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Preparing your practice: managing legislative and technological change

Intro

With new legislative and technological changes on the horizon, it's more important than ever that solicitors understand and prepare for these changes. Host Julian Morrow chats with the President of the NSW Law Society, **Brett McGrath**, about navigating complex legislative and technological changes, what these shifts mean for solicitors in their daily practice and how important it is to prepare now.

Julian: Welcome to Risk on Air, I'm Julian Morrow and today we're joined by the President of the NSW Law Society, Brett McGrath. Brett's also a partner in charge of family dispute resolution at the Marsden Law Group and today Brett joins us to discuss navigating legislative and technological changes and what they mean for solicitors in everyday practice.

Brett, welcome.

Brett: Thank you, Julian.

Julian: Well, let's get straight into the legislative change. On the 11th of September 2024, the Commonwealth Government introduced the Anti-Money Laundering and Counter-terrorism Financing Amendments Bill 2024. So it's passed the House of Representatives and at the time we're recording, the bill is before the Senate, although of course we know there's a federal election due in 2025.

Brett: That's absolutely right.

Julian: But could you give us a brief overview of what is often referred to as the very ungainly acronym of AMLCTF?

Brett: Thanks, Julian. Well, this is something that the Law Society has been talking about all year, since we understood that the federal government was really pushing to ensure that what we call tranche two professions so that includes real estate agents, lawyers, jewellers as well.

Julian: Jewellers

Julian: Jewellers are involved for that. So tranche two professions. For AML, Anti-Money Laundering and CTF, Counter-Terrorism Financing. So the European finance organization, FATF, they go around the world and ensure that countries are in compliance with anti-money laundering and counter-terrorism financing obligations, because I'm sure everyone who's listening will agree, no one wants to be a part of money laundering or counter-terrorism financing. So what they do, though, is they set a rating for countries, and if they don't meet certain criteria, they will blacklist a country.

Julian: Well, it sounds like no one wants to be on the blacklist.

Brett: No, no one wants to be on the blacklist. So countries that are on the blacklist include Haiti, and that's where they've rated Australia at the moment, because we haven't met our obligations yet. So part of that is introducing tranche two professions, and what the federal government is doing is they've introduced legislation, and AUSTRAC are the body that oversees all of the anti-money laundering and counter-terrorism legislation on that front. So what they've done is introduced legislation to cover those professions, which includes solicitors and also include barristers.

Julian: So there's a significant change on the horizon. What's the current situation?

Brett: So currently solicitors, we're one of the most regulated professions in the country. We have professional and ethical obligations to not assist clients with criminal activity. We have an overarching duty to the court and the administration of justice. So we've seen that there have been prosecutions of solicitors in Queensland, in the Gold Coast for example (the Attorney General referred to that in his National Press Club address) where they are prosecuted if they are found to assist with money laundering or terrorism financing.

So there's a regime in place where if you breach the current obligations that we have, there will be penalties, and they can be criminal penalties and can include the sentence to prison. So what this does with the new regime is it introduces a whole new raft of potential obligations on solicitors. One of the elements that is concerning, in which the Law Council of Australia, backed by the Law Society of NSW, is voicing to the federal government through this Senate hearing process, is we want to make sure that we continue to meet our obligations ethically and professionally, but not breaching any duty to the client. So what the new regime the government is proposing under the current form of the bill is that there'd have to be reporting of suspicion of transactions or if we suspect that our client is involved in money laundering. Now there are a whole bunch of problems that we see arising from that.

Julian: Yeah, you've mentioned the blacklist, but that sounds like a whole other grey area.

Brett: Well, that's right, and the threshold at the moment isn't that high. So it's putting solicitors and now barristers in a position where we may be reporting on a suspicion which we are then questioning. Is that then breaching our duty and ethical duty to maintain legal privilege, which is sacrosanct to uphold the rule of law? So the mere suspicion is going to create some issues that we're raising with the federal government through the law council. To give you an example of where that has been carved out, for want of a better term, is in Canada.

Canada has had anti-money laundering and counter-terrorism financing legislation for tranche two for about 8 years or thereabouts. They had, in 2015, a Supreme Court case which was a constitutional challenge about legal privilege, but they have a bill of rights, so that's where they drew that from, and they got that carved out.

You don't have to report your client if it comes under privilege, and we've got that carved out. Now Canada has that carve out and they are not blacklisted by FATF. So, importantly, FATF recognize that there are going to be peculiarities to each region and each country when they're trying to enforce certain aspects of AML and CTF. So we're encouraging the government to really look at those thresholds to make sure that we preserve some of the foundations of legal practice, particularly legal client privilege.

Julian: So we're having this conversation at a time where, if the bill goes through in its current form, there will be some sort of conflict between those traditional duties. I know the Law Council was certainly stressing concern about the lower threshold for suspicious matter reporting. Could you give us a sense of what the concerns are or what the threshold would be for suspicious matter reporting or also compulsory examination and things like that?

Brett: Yeah, and the impost Julian will be on small firms in particular. So there'll be a whole range of compliance around. Know your client, and those lower thresholds of suspicion may mean that if you're in a firm and you suspect your client of laundering money as a suspicion, well then it raises the question for us, and this is why the Law Council is putting this to the government. Well, if you play that out, I'm suspicious of my client that they're laundering money. I then report them to AUSTRAC. Do I in effect then lose my client effectively, because a lot of us are thinking well, that means I've breached my obligations to the client. I need to inform them of what I'm doing.

Julian: Are you able to inform the client under the legislation?

Brett: Well, and that's where it's murky, and so that's why we want to make sure that there are sufficient protections for solicitors and there are clear guidelines about what those professional obligations and ethical obligations are. One thing that the Law Society and the Law Council have big concerns about is how this will affect medium to small practices in particular. The cost of compliance for those 'know your client' obligations that you have to check on who your client is, will it be for checking for a will for someone or thereabouts, and so the due diligence that you have to go through is quite onerous. We already do a lot of those conflict checks and do those checks when we're conducting our adders and knowing who your client is. We've seen examples in New Zealand where they've had the cost impost for firms can be anywhere up to, say, \$40,000 a year.

Now for a small firm in rural and regional Australia, often that can be the make or break point for whether or not they continue to operate their practice. And when you combine that with the onset of artificial intelligence and gen AI, there are lots of changes that are going on in the legal profession and affecting the legal profession. Having those onerous obligations which we say the threshold is probably too low, we think it should be a little bit higher, having those lower obligations really is going to throw some practices to the wall.

Julian: You mentioned that in Canada there was a successful constitutional challenge. I'm no expert on constitutional law, but based on the vibe you'd have to think there's less prospect of something like that being successful in Australia. So I suppose that raises the question of what, at this stage, can and should solicitors be doing to prepare for this new, more onerous but potentially not quite as onerous as we've just described, regime of AML-CTF.

Brett: So, Julian, at the time of speaking, the Senate is compiling its report and that will be handed down on the 13th of November, and on that date we will also have our first CLE of a panel of experts who will be exploring what some of the implications of AML and CTF will be for the profession. They'll be the first in a series of podcasts and panel discussions and CLEs that we were running in relation to this.

- Julian:** Definitely worth checking out the NSW Law Society website for all the latest on AML and CTF.
- Brett:** So the Law Society of NSW has taken the bull by the horns on this issue. You will hear us talking about this non-stop for the next 18 months through the whole period of rollout and implementation. So we've set up an online portal for anti-money laundering. We've also got two series of CPD and CLE podcasts and panel discussions coming out. So go to the Law Society website and look up anti-money laundering and counter-terrorism. That's offered to all practitioners to access. So we will be offering education pieces to guide the profession through the changes. Until we know solidly what the Act will comprise of, we're covering all of our bases to see where it lands. So definitely the Law Society of NSW is offering those education pieces to help the profession.
- Julian:** And that's through the Law Society website and if you want to get, I suppose, a more detailed sense of what the Law Society's concerns and the Law Council's concerns are, there is a detailed submission that was put to the Senate Inquiry. Sounds like there are potentially very, very significant changes afoot, and one of the concerns I know is that the compliance model seems to be geared more towards larger firms. Would that be a fair observation?
- Brett:** Yeah, I mean, and larger firms are already doing a lot of the know your clients work already, so we're apprehensive that the smaller to medium firms are really going to be the ones that will have to have the greatest adjustment to any new regime that's in place. There will be a lag period between legislation and then enforcement of compliance, so really it'll be July 2026 is when enforcement is going to start being implemented from here. Throughout that process, though, the Law Society is going to continue to liaise with government, with AUSTRAC, and open those channels of communication to give feedback from the profession. So during that period we'll be asking for feedback from solicitors and from firms about their experience with the new legislation so we can feed that back through and seek any amendments if they need to.
- Julian:** And AUSTRAC, I think in July of 2024, found that, in the absence of regulation by AUSTRAC, the legal profession presents a "significant risk of money laundering". So, one way or the other, it sounds like there's going to be change afoot. So definitely something for all solicitors to be aware of and with, I imagine, a particular focus on when in time those new changes will come in.
- Brett:** That's absolutely correct. As President of the Law Society of NSW, I'll always defend the role that solicitors and legal professionals play in the system.
- We have as I said, stringent ethical and professional obligations already. We have duties of honesty, of integrity and that overarching duty to the court and the administration of justice. I think it's unfair of AUSTRAC to characterise lawyers as being a huge risk. I think when we look at 43,000 practicing certificate holders in NSW, in the last 12 months about 17 practitioners were referred to NCAT, the tribunal for misconduct. So 17 out of 43,000. And co-regulating profession that we are in NSW, we are often tougher on our own because we realise that the protection of the public interest is absolutely paramount and that solicitors need to be upholding those duties as a cornerstone of the administration of justice.
- Julian:** Well, as if that wasn't enough to worry about, Brett, we've also got the broader challenge of AI and its use in legal practice. What would you say solicitors need to understand about AI at this stage? And I imagine here we are thinking particularly about the smaller firms, where often the technological trickle down can be a little bit slower, but we know it's coming.

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Brett: Absolutely and that came hurtling towards the world, was it March last year, Julian or thereabouts, when ChatGPT went live globally and we recognised pretty early on at the Law Society that this was going to be something akin to the industrial revolution. We had several speakers come to a couple of our annual conference seminars and talking about AI and the impact and they were saying, look, it may not be that there's going to be a dramatic impact immediately, but in the long term it'll be huge. We'll look back in 10 years and think, wow, this is the inflection point when everything changed. And you're right, big firms are already using gen AI products, they've developed some of them themselves. It'll be the small to medium firms that we're conscious will perhaps be slower to adopt generative AI. And so we at the Law Society came up with a task force; that was one of my priorities this year as President, is to make sure the legal profession not only was responding and able to adapt to gen AI coming out, but hopefully influence how the justice system responds and utilises AI. So on that point, we've created the task force. We're already partnering with LexisNexis for an AI glossary so people understand the terms. I mean, as a lawyer, always go to the definitions, right?

Julian: That's where you start yeah.

Brett: We've got the AI glossary. We've also got an AI hub on the Law Society website. We're also working with the courts around what guidance they will come up with to assist the profession when using AI in the courts. We've seen those cases like Meta and Avianca in New York where ChatGPT was used, created those fake cases, hallucinated them. So we're also reminding practitioners of their ethical and professional obligations, that, whether it was from a pen to fax, to email to the Google, our professional ethical obligations haven't really changed all that much and AI falls within the boundaries of those obligations already, so it's not novel, they don't sit outside of it. So if again we come back to base, think about those obligations that we've got and look at AI through that lens.

Julian: What particular risks do you think AI poses for solicitors right now, in the late 2024?

Brett: The main risks that we have is around confidentiality, so the platform that practitioners use for AI should never be an open AI platform, for example, and if they are going to use a platform with a provider, they need to really test the transparency and confidentiality aspects of those systems and to make sure that what they call the ecosystem is trapped, and that your client's information and your IP is not then used in other realms or is exposed to the public more broadly. We're also conscious of the risks that self-represented litigants may not observe – they don't have those obligations necessarily that we do and may inadvertently or deliberately put confidential information out onto open AI sources.

So the courts are alive to that and are looking at ways to make sure that that's addressed for unrepresented litigants and we're assisting with that as well.

Julian: It's interesting as well to consider that there's certainly been some discussion about the extent to which lawyers have an obligation to engage with and stay up to date with technology. Are there risks of not engaging with AI?

Brett: Well, I mean, Julian, one of the maxims going around at the moment is that AI won't replace you, but a lawyer using AI will replace you. It's also similar to when Facebook came out and a lot of practitioners would say, look, I don't need to know or think about social media. The trouble is, the world around them was using social media and that did turn up in issues around evidence. I mean particularly take family law, for example, I mean everyone uses Facebook and they put photos up and it's all the, you know, capture all the chats on messenger.

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Similarly, practitioners can't put their heads in the sand around AI, because their clients will be using it as well and their clients might use AI, for example, and think, okay, I've got a letter of advice that took three hours and you charged for that. The client might come in and go, I put the similar question or set of questions into AI, I've got about 80% of your answer in a split second. These are going to be some of the questions that practitioners are going to have to face, because society is moving rapidly ahead with this. So I think there is a massive risk in not getting your head around AI as a practitioner, and that's why we've really gone ahead with the task force to make sure that we have resources available, like that AI glossary, like assisting with the court guidance that's going to come out shortly, to make sure practitioners understand the risks. And look, there's some positives as well for AI, Julian, too.

Julian: Obviously we wouldn't go into specifics, but are we starting to see AI issues arise at the level of professional negligence claims and misconduct for Australian solicitors?

Brett: Well, there was a recent case in the Federal Circuit and Family Court in Melbourne the name escapes me at the moment where it was very similar to the New York case of Avianca, where a practitioner did use AI for their case submissions and they were hallucinated. Now that practitioner ended up, when it was discovered, sort of threw themselves at the altar of the court and said I will pay the other side's costs, admitted to the conduct, took all steps to try and rectify the conduct, and it was still referred to the Victorian Legal Services Board for that conduct there. So there are going to be some implications if you misuse AI, because ultimately we sign off on any submission or any document to the court as being our own work. So you have to check it. But the big risk I think is going to be around supervision of junior practitioners. I don't want to dump on junior practitioners, but they're digital natives. They are already using Gen AI.

Julian: And there'll be different cultural generational norms.

Brett: Absolutely. That's exactly right, and so principals really need to be around this and asking the question did you use Gen AI? And if they have, don't dispute it. Go, okay, what were your prompts? Did you verify and check the cases that came out? There's another layer of supervision here that principals need to be aware of, because ultimately, they'll be held liable if something gets put before the court and it's one of their juniors who are doing it.

Julian: And I suppose at that point we should clarify that, even though it is possible now to create a very, very authentic voice clone of presidents of the Law Society and the like, it is actually two human beings speaking discussing these technological issues.

Brett: That's precisely right. And look, I mean that raises a really good point about deep fakes, Julian, and there was a case in Hong Kong where there was a Teams call and a senior associate had who he thought were partners in London and another senior associate, to authorise a transfer of about 14 million pounds (all three other people were deep fakes, so not only the video but the voices, and he didn't pick it up) and authorise the transfer and so that money is gone. So when it comes to fraudulent claims or dealing with the real world implications of transferring money, I mean, at the moment everyone does their due diligence of, you tell your clients I won't ever ask for your bank details or tell you unless I call you. Well, I think we need to add some other layers of protection here as well. I mean thinking about safe words, for example, just so that people are aware that fraud is going to exist. You've got those fraud claims that are happening, this is the mom and dad fraud ones where they're calling up and saying transfer me 10,000 bucks.

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So that's something practitioners need to be alive to – the cyber crime element that AI and deepfakes present.

Julian: Well, on that slightly terrifying note, Brett McGrath, thanks very much for joining us on Risk on Air.

Brett: Thanks for having me, Julian.

Outro

Thanks for listening to Risk on Air by Lawcover. Join us for the next episode on current risks in legal practice to stay up to date.

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