

**TRUST MONEY**  
**UNDER**  
**LEGAL PROFESSION ACT 2004**

**FREQUENTLY ASKED QUESTIONS**

**TRUST ACCOUNTS DEPARTMENT**  
**MARCH 2008**

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## 0. INTRODUCTION / DEFINITIONS

The definitions below will be useful for understanding various terms used throughout the Frequently Asked Questions.

**“Act”** – denotes the Legal Profession Act 2004. All section references refer to this Act unless stated otherwise.

**“ADI”** – approved deposit-taking institution (Banking Act 1959 (Cth)).

**“associate”** – the term is defined in Section 7 of the Legal Profession Act 2004 as:

- (a) an Australian legal practitioner who is:
  - (i) a sole practitioner (in the case of a law practice constituted by the practitioner), or
  - (ii) a partner in the law practice (in the case of a law firm), or
  - (iii) a legal practitioner director in the law practice (in the case of an incorporated legal practice), or
  - (iv) a legal practitioner partner in the law practice (in the case of a multi-disciplinary partnership), or
  - (v) an Australian legal practitioner whose services are made use of by the law practice to provide legal services (in the case of a complying community legal centre), or
  - (vi) an employee of, or consultant to, the law practice, or
- (b) an agent of the law practice who is not an Australian legal practitioner, or
- (c) an employee of, or person paid in connection with, the law practice who is not an Australian legal practitioner, or
- (d) an Australian-registered foreign lawyer who is a partner in the law practice, or
- (d1) a person (not being an Australian legal practitioner) who is a partner in a multi-disciplinary partnership, or
- (e) an Australian-registered foreign lawyer who has a relationship with the law practice, being a relationship that is of a class prescribed by the Regulations, or
- (f) a person (not being an Australian legal practitioner) who is a partner in a business that includes the law practice, or
- (g) a person (not being an Australian legal practitioner) who shares the receipts, revenue or other income arising from the law practice.

**“Approved ADI”** is defined in Section 243(1) of the Act as an ADI (authorised deposit taking institution) approved under Section 280 (Approval of ADIs) by the Law Society Council. A general trust account must be opened with an approved ADI in NSW. A listing can be obtained from the Law Society website. For the purposes of the FAQ, the term “approved ADI” is abbreviated as “AADI”.

**“Australian legal practitioner”** is defined in Section 6 of the Act as an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate.

**“client”** – throughout the trust accounts sections of the Legal Profession Act 2004 and Legal Profession Regulation 2005, the term “person on whose behalf the money is held” is used. This is because law practices regularly hold money on behalf of the client and another party or solely for another party. For example, in a conveyancing transaction, the vendor law practice receives a deposit from the purchaser. The money should be held on behalf of both parties and therefore the aforementioned term is used in the legislation. For the purposes of the Frequently Asked Questions, the term “client” will be used in lieu of “person on whose behalf the money is held”.

**“general trust account”** means an account maintained by a law practice with an approved ADI for the holding of trust money received by the practice, other than controlled money or transit money.

**“law practice”** is defined in Section 4 of the Legal Profession Act 2004 as:

- (a) an Australian legal practitioner who is a sole practitioner, or
- (b) a law firm, or
- (c) a multi-disciplinary partnership, or
- (d) an incorporated legal practice, or
- (e) a complying community legal centre.

The principal obligation to account for trust money in the Legal Profession Act 2004 rests with the law practice, which is operated by a principal (legal practitioner).

**“legal practitioner associate”** of a law practice is defined in Section 7 of the Legal Profession Act 2004 as an associate of the practice who is an Australian legal practitioner.

**“principal”** is defined in Section 7 of the Legal Profession Act 2004 as:

- (a) a sole practitioner (in the case of a law practice constituted by the practitioner), or
- (b) a partner in the law practice (in the case of a law firm), or
- (c) a legal practitioner director in the law practice (in the case of an incorporated legal practice), or
- (d) a legal practitioner partner in the law practice (in the case of a multi-disciplinary partnership), or
- (e) the person who is generally responsible for the provision of legal services by the law practice (in the case of a complying community legal centre).

**“Regulations”** – denotes the Legal Profession Regulation 2005. All clause references refer to the Regulations unless stated otherwise.

**“solicitor”** – the term is defined in Section 4 of the Legal Profession Act 2004 as:

- (a) a local legal practitioner who holds a current local practising certificate to practise as a solicitor and barrister, or
- (b) an interstate legal practitioner who holds a current interstate practising certificate that does not restrict the practitioner to engage in legal practice only as or in the manner of a barrister.

The terms “local legal practitioner” and “interstate legal practitioner” are defined in Section 6 of the Legal Profession Act 2004. For the purposes of the Frequently Asked Questions, the term “legal practitioner” is used to include “solicitor”.

# 1. GENERAL TRUST MONEY

**Question 1.1:** A legal practitioner (P Philpott) is the secretary of the local tennis club which is having a bordering/fence dispute with a neighbour at the end of court 1. The tennis club has decided to instruct Jones & Co (not the practitioner's law practice) to act in the matter. The club levies its members at \$50 per member and develops a "fighting fund" - all levies to be paid to the secretary (P Philpott) c/- Philpott and Associates.

As it happens all members pay the levy on time and the legal practitioner receives the levies at the office. The \$3,000 representing the "full fighting fund" is received on the one day and tennis club receipts are issued.

**What are the law practice's obligations to account for the money under the Act?**

**Response:** There are no obligations for the legal practitioner or the law practice to account within the Act as the money is clearly not entrusted to Philpott and Associates in the course of or in connection with the provision of legal services by the practice. Mr Philpott is acting in his personal capacity and not as a legal practitioner in this matter.

**Question 1.2:** There are three elements of Section 243 which dictates whether money received by a law practice is money to which Section 243 relates. What are these elements?

**Response:** The three elements that must be present are:

- \* money
- \* entrusted to a law practice
- \* in the course of or in connection with the provision of legal services by the practice

If the "money" has all the above elements, then it is "trust money" to which Section 243(1) applies. The term "entrusted" is not defined in the Act. However, the use of the word "entrusted" in the definition reinforces the general belief that trust money is not merely given or delivered to a law practice; it is placed in its "care and protection" to be held for or on behalf of another person.

**Question 1.3: What is “legal services”? Is that defined anywhere in the legislation?**

**Response:** Yes. The term is defined in section 4 of the Act to mean work done, or business transacted, in the ordinary course of legal practice. The last part of the definition, “in the ordinary course of legal practice”, is intended to invoke the common law meaning on what defines the practice of a legal practitioner. It requires consideration of the nature of the service provided, who it is provided by and in what circumstances.

The definition does not render a service a legal service simply because it is provided by a legal practitioner or by a law practice. The service must also be provided in “the ordinary course of legal practice”. The notion of engaging in legal practice was recently considered in the Victorian Supreme Court case, *Orrong Strategies Pty Ltd v Village Roadshow Ltd* [2007] VSC 1.

In other words, if the law practice is not providing a legal service, the money received should not be deposited into the general trust account.

**Question 1.4: Money entrusted pursuant to Section 243 of the Legal Profession Act is often referred to as trust money,**  
**(a) What are the types of trust money?**  
**(b) What are the five types of money that can be received as outlined by Section 243?**

**Response:** 1.4(a) There are five types of trust money, they are as follows:

1. Controlled money
2. Transit money
3. Money subject of a power (hereafter known as “power money”)
4. Written direction money
5. General trust money (other trust money not captured by the above four types of trust money)

A further subset of trust money is referred to as the “Investment of Trust Money”.

1.4(b) A brief description of the types of trust money follows:

1. **Controlled money** – money received or held by the law practice in respect of which the practice has a written direction to deposit the money in an account (other than a

general trust account) over which the practice has or will have exclusive control.

2. **Transit money** – money received (other than cash) by a law practice subject to instructions to pay or deliver it to a third party, other than an associate of the practice.
3. **Power money** – money received (other than cash) by a law practice subject of a power, exercisable by the practice or an associate of the practice, to deal with the money for or on behalf of another person. The power to the practice or associate may be exercisable by:
  - (a) the practice alone, or
  - (b) an associate of the practice alone (otherwise than in a private and personal capacity), or
  - (c) the practice or an associate of the practice jointly or severally, or jointly and severally, with either or both of the following:
    - (i) one or more associates of the practice,
    - (ii) the person, or one or more nominees of the person, for whom or on whose behalf the money may or is to be dealt with under the power.
4. **Written direction money** – money received (other than cash) by a law practice in respect of which the practice has a written direction by an appropriate person to deal with it otherwise than by depositing it in the account.
5. **General trust money** – any trust money received by the law practice that does not satisfy the above definitions

The requirements for the **investment of trust money** are as follows:

- the money must first be entrusted to or held by the law practice (in the above five types of trust money) in the ordinary course of legal practice, and primarily in connection with the provision of legal services to or at the direction of the client, and
- the investment is or is to be made in the ordinary course of legal practice and for the ancillary purpose of maintaining or enhancing the value of the money or property pending completion of the matter or further stages of the matter or pending payment or delivery of the money or property to or at the direction of the client,
- a written direction is obtained from the client directing the investment to be made.

The finer detail of the above types of trust money will be discussed in the later sections.

It must be noted that if transit money, power money, written direction money or general trust money is received in the form of

cash, the money must be deposited into the general trust account. This applies despite the client's direction to the contrary.

Controlled money received in the form of cash must be deposited in the existing controlled money account.

**Question 1.5(a): Philpott and Associates is representing Mr Thew in a family law dispute and it is agreed between both parties that the proceeds of the sale of the family home (\$100,000) shall be held in Philpott and Associates' general trust account pending satisfactory resolution of the agreement in relation to splitting of the sale proceeds. In what name should the trust ledger account be opened?**

**Response:** In terms of Clause 70 of the Regulations the ledger should be opened in the name of the person on whose behalf the money is held. In this case Philpott and Associates is holding the money on behalf of the husband and the wife, therefore the ledger should be opened in the name of both parties.

**Question 1.5(b): Prior to the resolution of the dispute relating to the sale proceeds, Mr Thew requests that Philpott and Associates release \$33,300 which represents approximately one-third of the proceeds which he will certainly be entitled to receive once the dispute is settled. He requires the money so that he can purchase a home unit. Can Philpott and Associates agree to this direction by the client?**

**Response:** No, Section 255(1)(b) requires that the money held in the general trust account must be disbursed only in accordance with a direction given by the person (on whose behalf the money is held). In the present situation, the money is held on behalf of Mr and Mrs Thew and therefore directions from both parties are required prior to any disbursement of trust money.

Alternatively, Section 255(2) provides that the trust money may be disbursed subject to an order of a court. In other words, if there is a court order authorising such disbursement, the \$33,300 can be paid to Mr Thew's nominated account.

**Question 1.5(c) A law practice does not operate a general trust account and is acting in a conveyance matter for a client selling a property without a real estate agent involved. The practitioner requests information as to how to deal with the contract deposit and asks can a legal practitioner friend, who operates a separate practice with a general trust account, hold the deposit in that account.**

**Response:** No, the deposit must not be held by another law practice unless there is an agreement appointing the third party law practice as the stakeholder. In this situation the third party law practice would be required to open a file and retain the various instructions received as stakeholder in the matter. The agreement must be documented otherwise the third party law practice is not instructed in the matter and as such cannot receive proper instructions, particularly if a dispute arises.

The deposit can be held in the general trust account of the legal practitioner acting for the purchaser if the contract permits.

The law practice may hold the deposit in a controlled money account if the contract permits. In that case the practice must obtain a written direction from the parties, which may be achieved by an insertion of a special condition in the contract. The special condition should specify that the deposit is to be released to the vendor on exchange and make provisions for the share of interest received from the deposit. It should also nominate the ADI where the deposit is to be placed.

In addition, the law practice would be required to provide an annual External Examiner's Report in relation to any controlled money held by the law practice.

Alternatively, a deposit bond can be used if the contract permits.

The holding of the deposit as transit money is not considered prudent. The deposit is usually a personal cheque and a personal cheque would not be acceptable at settlement. Transit money held by bank cheque could still present a risk as the purchaser could request a stop payment during the contract period.

**Question 1.6:** **Section 255(1)(b) of the Act states and in any case, (the money) "must be disbursed only in accordance with a direction given by the person" (on whose behalf it is held).**

**Question (a): Does the direction referred above need to be in writing?**

**Question (b): What records are considered appropriate for the law practice to retain to ensure that the appropriate trust records are maintained for disbursements from the general trust account?**

**Response:** (a) The direction by the person on whose behalf the money is held does not have to be in writing, however it is considered prudent practice that the law practice develop such office procedures to ensure that written directions

are obtained and retained in the matter file for and on behalf of the person on whose behalf the money is held.

There are situations whereby the law practice must insist on a written direction such as the direction by a beneficiary of an estate not to draw the cheque to the beneficiary but to draw the cheque to a car yard for the purchase of a motor vehicle in the name of the beneficiary. In this situation the law practice would retain the written direction and the invoice evidencing the purchase of the motor vehicle in the name of the beneficiary.

- (b)
  - (i) Written directions from the person on whose behalf the money is held or a file note to confirm the directions to pay.
  - (ii) Invoice/source record (which may include a copy of the cheque) to support the payment from the general trust account.

**Question 1.7:** **On completion of the month end trial balance and reconciliation statement, it becomes apparent that due to the dishonour of a personal cheque received into the general trust account relating to the matter Thew, purchase from Smith, there is a debit balance of \$1,000.00 recorded. What should be done to rectify this problem?**

**Response:**

- (1) The debit balance should be immediately rectified by the law practice by depositing the \$1,000 from the law practice's general account to the general trust account if funds cannot be immediately reimbursed by the client.
- (2) Advise the Manager of the Trust Accounts Department, Law Society in writing of the situation and steps taken to rectify the error. (See Section 262 of the Act)
- (3) Commence the appropriate recovery action from the client if reimbursement has not been received.

**Question 1.8:** **Do the following situations represent the receipt of trust money?**

- (i) **Money paid in accordance with a bill of costs and disbursements rendered by the law practice to a client which represents work done and disbursements which have been incurred and paid.**

**Response:** No. Section 246(4) states that it is not trust money.

**(ii) Money paid on account of barristers' fees yet to be incurred.**

**Response:** Yes, as the money is received in anticipation of the disbursement.

**(iii) Money received by a law practice, reimbursing barristers' fees incurred by the practice which were paid from the general account.**

**Response:** No, as it is a reimbursement. It may be prudent for the law practice to ensure that the payment to the barrister has been presented to the AADI statement.

**(iv) Money paid on account of costs and stamp duty not yet paid by the law practice.**

**Response:** Yes, as the money is received in anticipation of the disbursement. The money must be deposited into the general trust account or controlled money account belonging to person on whose behalf the law practice is holding the money.

**(v) Money paid to the law practice by the principal's father, who is not a client of the law practice, for the purpose of discharging the father's debts which fall due while the father is overseas on three months' holiday.**

**Response:** No, as there is no underlying legal matter. The law practice must ensure that the money is not deposited into the general trust account as a practice is not permitted to mix trust money with other money.

**(vi) Money received by a law practice being rent on a flat jointly owned by the principal and his wife.**

**Response:** Yes, provided there is an underlying legal matter and the money is accounted in accordance with Clause 73(2)(b) of the Regulations.

**(vii) Money received by the law practice in the principal's office for and on behalf of the local football club for which the practitioner is the treasurer.**

**Response:** No, if the practitioner is not also acting for the club in a legal matter.

- (viii) **Money received from a client reimbursing the law practice for stamp duty which was paid by the practice directly from the practice's general account.**

**Response:** No.

**Question 1.9(a):** **When is a law practice permitted to withdraw money from a general trust or controlled money account for legal costs?**

**Response:** Provided the law practice has disclosed costs in accordance with Part 3.2 (Costs disclosure and assessment) of the Act, Clause 88 of the Regulations details the prescribed procedures for withdrawing costs and disbursements from a general trust or controlled money account. There are two methods where the practice may withdraw costs, they are as follows:

Method 1

Clause 88(3) provides that the law practice may withdraw the trust money **if**:

- (i) the money is withdrawn in accordance with a **costs agreement** that complies with the legislation under which it is made and that authorises the withdrawal, **or**
- (ii) the money is withdrawn in accordance with instructions that have been received by the practice and that authorise the withdrawal, **or**
- (iii) the money is owed to the practice by way of reimbursement of money already paid by the practice on behalf of the person, **and**

**if**, before effecting the withdrawal, the practice gives or sends to the person a **request for payment** (e.g. a bill), referring to the proposed withdrawal. It must be noted that Clause 88(5) requires the instructions in (ii) above if given in writing must be retained for 7 years or if not given in writing, must be confirmed in writing within 5 working days after the law practice effects the withdrawal and that it must be retained for 7 years.

Method 2

The law practice may withdraw the trust money:

- (i) if the practice has given the person a bill relating to the money, and the person has not objected to withdrawal of the money within 7 days after being given the bill, **or**
- (ii) the person has objected within 7 days after being given the bill but has not applied for a review of the legal costs under the Act within 60 days after being given the bill, **or**

(iii) the money otherwise becomes legally payable.

The practice must ensure that the information required in Section 333 of the Act and Clause 111A of the Regulations is included in the bill.

**Question 1.9(b) Does the authorisation have to be in writing?**

**Response:** No, the authorisation does not have to be in writing. However, as stated above, any oral authorisation by the client (or the person on whose behalf the money is held) must be confirmed in writing within 5 working days. It is the Trust Accounts Department's view that "confirmed in writing" requires the law practice to initiate correspondence to the client confirming the instructions.

**Question 1.9(c) What happens if the law practice has not disclosed costs pursuant to Section 309 of the Act?**

**Response:** Section 317(1) of the Act states that the client is not required to pay the costs until it has been assessed by a cost assessor.

The law practice may not commence proceedings against the client until the costs have been assessed.

In the event where the law practice fails to disclose costs, gives the client a bill and the client objects to the withdrawal of trust money to pay the bill (within 7 days after being given the bill), the law practice must initiate application for costs assessment and have the costs assessed before funds may be withdrawn from the general trust account or controlled money account.

Further information may be obtained from Section 317 of the Act.

**Question 1.9(d) A practitioner asks whether it is possible to leave the practice's costs and disbursements in the general trust/controlled money account of the client (the person on whose behalf the money is held) until it suits the practitioner to transfer these fees.**

**Response:** Funds held in the general trust or controlled money account should only relate to current matters and are held on behalf of the client. Upon completion of the matter, the issue of the bill and the authorisation by the client, the fees must be paid from the general trust account to satisfy the debts of the person.

Clause 73 of the Regulations deals with funds of the law practice being held in the practice's general trust account. It permits a legal practitioner to have a ledger account under the law

practice's name for the purposes of aggregating in the account, by transfer from other accounts in the trust ledger accounts, money properly due to the practice for legal costs (in other words, a costs ledger for the practice). The Regulations stipulate that money must be cleared from the general trust account within one month after the date of the transfer to that ledger account.

In addition, the Regulations permit a ledger in the name of a legal practitioner associate of the practice (e.g. the name of the legal practitioner) for the receipting and holding of money in which the associate has a personal and beneficial interest as a vendor, purchaser, lessor or lessee or in another similar capacity. The money must be cleared from that ledger account at the conclusion of the matter.

The retention of authorised agreed costs in the name of the client in the general trust account may be construed as a failure to record the true position in regard to the ledger, that is the balance is not held for the person in whose name the ledger is maintained but the legal practitioner (Section 264(2)(b)) and/or an attempt to tailor the law practice's income.

It should also be noted that if a balance is retained in the ledger a trust account statement is required to be provided to the client at June each year in accordance with Clause 82(6)(c).

**Question 1.10:** **The following statement has been advanced by some legal practitioners when asked about the failure to issue a bill to the client, I have obtained a blanket authority at the commencement of the matter which entitles me to transfer money on account of work completed without rendering a bill of costs. I have the client's authorisation. Is this considered a sufficient authorisation to transfer money pursuant to Clause 88 of the Regulations?**

**Response:** Clause 88 of the Regulations provides that a bill of costs or a request for payment (see Question 1.9(a)) be issued and the client authorises the transfer. The blanket authorisation is not considered sufficient as it does not refer to a finite sum which is to be transferred. It is considered that the authorisation needs to be an informed authorisation, and it is difficult to understand how an authority to transfer money for costs and disbursements can be informed if the amount of costs has not been disclosed to the client giving the authority. Therefore a bill must be issued and specific authorisation in relation to that bill is required.

**Question 1.11:** A practitioner requests the client litigant to deliver the client's personal cheque, made payable to barrister X for Counsel's fees. The fees are due to be paid on Friday, 9 June. The client was late in sending the cheque (it arrives on the Friday morning) and, it is noted that the payee on the cheque is the law practice's trust account. The client is contactable whilst visiting Queensland relatives but cannot either (1) amend the cheque, or (2) issue a replacement cheque.

**The barrister must be paid that day, and the law practice is already on the limit of the overdraft facility.**

**(a) Where does the practice deposit the cheque?**

**(b) Can the law practice pay the barrister that day?**

**Response:** The most appropriate solution is to contact the client and obtain a written direction to endorse the cheque to the barrister (Section 254(1)(a)), the written direction may be obtained by facsimile. The direction must be kept as part of the law practice's trust records. It is also preferable for the practice to keep a copy of the endorsed cheque with the direction.

If the client does not authorise the endorsement, or if it is considered that the ADI may not accept the endorsement, then the cheque would have to be deposited into the general trust account and wait until the cheque has been cleared before the barrister is paid. Special clearances may be available to expedite the clearance of the cheque.

**Question 1.12:** Client A has \$100,000 in the law practice's general trust account being proceeds of a sale of property pending a review of investment alternatives. While Client A is away for a week's holiday at a secret retreat, Client B seeks bridging finance of \$80,000 for three days. Security of a caveat over an unencumbered real property is offered. The law practice is aware that Client A is keen to maximise the return on his capital. The interest rate offered is 25% p.a. If Client B does not obtain the bridging finance, the settlement will not be completed and the deposit will be forfeited. Client B seeks the practice's assistance for bridging finance.

**Can the law practice help Client B out of the predicament with the use of Client A's investment funds in the general trust account?**

**Response:** No. Without A's instructions, no funds may be paid out of the general trust account (Section 255(1)). Alternative finance

arrangements are the only possible solution. Also Section 479(1) of the Act states that a solicitor must not, in the solicitor's capacity as solicitor for a lender or contributor, negotiate the making of or act in respect of a regulated mortgage, unless:

- (a) the mortgage is a state regulated mortgage, or
- (b) the mortgage is a run-out mortgage, or
- (c) the mortgage forms part of a managed investment scheme that is operated by a responsible entity.

The legal practitioner may also be in breach of the Corporations Act for giving financial advice without the appropriate license.

**Question 1.13(a): Mr Thew, a client, attends the office and advises that he is departing overseas for 12 months holiday and requests that the legal practitioner agrees to be a signatory on his personal bank account and pay expenses as and when required. A formal power of attorney is not prepared. The practitioner is simply authorised to operate on the account by registration of the signature with the bank. If the practitioner agrees to be and becomes the sole signatory to this account, is it considered to be trust money within the meaning of Section 243 of the Act?**

**Response:** The practitioner has received an authority to operate over an existing account and as a result has direct control over the account. The transaction falls within the definition of trust money and is considered to be power money. The law practice is required to keep a record of all dealings with the money in that account in accordance with Clause 85 of the Regulations.

**Question 1.13(b): Given the above fact scenario, is the law practice required to record an entry in the register of powers and estates?**

**Response:** As the practitioner is a sole signatory of the account, the law practice is required to record an entry in the register of powers and estates (Clause 86).

In this case, the date of the power would be the date of the practitioner being made as a signatory of the account.

An entry is not required if the practitioner is required to operate the account jointly with an external party.

**Question 1.14: Is a law practice required to open a general trust account?**

**Response:** No. A law practice is only required to open a general trust account if the law practice receives money which is required to be deposited to a general trust account at an AADI. A list of AADIs is available on the Law Society website.

**Question 1.15: How can a law practice operate without a general trust account?**

**Response:** A law practice that does not operate a general trust account normally arranges its affairs so that it does not receive money that is required to be banked to a general trust account at an AADI. They normally do this by the use of transit money (section 243), which is a cheque made payable to a third party. The law practice receives the cheque, holds it for the prescribed period and then passes it to the named third party as soon as practicable or at the expiration of the specified period instructed by the person. The law practice is required to retain a photocopy of the cheque and brief particulars sufficient to identify the transaction in the matter file to record the transaction.

**Question 1.16: Legal Practitioner - Sole Executor of Will**

**Are monies realised in an estate of which a legal practitioner is the Sole Executor trust money and if so, what type of trust money is it? And what records is the law practice required to keep in order to comply with the relevant Regulations?**

**Response:** Section 243 of the Act imposes on a law practice the prescribed duties of accountability for money received on behalf of another person where that money is received "in the course of or in connection with the provision of legal services by the practice".

If a legal practitioner is the executor of the will of a deceased person and acts in his or her capacity as a legal practitioner for the purposes of administering the estate, Sections 243 and 254 will apply to money received by the law practice, in the course of or in connection with the provision of legal services by the practice.

It may be argued that if a legal practitioner/executor receives money on behalf of an estate, in the capacity as the legal personal representative of the deceased, the legal practitioner receives the money on the practitioner's own behalf. If, however, the legal practitioner is acting as legal practitioner for the estate

as well as acting as the executor of the estate it could not be said that the legal practitioner receives the money, in the capacity as legal practitioner, as the agent for him/herself in his capacity as executor. It is a contradiction in terms to say that a person can act as his own agent. A person cannot be a trustee for himself although he can act as a trustee for himself and another party.

The legal practitioner/executor who receives money on behalf of an estate does not receive it beneficially or as the practitioner's own agent but rather receives the money for the purpose of administering the terms of the will of which the legal practitioner has notice. It would follow that the persons on whose behalf the legal practitioner receives the money would be those persons entitled under the trust of the deceased's will. If that is the case, Section 258 will require the law practice to account for the money as money subject of a power in accordance with the provisions of that Section. If the money is received into a separate estate account controlled by the legal practitioner/executor it would constitute power money, in terms of record keeping, the law practice would be obliged to comply with the Clauses 85 and 86 of the Regulations.

If the money is received into the law practice's general trust account, it will be trust money and the law practice will be accountable for it in accordance with the Clauses 60 to 74 of the Regulations.

In the alternative, it may also be treated as controlled money if the legal practitioner, on behalf of the estate, gives the law practice a written direction to invest the money in an interest-bearing account pending distribution of the estate. The practice would then be required to comply with Clauses 75 to 80 of the Regulations for controlled money.

**Question 1.17: Legal Practitioner Trustee**

**I have some difficulty with the trust money requirements of the Act and Regulations. I am presently the joint trustee of a reasonably large estate which is required to remain intact until at least 2010. I am also acting as Attorney for two people who are presently living overseas as the result of a work posting. I am employed full time as an Instructor at a University but in order to provide services to longstanding clients I am also employed as a part time consultant of a small legal practice. My present Practising Certificate entitles me to practice only as an employee and I have no desire to change this for the moment. While the original**

**contact with the testatrix of whose estate I am trustee and with the persons for whom I am attorney were made while I was employed by my former employer in both cases it was clearly stated that the request for me to act in the relevant capacities was a personal one.**

**In the case of the estate all financial transactions are recorded by a firm of accountants who have initial dealings with receipts which are deposited by them to estate accounts with banks. Of course all cheques and transactions are authorised and executed by the two trustees. All tax returns and annual accounts are prepared by the accountants.**

**In the case of the attorney role this involves mainly attending to payment of outgoings relating to real property out of the peoples cheque accounts. Many of the payments are by direct debit.**

**The question seems to be whether I am receiving the money in the course of practicing as a legal practitioner. I am definitely not receiving them in the course of my employment at the University or by the law practice and it would be contrary to my instructions and the wishes of the other trustee and the beneficiaries for the practice to become involved. I am not presently carrying out any legal work for either in the usual sense.**

**Are the accounts considered to be controlled money accounts?**

**Response:**

You have already identified what appears to be the critical question in relation to your enquiry, that is, whether the money controlled by you in estate accounts of which you are a joint trustee and in accounts of persons overseas, for whom you hold power of attorney, should be considered as having been received by a law practice "in the course of or in connection with the provision of legal services by the practice".

You appear to indicate that you are not carrying out any legal work in respect of the affairs of the persons to whom the accounts relate and that you accepted your appointment to the relevant positions in a personal capacity, rather than in the course of your employment as a legal practitioner or in connection of you providing legal services as an employed legal practitioner.

If you are acting merely as the trustee and not as a legal practitioner/trustee in respect of the estate accounts, it would

appear that the money deposited to or held in the accounts should not be regarded as trust money.

The provisions of the Act are directed to making the law practice and legal practitioners accountable for money they receive in the course of their practice notwithstanding that the occasion for their receiving the money may be that they are acting in some additional capacity such as a trustee, stakeholder, bailee etc.

A practitioner who acts merely as a trustee and not in the dual capacity of legal practitioner and trustee would be accountable for money received or controlled in the sole capacity of trustee.

**Question 1.18: What is meant by the term “debit balance” in relation to trust accounting?**

**Response:** The term indicates that a trust ledger account has a debit balance disclosed on it. A debit balance indicates that the ledger account has insufficient funds to cover a transfer or payment and other funds have been used to cover this. Therefore, the legal practitioner is in breach of Section 262 in that the legal practitioner has caused a deficiency in any trust account or trust ledger account. All debit balances should be investigated and corrected by the legal practitioner immediately (see below regarding notification requirements).

**Question 1.19: Deficiency in Trust Accounts**

**What should I do if I discover that there is a debit balance in my general trust account?**

**Response:** Section 263(1) requires a legal practitioner associate (e.g. principal, partners, employed legal practitioner) to give written notice to the Law Society when the practitioner becomes aware that there is an irregularity (e.g. “debit balance”) in any of the law practice’s trust accounts or trust ledger accounts. It should be noted that AADI’s are also required by Section 282(1) to report any deficiency in a trust account to the Law Society. Therefore you must notify the Trust Accounts Department in writing as soon as you become aware of the deficiency.

A form for notification has not been designed and the Trust Accounts Departments requests a letter be issued to the Chief Trust Account Investigator and Supervisor advising of the reason(s) for the debit balance(s) and evidence of rectification.

**Question 1.20: Money in Dispute**

**I acted for a client in a sale of property. The settlement monies were deposited into my practice's general trust account. Today, I received notice from my client's legal practitioner (another law practice) that the money is subject to a property settlement. I am unsure whether proceedings have been initiated.**

**I have made every effort to resolve the dispute by recommending that the money be deposited to one of the party's law practice general trust account. However, the parties' legal representatives cannot reach an agreement. Can I send the money to unclaimed monies?**

**Response:**

No. You can only send unclaimed monies to the Office of State Revenue if you cannot locate the client. In this scenario, you are able to locate the client but you cannot receive instructions as to where the money should be disbursed. Section 255 of the Act stipulates that the law practice must disburse the trust money only in accordance with a direction given by the person.

However, Section 255(2) qualifies the above requirement by stating that the money can be disbursed subject to a court order or as authorised by law.

Section 95(1) of the Trustees Act 1925 (NSW) allows the trustee to pay the money into court. The relevant rules can be found in Part 70 Trustee Act Rules of the Supreme Court Rules 1970. You must satisfy yourself that the money is disputed by the parties and that reasonable efforts have been made to resolve the matter.

## 2. SECTION 264 – RECORDKEEPING

**Question 2.1:** What are the three basic requirements for the maintenance of trust records detailed in Section 264 of the Act?

**Response:** The basic requirements detailed by Section 264 are that the records:

- (a) Disclose at all times the true position in relation to money received by the legal practitioner.
- (b) Be kept in a manner that enables the records to be conveniently and properly investigated or externally examined.
- (c) Be kept in accordance with the Regulations.

**Question 2.2:** How does the Regulations assist a legal practitioner in the running of a legal practice?

**Response:** The Regulations is a very good basic accounting guide. It guides the practitioner by detailing:

- \* The records to be maintained if trust money is received.
- \* The information that is required to be recorded in these records.
- \* The accounting reports that are required to be produced.

**Question 2.3:** A fellow practitioner seeks your assistance in understanding Sections 243 and 254. He advises he issues receipts for all trust money received and writes cheques when needed. He is of the opinion that these are the only records required and that is sufficient in order to comply with Section 264 of the Act.

**Why do the actions of the practitioner not comply with the Regulations?**

**Response:** Section 264(2)(a) requires trust records to be kept in such manner as the Regulations prescribe. The practitioner is not maintaining trust ledger accounts in accordance with Clause 70, cash books in accordance with Clause 67 and not producing the month end reports as required by Clause 72.

Section 264(2)(b) requires the law practice to maintain records that disclose the true position in relation to money received on behalf of another person. Without the maintenance of a trust ledger account, practice is not showing the true position in relation to money held for each matter.

Section 264(2)(c) requires the trust records to be kept in a manner that enables them to be conveniently and properly

investigated or externally examined. This requires that the records required by the Regulations be kept up to date, the entries be posted on a regular basis and the reports produced upon request.

**Question 2.4:**      **Section 264(2)(b) requires that a law practice must keep trust records that disclose at all times the true position in relation to money received. In order for the trust ledger account to disclose the true position in relation to client's funds held, would you please advise:**

**(a) how often should the entries be posted to the trust ledger account?**

**(b) when should a trust account receipt be issued for trust money received?**

**Response:**      (a) Ideally, the trust ledger should be posted on a daily basis, however with the exigencies of running a busy practice this may not always be possible. Clauses 68(4), 69(4) and 70(9) requires that in respect of a receipt, payment or transfer of trust money, transactions must be recoded in the respective cash book or ledger within 5 working days. It would be clearly inappropriate for a law practice with a reasonable number of entries per day to do anything but post on a daily basis.

(b) The trust account receipt should be issued on receipt of trust money or as soon as practicable thereafter (Clause 61(3)).

**Question 2.5:**      **What procedures should a practitioner personally conduct on a regular basis to ensure that the provisions of Act and Regulations are complied with?**

**Response:**      The practitioner should address the following areas:

- \* Ensure that trust records are maintained and are up to date.
- \* Ensure that the information contained in the trust records is accurate.
- \* The above will be achieved by regular review (at least monthly) of the trial balance, reconciliation statement and trust account cash book.

**Question 2.6:**      **What issues need to be addressed when commencing a new law practice and opening a set of records for a general trust account?**

**Response:**      \* Ensure that the account name contains the name of the Law Practice and the expression "law practice trust account" or "law practice trust a/c" (Clause 60(2)) and that cheques

issued by the AADI show the name of the law practice and the words law practice trust account on the cheque.

- \* Within 14 days after establishing a general trust account, a law practice must give the Law Society Council written notice of that fact (Clause 74(1)) – a form is available on the Law Society website for download.
- \* Ensure that receipts and cheques also contain the same proposed trading name of the law practice.
- \* Ensure that both office and trust accounting systems are defined prior to the commencement of the law practice.
- \* Ensure that the appropriate registers in relation to the filing of matter files, wills and security documents are in place prior to commencement of the business.
- \* Ensure that discussions have been held with the external accountant as to the office account records to be maintained.

**Question 2.7: When disposing of a law practice what are the issues that need to be addressed?**

**Response:** The following areas need to be addressed:

#### Files

- \* Ensure that authorisation has been obtained to transfer current client files to the purchasing law practice as directed by the client. Also see Rule 30 of the Revised Professional Conduct and Practice Rules.
- \* Ensure provision for the retention/storage of completed client files.
- \* Ensure that records relating to the transfer of wills and securities packets are adequate.

#### Trust

- \* The general trust account should be closed as soon as practicable after disposing the law practice or ceasing to engage in legal practice in NSW, and within 14 days after closure of the general trust account, a law practice must give the Law Society Council written notice of that fact (Clause 74(5)).
- \* Ensure that the authorisations to transfer trust and controlled money balances to the new law practice have been obtained from the client.
- \* Review the inactive matter balances prior to transfer.
- \* Ensure that provision for the storage/retention of trust records is appropriate for a period of not less than seven years.
- \* Ensure that the statutory provisions relating to the submission of an external examiner's report are complied with.

**Question 2.8:** The Regulations provides a time limit for the completion of controlled money statements (listings), monthly trial balances, reconciliation statements, and as a consequence the trust account cash book balance. What is the time limit?

**Response:** Fifteen working days from each month end.

**Question 2.9(a):** Clause 88(4) states that a bill is to be given to the person. Is this term defined?

**Response:** The term "given" is defined at Section 332(5) of the Act. The bill may be given:

- \* personally to the person or an agent of the person
- \* by post to the person or agent at the usual or last known address
- \* by leaving it for the person or agent at the usual or last known address – with a person on the premises who is apparently at least 16 years old and apparently employed or residing there
- \* by sending it by facsimile transmission to a number specified by the person
- \* by DX
- \* by email

**Question 2.9(b):** Clause 88 states a law practice has given a bill of costs in accordance with Section 261(1) of the Act. Is a bill of costs defined?

**Response:** The term 'bill' is defined in Section 302 of the Act as "a bill of costs" for providing legal services".

Section 332 and 333 prescribe the provision for or with respect to the form of and the particulars to be included in the bill.

**Question 2.10(a):** How long must trust records be maintained?

**Response:** Clause 89(2) of the Regulations defines the period as seven years from the date it was created.

Some trust records are required to be kept for seven years after the finalisation of the matter.

**Question 2.10(b)** Do the records have to be retained in printed form?

**Response:** For law practice using a computerised accounting system, the Regulations require certain records to be printed, for example:

- \* reconciliation statements (including trial balance statement and [bank] reconciliation statement), and
- \* controlled money listing of accounts.

For other records, provided they are maintained in a form that enables them to be printed (in a form that is readable or reportable on demand), the records do not have to be printed. However when considering the storage of records in a form other than printed form the law practice must ensure that the information will be accessible over the period of seven years. The Trust Accounts Department suggests that cash books are retained in printed form for at least 12 months to avoid the necessity of the law practice having to print records during an external examination or routine investigation.

**Question 2.11: What are the responsibilities in relation to the use of computer software for the maintenance of trust records?**

**Response:** Prior to the use of software, the law practice must ensure that the software complies with the Regulations in particular compliance with Clause 58 which specifically relates to the maintenance of records on computer.

The Law Society's Trust Accounts Department has issued certificates of examination for a number of software programs. This list is available from the Law Society's Website ([www.lawsociety.com.au/6194](http://www.lawsociety.com.au/6194)).

**Question 2.12: What are the minimum general trust records that need to be maintained by the Act and Regulations?**

**Response:**

- \* Deposit record (Clause 62)
- \* Trust Account Receipts and Payments Cashbook (Clause 68, 69)
- \* Trust Transfer Journal (Clause 71)
- \* Trust Ledger Account (Clause 70)
- \* Trial Balance Statement (Clause 72)
- \* Reconciliation Statement (Clause 72)
- \* Trust Account Statement (Clause 82)
- \* Duplicate trust receipts (Clause 61(4)) unless exempted by operation of Clause 61(4)
- \* Cheque/EFT Payment Record (Clause 65 & 66)

**Question 2.13:** The Regulations requires the form in which trust money is received, i.e. cash, cheque or direct credit to be recorded in three areas, these being the receipt (Clause 61(5)(c)), the trust account cash book (Clause 68(1)(d)), and the deposit slip (Clause 62(3)(c)). Why is the legislation so particular in relation to the recording of the form in which the funds are received?

**Response:** It is important to the trust accounting system that the funds received are deposited intact and the legal practitioner should not be cashing cheques from trust money received. An essential control that should be implemented by law practice over the trust records is that the receipt should be compared to the deposit slip to ensure that the funds are deposited as received and there are no general/office account, employee or other cheque deposits which have been substituted in the deposit to the general trust account. A method adopted for misappropriating trust money is for receipts to be issued for cash, the cash is not deposited and cash or cheques relating to another person are substituted in lieu of the cash received. The law practice must be on guard for this type of transaction, and the Regulations prompts the control by insisting on the form of funds being recorded in each of the records.

### 3. RECEIPTS

**Question 3.1:** How long must a law practice wait prior to drawing against a cheque receipted into the general trust account?

**Response:** There is not a clause in the Regulations which dictates that a cheque should not be drawn against in x number of days.

The guidance is Section 243 which dictates that funds are entrusted to the law practice for or on behalf of another person, therefore a cheque should only drawn against cleared funds.

The period is set by the AADI. It is suggested that each law practice consult with the AADI to determine the period applicable, and if a cheque is to be drawn urgently, prior to the expiration of the period set by the AADI, then a special clearance should be obtained.

**Question 3.2:** What information is a trust receipt required to disclose?

**Response:** The trust receipt is required to disclose the following:

- \* The date of the receipt of money,
- \* The date of issuing the receipt (if the date of issuing the receipt is different to the date of the receipt of money),
- \* Amount of money received,
- \* Form in which the money was received,
- \* The name of the person from whom the money was received,
- \* Name of the person on whose behalf the money is held,
- \* Matter description,
- \* Matter reference (or the trust ledger reference, whichever is applicable),
- \* The reason for the receipt,
- \* Discloses the law practice's name,
- \* The expression "Trust account" or "Trust A/c",
- \* The name of the person who made out the receipt,
- \* Receipts shall be numbered and issued in consecutive series.

**Question 3.3:** Is it required for a receipt to be issued for money received into the general trust account other than by way of a cheque?

**Response:** The answer is "yes". A receipt must be issued as soon as practicable after receipt of money, whether it be by way of cash, cheque or direct deposit.

**Question 3.4:**      **Section 264 requires that information recorded on the receipt is accurate. What controls should a legal practitioner implement to ensure that information entered on the receipt is accurate?**

**Response:**      Some of the controls that may be implemented are:

- \* The principal responsible for the law practice should either prepare the receipt or prepare a receipt requisition, including all required details.
- \* Where a legal practitioner is unable to be directly involved in the recording of general trust money received, it should be ensured that this task is carried out by competent experienced personnel in accordance with set procedures.
- \* If receipts are issued by persons other than the legal practitioner responsible for the matter, then a regular file review comparing the file to the trust ledger should be completed by the practitioner responsible.
- \* Partners should be responsible for opening all mail.
- \* The principal (or the managing partner) reviews the month end cash book balance, reconciliation statement and trial balance statement.

**Question 3.5:**      **What is a Cancelled receipt”?**

**Response:**      A cancelled receipt is a receipt which is made out and prior to its issue, it is realised that the content of the receipt is incorrect. Such occasions may be that the receipt was made out for trust moneys in error, when the money received related to the office account, or an incorrect name from whom the money was received is shown. It is permissible for these receipts to be cancelled. A receipt should not be cancelled unless the original receipt has been retained.

The essential controls for cancelling a receipt are:

- (i) The original and duplicate of the cancelled receipt must be retained.
- (ii) The original and duplicate of the cancelled receipt must be marked cancelled.
- (iii) The receipt number is recorded in the trust account receipts cash book in receipt number sequence with the notation reading "cancelled" and the reason for cancellation shown. A nil amount will then be recorded.
- (iv) The entry is not posted to a trust ledger account under a manual accounting system.

This entry is also often referred to as a nil value receipt. It is imperative that the original of the cancelled receipt is retained and suitably notated.

In a computerised accounting system, the printed receipt must be retained as the system will show the cancelled receipt as a reversed receipt.

**Question 3.6(a): What controls should be in place over the unissued trust accounts receipts of a law practice?**

**Response:** On receipt of the printed trust account receipt books, the law practice should ensure that:

- \* The receipts should be checked to ensure that the sequence for all books is intact.
- \* Each book should be registered in a suitable register, and controls placed over the storage and issue of the receipt books i.e. they be retained in a secure place and signed for on issue.
- \* The receipt book in use be constantly checked for missing receipts, both original and duplicate.
- \* The current receipt book in use should be stored in a secured place.
- \* The original and duplicate of any cancelled receipt is retained and suitably marked.
- \* The trust account receipts cash book is reviewed by the legal practitioner to ensure that the receipts sequence has been accounted for.

For law practices using a computerised accounting system with pre-printed receipts the controls are as stated above.

For law practices using computerised accounting systems that print the original receipt then the above controls are not applicable. However, the law practice must ensure that they retain the original of any receipt that is not issued by the law practice due to printer problems etc. as these receipts would be processed as reversals to the accounting system and the receipt has never been issued. The original receipt must be retained.

For computerised accounting software under either of the above methods the practice should ensure that the printed receipts are reviewed against the trust account receipts cashbook for missing receipt numbers.

**Question 3.6(b) Why should such controls be in place?**

**Response:** Security over unissued trust account receipts is essential to the integrity of the trust account system. If trust account receipts are obtained by unauthorised persons, the receipts may be issued to

the clients or other person and the funds may never be accounted for.

Control over unissued receipts assists the legal practitioner to ensure the completeness of the accounting system, that is, all cash received by the law practice is accounted for within the accounting system. For an example, if an employee has unauthorised use of trust account receipts, and clients pay by cash, then the employee can receipt the cash using the unauthorised receipts and the funds may never be accounted for within the trust accounting system. The client is satisfied in that a receipt has been issued.

## 4. CHEQUES

**Question 4.1:** What are the essential elements required to be shown on the source record which is required to support the payment of money from the general trust account?

**Response:** The essential elements are:

- \* Cheques shall be numbered in series,
- \* The date the cheque was drawn,
- \* The name of the person on whose behalf the cheque was drawn,
- \* The payee of the cheque,
- \* If a trust cheque is made payable to an ADI, the name of beneficiary (e.g. payee on a bank cheque) must also be recorded. For example, if a CBA trust account cheque is made to CBA to obtain a bank cheque made payable to the Office of State Revenue, the records must include "CBA B/C Office of State Revenue".
- \* The amount of the cheque,
- \* The purpose/reason for payment,
- \* Details identifying the ledger account to be debited,
- \* Matter description.

**Question 4.2(a):** Can a legal practitioner draw a general trust account cheque payable to cash or open a cheque to cash at the direction of the client?

**Response:** A legal practitioner is unable to draw a cheque to cash or open it to cash. Clause 65(2)(a) prohibits a cheque drawn on the general trust account being made payable to cash. The client is unable to direct the practitioner to breach the provisions of the applicable legislation. The reason for this clause is that for a cheque drawn to cash or opened to cash there is no audit trail in regard to who received the cash.

**Question 4.2(b):** In respect of the above, what about if the law practice draws an office account cheque to cash and gives it to the client and obtains a reimbursement from the general trust account?

**Response:** The Trust Accounts Department does not condone this method as the law practice may be seen to circumvent the legislation by avoiding the trust account regulations. The law practice should advise the client that the instructions cannot be acted upon and make alternative arrangements on this matter.

**Question 4.2(c):** A legal practitioner acting for a purchaser has been advised by the AADI that a trust cheque issued by the law practice to purchase a bank cheque for settlement will not be accepted unless the trust cheque is opened to cash.

**What can law practice do as Clause 65 precludes any trust cheques being drawn payable to cash?**

**Response:** The purpose of this regulation is to provide an audit trail and drawing cheques to cash defeats the audit trail. Some AADIs have recently changed their requirements for the purchase of bank cheques and require the trust cheque to be drawn to cash. In these circumstances it is the Trust Accounts Department's recommendation that if the AADI allows the words "Cash – *name of AADI B/C named payee*" to be inserted in the Payee section of the trust account cheque, the Department would accept such wording as compliant with the Regulations. For example, if a trust cheque was made payable to Westpac Bank to obtain a bank cheque in favour of the Office of State Revenue, the words "Cash – Westpac Banking Corporation – B/C Office of State Revenue" must be inserted in the Payee section of the trust cheque.

A copy (front and back) of the cheque drawn must be kept and the name of the AADI and payee on the cheque including the name of beneficiary (e.g. OSR) are recorded in the relevant cheque butt, trust account payments cashbook and trust ledger account. This is to ensure that in the event the term "Cashed Cheque" is shown on the AADI statement, a copy of the cheque can be produced to substantiate the entry in the trust records and that no physical cash was in fact withdrawn from the trust account to obtain the AADI cheque.

**Question 4.3:** **Who is permitted to sign trust cheques?**

**Response:** A sole practitioner or principal of a law practice is permitted to sign general trust account cheques. Other persons can be authorised to sign general trust account cheques and controlled money withdrawal records pursuant to Clause 65 and 78 of the Regulations respectively. This authorisation must be in writing and must be to any of the following persons:

- \* Authorised legal practitioner associate (which includes supervised principals and employed legal practitioners),
- \* An Australian legal practitioner who holds an unrestricted practicing certificate authorising the receipt of trust money, or
- \* Two or more authorised associates jointly (e.g. legal secretaries or bookkeepers employed by the law practice).

The law practice must also ensure that they notify the Law Society the names of the persons authorised to operate the general trust account. A form is available for download from the Law Society website.

If the law practice has an internal control procedure whereby the accounts clerk (or office manager) is authorised to sign the cheque jointly with a principal of the practice, the Law Society is not required to be notified of such authorisation as the principal's signature would always be on the cheque.

**Question 4.4(a) Can a law practice stop payment on a general trust account cheque that has been issued?**

**Response (a):** Yes.

**Question 4.4(b) What procedure should be followed in stopping the payment of a general trust account cheque and recording the reversal in the trust records?**

**Response (b):** The law practice should:

- (i) Contact the approved ADI and request the issue of a stop payment order.
- (ii) Contact the person to whom the cheque has been issued and advise of the problem.
- (iii) Enter the reversal in the cash book by rewriting the entry in the cash book, adding the reason for the reversal and entering the amount as a negative amount. This has the effect of cancelling the original entry.
- (iv) Posting the entry to the credit side of the ledger (the opposite side to the original cheque).
- (v) If applicable, a replacement cheque is issued in a normal manner.

**Question 4.5: What are the procedures which should be adopted when signing a general trust account cheque?**

**Response:**

- (i) Ensure that the cheque is marked "Not Negotiable" and on signing the cheque the "or bearer" is struck out and initialled.
- (ii) Ensure that the trust account records are up to date.
- (iii) Ensure that there are sufficient trust funds to the credit of the trust ledger account from which the cheque is to be drawn.
- (iv) Ensure that the cheque is accompanied by supporting documentation to support the payment.
- (v) Ensure that the payment relates to the matter.

- (vi) Ensure that the document that is produced supporting the payment is appropriately marked to indicate that payment has been made.
- (vii) Ensure that adequate authority is obtained for the payment of trust money for costs and disbursements. Also see Question 1.9a.

**Question 4.6:      Cheque Endorsement**

**I am the legal practitioner for a collection agency. As a result of this activity I receive cheques which are made payable to my law practice rather than the creditor.**

**I hold a written direction from my client to endorse all such cheques received by me direct to my client, and I now follow that instruction.**

**I am unclear as to this situation and on my reading of Section 257 of the Act, such monies would be "transit monies".**

**Response:**

The cheques, which you endorse after receipt from a debtor of your client and pass on directly to your client in accordance with your client's instructions, would properly be regarded as "written direction money" to which Section 254 (1)(a) would apply. It is recommended that the cheque should be copied and placed on the matter file with the written direction and a note explaining what has occurred with the cheque. This procedure creates a reasonable audit trail in relation to the cheque involved.

In the absence of a written direction the cheque should be dealt with in accordance with the legislation pertaining to trust money. It should also be emphasised that if written direction money is the only type of trust money received the law practice is still required to obtain an External Examiner's Report.

**Question 4.7:      Can a withdrawal be made from the general trust account by using electronic funds transfer?**

**Response:**

There is nothing to prevent a law practice from using the electronic funds transfers from the general trust account provided the appropriate records are maintained. The appropriate records to be maintained to record electronic fund transfers are contained in Clause 66 of the Regulations.

Attention is directed to Clause 66(2) in regard to who can authorise an electronic fund transfer. The same controls must be

implemented for electronic fund transfers as those adopted when signing trust cheques.

Before adopting electronic fund transfers the liability clauses must be clearly understood. A transaction is authorised by a password. The control of password security by a legal practitioner is essential and is the basis upon which the system is built. If the AADI receives a valid transaction that is the correct passwords have been entered, then the transaction will be processed without question. The person who enters the transaction may never be identified if there is a lack of control over the use of security passwords.

Also audit trails must be reviewed to ensure transaction referencing in the trust account cash books and AADI statement enables a transaction to be traced through the records. Original AADI statements must be retained. It is suggested that before electronic fund transfers are used within a legal practice, the processes are documented, fully understood by all principals and staff and the processes are regularly reviewed.

It must be remembered that there is no such thing as a "forged cheque" with electronic fund transfers. The AADI will only pay on an authenticated transaction that is one that contains correct passwords which the practitioner is expected to control.

A further control to be exercised by the law practice is to ensure that it reviews the AADI statements at least once a day to ensure that only authorised payments are made from the trust and office accounts. It is critical that there is minimal time between the unauthorised transaction and reporting the incident to the AADI.

The practice should also ensure that adequate software applications, such as firewalls and virus protection are installed and kept up to date in order to prevent the computers being subject of unauthorised access and/or malicious activity. Purported emails from your bank requesting personal details and password must not be opened or replied to.

Section 263(1) of the Act requires a legal practitioner of the law practice to notify the Law Society in writing when the practitioner becomes aware that there is an irregularity (e.g. deficiency) in the practice's trust account(s) or trust ledger account(s).

**Question 4.8:** A practitioner friend told me this morning that he was advised by another practitioner that it is a requirement on general trust account cheques that the pay to section on the cheque which currently reads "Pay to the order of" should be altered to "Pay to" to conform with the Law Society requirements. Would you please advise me if this is correct?

**Response:** No. Clause 65(2) of Regulations requires all payments by cheque to:

- (a) be made payable to or to the order of a specified person or persons and not to bearer or cash,
- (b) be crossed "not negotiable",
- (c) include the name of the law practice or the business name under which the law practice engages in legal practice, and
- (d) the expression "law practice trust account" or "law practice trust a/c" (this specific requirement does not apply to general trust accounts opened prior to 1 October 2005).

In other words, both "Pay to the order of" and "Pay to" would comply with the above regulation.

## 5. TRUST ACCOUNT CASH BOOKS

**Question 5.1:** What are the trust account receipts and payments cash books (“cash books”) used for and why do the cash books need to be maintained within the trust accounting system?

**Response:** The cash books are designed as a summary of receipt and payment transactions.

The cash books are used within the accounting system to record all financial transactions, that is, receipts, receipt reversals, receipt cancellations, cheque, cheque reversals and cheque cancellations. The cash books should provide control over the receipt/cheque sequencing, banking (for receipts) and monthly totals for the receipts and payments.

**Question 5.2:** How is the trust account cash book balance achieved?

**Response:** Clause 72(2) of the Regulations requires that the general trust account balance as shown in the AADI records is reconciled with the practice’s trust account cash books. The balance should then be carried forward to the commencement of the next month, or the balance is carried forward to a ledger account maintained for that purpose. Therefore the methods used to arrive at a cash book balance are:

(i) Cash book summary.

This method requires that at month end the receipt book and payments book is totalled to obtain the total receipt and total payments for the month. The following statement is then recorded on the last page of the chosen record. It is desirable that the summary is recorded in the same record each month.  
Cash book summary.

Opening balance as at --/--/-- \$  
Plus receipts for the month of \$  
Less payments for the month of \$  
Closing balance --/--/-- \$

The opening balance is the closing balance from the previous month.

(ii) Cash book balance.

This method records the opening balance as the first entry of the receipts cash book. The bookkeeper/practitioner at month end then totals the cash book. The difference between the opening balance plus receipts, less payments, gives the balance to be

carried forward. This figure is carried forward as the opening balance for the next month.

(iii) A control account ledger.

Under this system, the monthly total of receipts and the monthly total of payments are each posted (recorded) in a ledger account. The receipts total will be added to the balance at the end of last month and the total payments deducted. This will result in a month end cash book balance.

## 6. DEPOSITS

**Question 6.1:**      **What are the requirements for the deposit of trust money?**

**Response:**            Section 254(1) of the Act requires that trust money received must be deposited in a general trust account as soon as practicable after the receipt of trust money. In other words, the money should be deposited before the end of the next banking day after the day of its receipt, or if that is not practicable, as soon as possible after that day.

**Question 6.2:**      **What information should be recorded on the copy of the record maintained to record a deposit to the general trust account?**

**Response:**            Clause 62 of the Regulations requires the deposit record to include:

- (a) The date of the deposit.
- (b) The amount of the deposit.
- (c) The cheque, notes and coin content.
- (d) For cheques, the name of the drawer, bank (ADI) and branch and the amount of each cheque.

The person responsible for completing the deposit should ensure that the AADI stamp and teller's initials are also recorded on the duplicate record kept by the law practice. It is not a requirement that this be shown, however it is considered to be good internal control that the depositor of the funds ensures that the AADI's receipt, that is the stamp and initials are shown on the duplicate copy of the deposit slip.

**Question 6.3:**      **Does the Regulations permit the depositing of money by use of "Quick Banking" style deposit system?**

**Response:**            The Regulations does not preclude the use of this method of depositing money. However before using this method of depositing money the liability in the event of a lost deposit must be understood. The AADI usually disclaims all losses of cheques deposited through the quick banking facility.

The Trust Accounts Department advises that this method of deposit should not be used if the deposit contains cash or ADI cheques (e.g. bank cheques). This reason for this is in the event of a lost deposit the practitioner/law practice must cover the lost cash and bank (ADI) cheques are extremely difficult to cancel and have them reissued.

## 7. RECONCILIATION STATEMENT

**Question 7.1(a): Why is the monthly reconciliation statement procedure considered to be such an important procedure within the trust account regulations?**

**Response:** It is considered to be an important document because it is the procedure that compares the internal records (the law practice's records) with the external records (the AADI's records) in regard to the amount of trust money held in the general trust account. Satisfactory completion of the procedure at month end should ensure that both records agree. Any variances shown in the reconciliation statement should be thoroughly investigated to ascertain why they are shown, for example if an outstanding deposit is shown in the reconciliation, the law practice should ensure that this money has been deposited on the first available banking day after month end.

**Question 7.1(b): What are the procedures for completing a reconciliation statement?**

**Response:** The procedures for completing a reconciliation statement are:

- (i) Ensure that all receipts and payments are entered into the trust account receipts and payments cash books prior to month end closure.
- (ii) Total the receipts and payments cash books to disclose the closing cash book balance.
- (iii) Obtain the month end AADI statement.
- (iv) Compare the AADI statement with the cash book:
  1. In respect of receipts:
    - 1.1 Tick entries that are common to both in the AADI statement and trust account receipts cash book.
    - 1.2 List entries which appear in the AADI statement that are not recorded in the trust account receipts cash book, on a list appropriately headed.
    - 1.3 List items in the trust account receipts cash book that do not appear in the AADI statement on a list appropriately headed (usually undeposited receipts).

Thoroughly investigate the items shown above in lists 1.2 and 1.3 to ascertain the reason for the discrepancy between the records. Ascertain the method of correction required. Some items will need to be corrected by the AADI, other items will need to be corrected in the trust records.

2. In respect of payments:
  - 2.1 Tick the entries that are common to the AADI statement and trust account payments cash book.
  - 2.2 List the entries that appear in the AADI statement that are not recorded in the trust account payments cash book on a list appropriately headed.
  - 2.3 List the items that are recorded in the payments cash book that are not recorded in the AADI statement on a list appropriately headed.

Items listed as per 2.2 and 2.3 above need to be thoroughly investigated as to their nature and if necessary corrective action be taken.

- (v) Complete the reconciliation statement by commencing with the AADI statement balance, adjusting this to agree with the trust account cash book balance.

Note: Monthly reconciliation statements must be prepared within 15 working days of each month end.

## 8. TRUST ACCOUNT LEDGER

**Question 8.1:** What is the purpose of the trust ledger account in the trust accounting system?

**Response:** The trust ledger account is the accounting record that draws all entries relating to a particular matter together. It provides the history in relation to that matter and if maintained on a regular basis will provide the balance of funds held by the law practice on behalf of the client (person on whose behalf the money is held).

**Question 8.2:** What information should the trust ledger account provide?

**Response:** The trust ledger account title is required to disclose the name of the person on whose behalf the money is held, the person's address and particulars sufficient to identify the matter in relation to which the trust money was received.

The particulars of each transaction must include:

- \* The date of the transaction (e.g. date of issuing the receipt or date of payment), and if different the date of receipt of money,
- \* Receipt/cheque/EFT number and journal reference,
- \* Name of the person whom money is received or paid to. In the case of a cheque made payable to an ADI, the name or BSB number of the ADI and the name of the person receiving the benefit of the payment,
- \* The amount of the transaction,
- \* The resulting balance of account arising from the transaction,
- \* For payments by EFT, the name and number of the payee account.

**Question 8.3:** Can a law practice maintain a trust ledger account in the practitioner's own name?

**Response:** The answer is yes, if the transaction is one that falls within the provisions of Clause 73 of the Regulations which are:

- (a) The law practice maintains an account for the purpose of aggregating by transfer from other accounts in the trust ledger, money properly due to the practice for legal costs.
- (b) An account in which the legal practitioner has a personal and beneficial interest as a vendor, purchaser, lessor, lessee or in other similar capacity.

**Question 8.4:** If the law practice maintains a trust ledger account to record the purchase of a property in the legal practitioner's name, how long can the funds be held in this particular account?

**Response:** The funds can be held by the law practice in this trust ledger account until completion of the purchase matter. On completion of the matter the law practice must ensure that the money is withdrawn from the general trust account.

**Question 8.5:** If the law practice operates a clearing account in the law practice name for the purposes of transferring costs and disbursements from individual trust ledger accounts, how long can the funds be held in the clearing account?

**Response:** The law practice must ensure that the money in the trust ledger account is withdrawn from the general trust account not later than one month after the day on which the money was transferred to the account.

**Question 8.6:** Clause 70(4)(e), (5)(d), (6)(e) and (7)(e) requires that the trust ledger account records "particulars sufficient to identify the purpose for which the money was received/paid". What information is required to be recorded to comply with this clause of the Regulations?

**Response:** The Trust Accounts Department has always referred to this as the reasons for the receipt or payment. The accounting system should be designed to provide management information to the manager of the business, therefore it is considered that the information that should be recorded is:  
For receipts - e.g. on account of costs and disbursements, stamp duty, on account of barristers fees.  
For payments by cheque or EFT - e.g. Supreme court filing fee, building report, distribution of an estate.  
For journals - e.g. transfer from sale to purchase to cover anticipated disbursements.

By recording this information in the trust ledger account, any person reviewing the records is not required to access any other record to obtain the reason for the receipt, payment or journal entry.

**Question 8.7:** A client pays the law practice trust money on account of costs and disbursements, as to \$400.00 for a purchase matter and \$500.00 for a third party matter. The money is paid in the form of one cheque for \$900.00. In terms of the

**trust ledger account, how should the receipt of these funds be handled?**

**Response:** The monies received should be credited to individual ledger accounts for each matter, i.e. \$400.00 to the purchase matter and \$500.00 to the third party matter.

Clause 70(1) of the Regulations requires a separate trust ledger account for each matter for each person on whose behalf the money is held in respect of trust money.

**Question 8.8:** **A client has a third party matter with a current trust ledger account balance of \$10.00 and has authorised the law practice to pay a doctor's report fee of \$120.00. The client has another unrelated matter with surplus balance of \$500.00. Can the balance be paid from the unrelated matter?**

**Response:** The payment should not be made from the unrelated matter account. The client (person on whose behalf the money is held) should be contacted and authority obtained to transfer sufficient funds from the unrelated matter to the third party matter. The report fee should then be paid from the third party matter account.

## 9. TRIAL BALANCE STATEMENT

**Question 9.1:** What is a “trial balance” called in the Regulations?

**Response:** The term “trial balance” is no longer existent in the Regulations. Clause 72(2)(b) of the Regulations requires the law practice to prepare a statement reconciling the balance of the trust ledger accounts with the balance of the practice’s trust account cash books and containing a list of the practice’s trust ledger accounts.

As the above requirement effectively refers to a trial balance statement, the Trust Accounts Department considers the term “trial balance statement” is appropriate to distinguish it from the reconciliation statement (which is previously known as the “Bank Reconciliation” in the Legal Profession Regulation 2002).

**Question 9.2(a):** What is the purpose of the trial balance statement?

**Response:** The trial balance statement is used in an accounting system to ensure the principle of double entry accounting has been followed correctly, i.e. the system is in balance.

The trial balance statement is designed to highlight any errors with the law practice’s internal records. Such errors may be failure to post both sides of the transaction, posting an entry to the wrong side of the ledger, incorrect calculation of the balance, and transmission errors in posting, that is \$15.00 as \$51.00.

**Question 9.2(b)** What are the procedures for preparing a trial balance statement?

**Response:** The procedures required to be followed when completing a trial balance are:

- (i) Ensure all entries for the month in question have been entered into the trust account cash books and posted to the relevant trust ledger accounts. This procedure is completed prior to reviewing the AADI statement.
- (ii) Ensure all journal entries have been posted to the relevant trust ledger accounts.
- (iii) Ensure each ledger account has been balanced.
- (iv) On a separate sheet of paper, appropriately headed as required by the Regulations, list the month end balance of each individual trust ledger account. Ledgers showing Nil balances may be excluded from the trial balance statement. A statutory deposit account, if opened, should be included.
- (v) Add the trial balance.

- (vi) Compare the total of the trial balance with the trust account cash book balance. For the accounting system to be in balance the reconciled trust account cash book balance (as per the reconciliation statement), control account/cash book balance and the total of the trial balance statement should all agree. In some systems, the statutory deposit may also have to be brought to account in the comparison.

**Question 9.3: What information is the trial balance statement required to show?**

**Response:** The trial balance statement is required to show the following information:

- \* The month to which the trial balance statement refers.
- \* Matter description.
- \* The name of the person on whose behalf the money is held.
- \* Reference number or other identification.
- \* Balance of the trust ledger account at month end.
- \* The total of all trust ledger account balances.
- \* The date of preparation (within 15 working days of month end).
- \* A comparison between its total and the reconciled cash book balance.

**Question 9.4: Clause 72(2)(b)(i) of the Regulations requires that the trial balance statement show a comparison between its total and the balance of the practice's trust account cash books (reconciled cash book balance). What is the purpose of this clause of the Regulations and where should the comparison be shown?**

**Response:** The purpose is to document the comparison. This ensures that the trial balance statement is in balance with the reconciled trust account cash book balance (the balance recorded after completing the reconciliation statement). A control feature that should be exercised by each and every law practice is to ensure that the comparison is completed and the figures that are shown in the comparison agree back to the original records. If the comparison is completed and recorded then the records should not be out of balance or if the records are out of balance the error should be highlighted within 15 working days of month end when the comparison is required to be completed.

The comparison is required to be shown on the trial balance statement. An example is as follows:

*Clause 72(2)(b)(i) Comparison*

Total Trust Ledger Accounts	\$_____
<i>Add</i>	
Statutory deposit	\$_____
Reconciled Trust Cash Book Balance	\$_____
Variance (should be nil)	\$_____

## 10. TRUST ACCOUNT STATEMENTS

**Question 10.1:** When is a trust account statement for general trust money required to be forwarded to the person on whose behalf the trust money is held?

**Response:**

- \* On demand after the client makes a reasonable request,
- \* On completion of the matter,
- \* As at 30 June each year, unless exempted by the provisions of Clause 82(7). The exemptions are:
  - the account has been opened for a period of less than six months,
  - the balance of the account is zero and no transactions affecting the account has taken place within the previous 12 months,
  - a trust account statement has been furnished within the preceding 12 months and there have been no additional transactions since the date of forwarding that statement.
- \* The client is an sophisticated client (see Clause 83 of the Regulations and sections 312(1)(c) & (d) of the Act) and that the client directs the practice not to issue a trust account statement.

**Question 10.2:** Which types of trust money am I required to issue trust account statements?

**Response:**

- \* general trust money
- \* controlled money
- \* power money (where practicable)
- \* investment of trust money

The law practice is not required to issue trust account statements for written direction money or transit money.

**Question 10.3:** The Regulations require me to “furnish” a trust account statement to the person on whose behalf the money is held or controlled. How can I furnish the trust account statement?

**Response:** The term “furnish” is not defined in the Act or Regulations. However, it is the Trust Accounts Department’s view that the term is synonymous to “give”. In other words, the method of giving a bill of costs to a client as regulated by Section 332(5) of the Act and Clause 111 of the Regulations may be used to define how a trust account statement can be furnished to the

person on whose behalf trust money is held or controlled. The trust account statement may be furnished:

- (a) by delivering it personally to the person or to an agent of the person, or
- (b) by sending it by post to the person or agent at:
  - (i) the usual or last known business or residential address of the person or agent, or
  - (ii) an address nominated for the purpose by the person or agent, or
- (c) by leaving it for the person or agent at:
  - (i) the usual or last known business or residential address of the person or agent, or
  - (ii) an address nominated for the purpose by the person or agent,  
with a person on the premises who is apparently at least 16 years old and apparently employed or residing there, or
- (d) by sending it by facsimile transmission to a number specified by the person (by correspondence or otherwise) as a number to which facsimile transmissions to that person may be sent, or
- (e) by delivering it to the appropriate place in a document exchange in which the person has receiving facilities, or
- (f) by sending it to an email address specified by the person (by correspondence or otherwise).

## 11. TRANSIT MONEY

**Question 11.1: Does a law practice have to keep records for transit money?**

**Response:** Yes. In respect of transit money received by the law practice, Clause 81(2) of the Regulations requires the practice to record and retain brief particulars sufficient to identify the relevant transaction and any purpose for which the money was received.

It must be noted that transit money received in cash must be deposited into the general trust account of the law practice or an existing controlled money account before the money is otherwise dealt with in accordance with the instructions relating to the money.

When third party cheques are received, a law practice should ensure where possible, that copies of the cheques are retained. Copies of other documentation received for example, settlement directions from the vendor; directions from an incoming mortgagee or directions to an agent; should also be retained. Together, these kinds of records will assist a law practice discharge its obligation in respect of clause 81(2) to “record and retain brief particulars sufficient to identify the relevant transaction and any purpose for which the money was received”.

**Question 11.2: Where should I keep the records for transit money? Should I keep them in a central register?**

**Response:** No. Transit money records should be kept in the relevant matter file.

**Question 11.3: What happens if the law practice cannot pass on the third party cheque or the instructions had expired?**

**Response:** The law practice must contact the client (or the drawer of the cheque) to make other arrangements. It must be noted that the law practice cannot deposit the third party cheque into its general trust account without instructions from the client or the drawer of the cheque.

For example, the client provides the law practice with a cheque payable to the Office of State Revenue for stamp duty. It was later determined that the cheque was no longer required. The law practice must contact the client and return the cheque or make other arrangements. For example, the client may open the cheque or provide a written direction to the practice to deposit the cheque to the general trust account, however this is subject to AADI accepting the direction.

## 12. POWER MONEY (MONEY SUBJECT OF A POWER)

**Question 12.1:** What is power money?

**Response:** Power money is defined in Section 243(1) of the Act as trust money that is to be dealt with subject of a power (which includes authority) given to the practice or an associate of the practice to deal with the money for or on behalf of another person.

The definition is elaborated in Section 243(3) of the Act which states that a power given to a law practice or an associate of the practice to deal with money for or on behalf of another person is a reference to a power exercisable by:

- \* the practice alone,
- \* an associate of the practice alone (otherwise than in a private and personal capacity), or
- \* the practice or an associate of the practice jointly or severally, or jointly and severally, with either or both of the following:
  - (i) one or more associates of the practice,
  - (ii) the person, or one or more nominees of the person, for whom or on whose behalf the money may or is to be dealt with under the power.

**Question 12.2(a):** In a family law matter, my law practice was appointed by the Court to operate an interest bearing account jointly with another law practice pending resolution of the matter. Is that power money?

**Response:** Yes. The law practice is given a power (the Court order) to deal with trust money jointly with another law practice.

**Question 12.2(b):** In this case, who bears the responsibility to keep trust records?

**Response:** Both law practices will be required to keep trust records in accordance with Clause 85 of the Regulations (see below). However, if there as there is normally on one ADI statement and one cheque book , the law practices can by agreement, allocate the task of recordkeeping to one law practice and ensure that the other law practice gets a copy of records at least monthly.

**Question 12.3: What are the record keeping requirements for power money?**

**Response:** If a law practice is given a power to deal with money for or on behalf of a person (e.g. power of attorney, grant of probate or signatory to a bank account), whether alone or jointly, the practice is required to keep records in accordance with Clause 85 of the Regulations.

The law practice must keep:

- \* a record of all dealings with the money to which the practice or associate is a party, and
- \* all supporting information in relation to the dealings,

in a manner that enables the dealings to be clearly understood.

It is suggested that the record of all dealings be kept in the form of a ledger.

## 13. WRITTEN DIRECTION MONEY

**Question 13.1: What is written direction money?**

**Response:** Written direction money refers to trust money subject of a written direction from an appropriate person to deal with the money which directs the money to be deposited to an account other than a general trust account. The law practice is obliged to follow the appropriate person's instructions (subject to a court order or as required by law). It must be noted that written direction money received in cash must be deposited into the law practice's general trust account before it is otherwise dealt with in accordance with the direction.

An appropriate person is defined section 254(5) as a person legally entitled to give the law practice directions in respect of dealings with the trust money.

An example is where the law practice received a cheque payable to the practice being proceeds from the sale of a property. Before the cheque is deposited into the practice's general trust account, the client was made bankrupt and the trustee in bankruptcy served a sequestration order on the practice and a written direction requiring the practice to endorse the cheque made payable to the trustee. The law practice must act in accordance with that direction.

**Question 13.2: What are the record keeping requirements for written direction money?**

**Response:** The law practice must keep the written direction as part of its trust records for a period of seven years after the finalisation of the matter to which the direction relates.

A folder containing the original written direction and a copy of the endorsed cheque should be kept and a copy placed in the relevant file.

**Question 13.3 My legal practitioner friend told me that it is permissible under the Act to deposit money received on account of costs and disbursements in my practice's general (office) account provided the client's written consent is obtained. Is that correct?**

No. The Act clearly provides in Section 243(1) that money received on account of costs and disbursements is trust money.

Upon receipt, the money must be deposited into a general trust account or controlled money account in accordance with Section 254.

The client's written direction cannot change the character of the money from trust money to non-trust money. Section 260 of the Act prohibits a law practice from depositing trust money into an account with other money (e.g. a law practice general account).

## 14. CONTROLLED MONEY

**Question 14.1: What is controlled money?**

**Response:** "Controlled Money" means money received or held by a law practice in respect of which the practice has a written direction to deposit the money in an account (other than a general account) over which the practice has or will have exclusive control.

**Question 14.2: My practice was directed to hold money on behalf of a client who has directed in writing that the money is to be deposited to a controlled money account. What records are required to be maintained in respect of this account?**

**Response:** The controlled money records that are required to be maintained are:

- \* Written direction from the client in regard to the deposit and withdrawal,
- \* A controlled money receipt (clause 76),
- \* Controlled money register (clause 80),
- \* Payment record (clause 78),
- \* Record of Controlled money movements (ledger format),
- \* Controlled money listing of accounts as at the end of each month (clause 80(8)).

**Question 14.3: If controlled monies are held at the end of any given month, then how many days after month end should the controlled monies listing of accounts be prepared?**

**Response:** Within 15 working days after month end.

**Question 14.4 Controlled Money - Joint Signatories**

**During the course of a litigation matter, there are instances where the Court directs an amount in dispute to be deposited into an interest-bearing account to be operated jointly by the law practices representing the parties.**

**In the cases mentioned above the monies are held jointly by two different law practices in trust for the two parties and one of them holds the passbook. Neither can be said to have received the monies and while vendor's law practice would usually hold the passbook, this is not always the position.**

**Please advise whether and, if so, how and by whom the above monies are to be dealt with as controlled money.**

**Response:** By virtue of Section 248(1)(c) a law practice will be deemed to have received money in relation to which the practice "is given a power to deal with the money for or on behalf of another person", that is a power money account.

If the law practice (or the legal practitioner) of one party, had the right to operate on the account solely, that is, the account can be operated by either the legal practitioner's signature or the other side's practitioner's signature, that would mean that the practitioner could operate on the account independently. The money received would be considered as money subject of a power because a controlled money account must be exclusively controlled by the law practice or its associates.

In terms of recordkeeping, if the two law practices are joint signatories of the account and there is only one bank statement/passbook, the law practices can by agreement, allocate the task of recordkeeping to one law practice and ensure that the other law practice gets a copy of records at least monthly. It must be noted that an External Examiner's Report is required for power money accounts.

**Question 14.5: Can we hold controlled money in a foreign currency account?**

**Response:** Yes, provided the account is held at an ADI and the account is clearly identified as a foreign currency account in the:

- \* Controlled money receipt,
- \* Controlled money movement record (ledger), and
- \* Controlled money monthly listing of accounts.

## 15. TRUST MONEY RECEIVED IN CASH

**Question 15.1**                    **What are the requirements according to the Legal Profession Act and Regulation in relation to trust money received in cash?**

**Response:**                    ***Trust money*** (other than controlled money and money subject of a power) received in the form of cash must be deposited in a general trust account of the law practice concerned. (Section 258A(1))

If the law practice has a **written direction** by an appropriate person to deal with the trust money otherwise than by depositing it in a general trust account of the practice, the trust money must be deposited in the general trust account before it is otherwise dealt with in accordance with the direction, despite anything to the contrary in the direction.

**Controlled money** received in the form of cash must be deposited to an existing controlled money account in accordance with Section 256. If a controlled money account had not been opened as at the time of the receipt of money, the money must be deposited into the general trust account and money dealt with accordingly.

**Transit money** received in the form of cash must be deposited in a general trust account of the law practice concerned before it is otherwise dealt with in accordance with the instructions relating to the money, despite anything to the contrary in the instructions.

**Money subject of a specific power** (power money) that is received in the form of cash must be deposited in a general trust account (or a controlled money account in the case of controlled money) of the law practice concerned before it is otherwise dealt with in accordance with the power, despite anything to the contrary in the power or any relevant direction.

When a law practice receives cash in a transaction valued at AUD \$10,000 or more, it is required by the Financial Transactions Reports Act 1988 to report the transaction. The law practice must complete Form 15A reporting the relevant cash transaction and the form can be obtained by calling Austrac on 1300 021 037 or by email [help\\_desk@austrac.gov.au](mailto:help_desk@austrac.gov.au).

## 16. STATUTORY DEPOSIT

**Question 16.1**                    **How do I calculate the amount to be held in the statutory deposit account?**

**Response**                        Please refer to the Electronic Statutory Deposit Calculator published on the Law Society Website at <http://www.lawsociety.com.au/statutorydepositcalculator/>

An offline version is available to be downloaded from the above address.

**Question 16.2**                    **After doing the statutory deposit calculation, my practice cannot pay the required amount into the statutory deposit account. What can my practice do?**

**Response**                        A form titled "Request for Determination of Statutory Deposit" is available for download from the Law Society of NSW website for completion. This form should be completed and an estimate made as to whether a portion of the required statutory deposit can be made. Please ensure that you determine the amount that you consider is appropriate to be held before submitting the form the Trust Accounts Department.

## 17. EXTERNAL EXAMINER'S REPORT

**Question 17.1**                      **Who is required to have its records externally examined?**

**Response**

A law practice that is entrusted with trust money excluding transit money during the reporting period (see below) is required to prepare trust records in accordance with the Regulations. Section 274(1) of the Act requires that a law practice must have its trust records externally examined at least once each financial year and the Law Society Council have determined the reporting period to be 1 April to 31 March each year.

Clause 92 of the Regulations provides an exemption to the above, that if the only trust money received or held by a law practice is transit money, an External Examiner's Report ("Report") is not required.

If the law practice ceased to hold trust money (or ceased to engage in legal practice in NSW) during the reporting period, the practice must have its trust records externally examined and the Report lodged with the Law Society within 60 days from the date of ceasing to hold trust money or ceasing to engage in legal practice in NSW. The report must cover the period from the last external examination (which is usually 31 March) and the date of ceasing to hold trust money.

If practitioners are unsure as to whether their law practice is required to submit a Report, they should contact the Trust Accounts Department for guidance.

**Question 17.2**                      **If I was a principal of two law practices during the reporting year, do my practices have to lodge separate Reports?**

**Response**

Yes. The report is a law practice based report and if the practitioner have been principal (whether equity or salaried) of more than one law practice during the reporting period then a Report must be lodged for each law practice.

The law practice (and the practitioner) must ensure that all principals' names are included in the Reports. Any principal that left the practice during the reporting year must also be included.

**Question 17.3****Who can be appointed as an external examiner?****Response**

The Act gives the Law Society Council the power to define a class of persons who is eligible to be appointed as an external examiner of a law practice. The Law Society has determined that persons eligible to be appointed as external examiners are:

- A member of CPA Australia who holds a current public practice certificate, or
- A member of the Institute of Chartered Accountants in Australia who holds a current certificate of public practice, or
- A member of the National Institute of Accountants in Australia who holds a current certificate of public practice, or
- Registered as an auditor under Part 9.2 of the Corporations Act 2001 (Cth),

**AND**

Has successfully completed an education course required by the Law Society Council

Additionally, the Law Society Council further resolved that if a person of the above class of persons had been appointed as an external examiner (or equivalent) in another Australian jurisdiction, the person may apply to the Law Society Council to seek an exemption to complete the education course which may enable the person eligible to be appointed as an external examiner in New South Wales.

**Question 17.4****How do I locate an external examiner?****Response**

A data base of External Examiner's is available on the law Society website at [www.lawsociety.com.au/18006](http://www.lawsociety.com.au/18006). An external examiner can be located by Surname, Location or Postcode.

**Question 17.5****Do I have to notify the Law Society if I appoint an external examiner to examine my trust records?****Response**

Yes. Clause 93 of the Regulations requires the law practice to notify the Law Society in writing on each occasion it appoints an external examiner or terminates the appointment of an external examiner.

A form titled “Notification of Appointment or Termination of External Examiner” is available from the Law Society website [www.lawsociety.com.au/18461](http://www.lawsociety.com.au/18461) for completion.

**Question 17.6**                      **Who is responsible for lodging the completed External Examiner’s Report with the Law Society?**

**Response**                              The external examiner is responsible for giving a written report of the examination to the Law Society.

**Question 17.7**                      **When is the External Examiner’s Report required to be lodged?**

**Response**                              The date of submission of the External Examiner’s Report is determined by the Law Society Council. The date of submission for the Report is usually on or before 31 May each year after the reporting period.

**Question 17.8**                      **What is the role of the External Examiner and what are the reports used for?**

**Response**                              To answer this question an overview of the legislative scheme relating to the Financial Assurance Scheme in New South Wales is required. The Legislative regime to ensure that appropriate records are maintained and that the records are accurate was developed as a result of a detailed study of the Legal Profession by the Law Reform Commission. The study assessed the proposition of full audit as against some other system.

The regime adopted was that the “audit” objectives would be effectively satisfied if the functions were split between External Examiners and Law Society Trust Account Investigators.

The External Examiners were identified as being best suited to conduct yearly compliance and accuracy testing by completing an annual examination of the records and reporting on the compliance and accuracy of the records.

The Law Society Trust Account Investigators were considered best suited to test the completeness of the records by random trust account investigations.

The roles of the External Examiner and the Law Society Trust Account Investigators therefore complement each

other in a manner that ensures that each “audit” objective is satisfied by the people most capable and in the best position to do so.

If a trust account investigator detects a substantial non compliance issue then they may review the External Examiner’s checklist and/or work papers to ascertain whether or not the matters were reported or should have been reported by the External Examiners.

Therefore it is expected that the External Examiner’s Report (“the Report”) is supported by appropriate working papers that indicate:

- \* that the examination has been planned, that is; what is required to be done?
- \* the type of tests conducted to support the various sections of the checklist and the extent of the tests conducted.
- \* that the tests have been completed satisfactorily.
- \* the results have been communicated to the law practice.

It is stressed that the Report forms an integral part of the Law Society’s function in determining the appropriate routine investigation cycle to be adopted for each law practice or any other appropriate action that is deemed necessary.

The Regulations represent the minimum level of controls that should be present in a law practice’s trust money accounting system. If they are adhered to it is considered the accounting records will be reasonably reliable. However with the infinite variations in size of a law practice together with the variations in types of services offered and consequently transactions in which they are involved make, it impossible to prescribe a completely standard accounting system. The Regulation recognises this and calls upon the External Examiner to utilise their skills and determine whether additional internal controls and accounting procedures would be appropriate to the particular practice they are reporting upon and if so whether they have been implemented.

The external examiner is required to confirm the accuracy of the information completed by a principal of a law practice in the Law Practice Statutory Declaration and Trust Money Statement and provide an opinion on whether the trust records:

- \* have been properly kept in accordance with the provisions of the Act and Regulations;

- \* in a way that at all times discloses the true position in relation to the trust money received;
- \* can be conveniently and properly externally examined;

and submit this opinion to the Law Society of New South Wales.

The Law Society has been careful to ensure that it does not dictate to the accountancy profession what has to be completed in forming the above opinion. This role has been left to members of the accountancy profession.