obligations to maintain client privilege and confidential information.

Unrealistic timeframes and the need for practical concessions

26. Paragraph 49 requires a claimant to particularise a claim over material held in a privileged material container within 14 days of asserting the claim. That timeframe is unlikely to be workable for many claimants, particularly sole practitioners, small legal practices, regional practices and barristers. It is especially difficult where a warrant has been executed at the practitioner's premises, the volume of material is substantial or the practitioner must obtain independent advice.
27. The 2025 Submission specifically identified several categories of claimants who would require more tailored or lenient expectations in relation to the standard of claim. These included sole practitioners and small legal practices, particularly those in rural, regional and remote areas, barristers, lay people and reporting entities responding on their own behalf, and legal practitioners making claims for clients or former clients from whom instructions cannot be obtained.
28. The 2025 Submission also proposed a number of practical concessions to reduce the administrative burden on claimants. These included tailored or limited reviews, additional time to particularise claims, provisional claims in urgent matters, batch descriptions, agreed review methodologies, and the acceptance of existing documents, such as in-house LPP logs or privilege registers, in place of the prescribed LPP forms.
29. Apart from the general statement in paragraph 49 that AUSTRAC may accept information in an alternative format where necessary and practicable, these accommodations do not appear in the draft Guidelines. If those concessions are intended to be addressed in the revised forms, the forms should be released for consultation so that their adequacy can be properly assessed.

The costs of asserting and defending privilege

30. The draft Guidelines appear to proceed on the assumption that claimants will have the resources to participate in the processes they establish. For a substantial part of the profession, that assumption is not correct. Sole practitioners and small practices make up a significant part of the private legal profession, and practitioners in that category have raised serious concerns about the costs of asserting privilege under the proposed regime, particularly where the claim is made on behalf of a client or former client.
31. Those costs arise at every stage of the process. A practitioner may need to review files, assess the dominant purpose of communications, complete and particularise the LPP form, respond to requests for further information, and take steps to preserve the claim. Where the material is held in a privileged material container, paragraph 49 requires the claim to be particularised within 14 days. That timeframe is likely to be difficult for many smaller practices, particularly where the volume of material is substantial or independent advice is needed.
32. The difficulty is more acute where the practitioner is asserting privilege on behalf of a client or former client who cannot be contacted because of the tipping off provisions. In that situation, the practitioner cannot obtain instructions, cannot seek authority to incur costs, and may have no current retainer under which the work can be charged. The practical effect is that the regime may require the practitioner to undertake significant skilled and time-consuming work, without any realistic prospect of remuneration, in order to preserve a privilege that belongs to someone else.
33. The position is aggravated by the need for independent advice. Paragraph 29 introduces the possibility that completion of LPP forms may be enforced through infringement notices or civil penalty proceedings. A prudent practitioner completing a form without instructions may therefore need advice about the content of the form, the basis of the claim, and the risks of making or maintaining it. The draft Guidelines create circumstances in which independent advice may be practically necessary, but do not provide any mechanism by which the cost of that advice can be met or recovered.
34. If a claim is challenged, the costs may escalate further. Direct engagement and any alternate agreed approach under paragraphs 51 and 52 will consume professional time that cannot be billed. Arbitration, which paragraph 54 identifies as the preferred dispute resolution mechanism, can be expensive, and the draft Guidelines do not explain who is to pay the arbitrator. Court proceedings also carry significant cost implications.
35. In that context, paragraph 59 is particularly concerning. It provides that AUSTAC will, if appropriate, seek to recover its costs in any court proceedings. The draft Guidelines do not make any exception for third-party claimants. As the 2025 Submission explained, it would be neither fair nor appropriate for a practitioner to be exposed to an adverse costs order where the practitioner was obliged to assert and maintain privilege in the absence of instructions, was prevented by the tipping off provisions from making enquiries relevant to the merits of the claim, and could not charge the client for the work involved.
36. In those circumstances, Practitioners will not be advancing a claim for their own benefit. They are seeking to preserve a privilege that belongs to the client, in circumstances where they may be unable to obtain instructions, negotiate a compromise, concede disclosure, or take other steps to resolve the issue. The costs of doing so fall on the practitioner personally. For a small practice, there is also a real opportunity cost. Time spent on an unfunded privilege dispute is time taken away from fee-earning work, and in a sole practice there may be no one else available to absorb that burden.
37. The 2025 Submission asked what is to occur where a practitioner cannot afford to participate in the dispute resolution process. The draft Guidelines do not answer that question. The Society is

concerned that, in practice, privilege claims may be abandoned or inadequately defended not because of their merits, but because of the financial position of the practitioner who happens to hold the relevant documents. That would compromise the privilege of clients who may have no knowledge of the dispute, and would mean that the protection afforded to a client's privilege depends on the resources of their current or former solicitor.

38. The Guidelines should therefore address costs expressly. They should confirm that AUSTRAC will not seek costs against a legal practitioner who has asserted privilege on behalf of a client or former client in circumstances where the tipping off provisions prevented the practitioner from obtaining instructions. They should also specify how any arbitrator or independent expert appointed under paragraphs 53 to 56 is to be funded, and establish a mechanism by which reasonable compliance costs incurred by a third-party claimant, including the cost of obtaining independent legal advice where reasonably necessary, can be met or recovered.

I trust these comments are of assistance in the development of the Law Council's submission.

Please contact me if you have any queries.

Yours sincerely

A handwritten signature in black ink, appearing to read 'David Colovic', with a long, sweeping flourish extending upwards and to the right.

David Colovic
President