

External Examiners Canaries in the Coal Mine 2020

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Victorian Legal Services
BOARD + COMMISSIONER



Welcome

We had hoped to get together as a group not only to give you information, but to also encourage discussion and answer your questions in person.

As we know, this isn't possible this year due to the COVID-19 health and safety restrictions. We hope this presentation can provide a valuable guide to this year's External Examination year.

Introducing the team

- **Maggie** is the manager of the Board and Commissioner's trust account function and has worked for the Board and Commissioner for 12 years.
- **Christine** is our trust account analyst and has been working for the Board and Commissioner for 23 years.
- **Chellene** is a trust advisor and has been with the Board and Commissioner for nearly 16 years. When you contact the Board and Commissioner it will be Chellene who is your first point of contact.

We refer to this presentation as **canaries** in the **coal mine** for a reason. It's a metaphor that relates to the Industrial Age of the 19th and 20th centuries when caged canaries provided miners with some advanced warning of danger. The coalminers carried a caged canary when they entered the mines to guard them against hazardous fumes.

It's a term that we use today for figurative purposes only; we rely on you to provide us with the early warning signs, indicators of trouble, or more accurately potential regulatory breaches, within the workings of a law firm. You are our eyes and ears!



Role of External Examiners

How do External Examiners support the work of the Victorian Legal Services Board and Commissioner?

- Your work helps us protect consumers and support the profession.
- You are a key investigatory link between the law firm and us.
- Your role is to help educate lawyers about the trust account rules and so help them to comply.
- Your role is also to advise our organisation about any problems with record keeping so we can decide what action to take.



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STRATEGY
A CLEAR DIRECTION

- Risk-based
- Evidence-based
- Outcome-focused
- Collaborative
- Consistent
- Independent
- Transparent
- Consumer focused

What we do with your report findings

When you upload your External Examiner Report into **LSB Online**; we look for information about whether any Rules are being breached. If we identify serious issues, we consider what else we know about the law practice and its lawyers. This may include:

- current complaints
- matters that the lawyer or their staff have self-reported
- their disciplinary history
- how they have kept trust records in the past
- their practice history
- conduct that would cause significant harm to consumers.

We engage with the law practice as needed by telephone or email and we ask for information or documents, alternatively, we may arrange for a trust investigator to attend the legal practice.

The outcome might be that everything is resolved, or we may refer the matter to the disciplinary team, put conditions on a Practising Certificate, recommend education,

or remove trust authorisation.

We sincerely appreciate your role as external examiners.



This year we will be taking a slightly different approach to the External Examination audit:

1. We are mindful of concerns in the community and considered what approach to take here. At this stage we do not think it necessary to postpone the external examinations but we will be putting in place the following alternate arrangements:
 - a) You should be doing examinations virtually given the current government emphasis on work from home wherever possible.
 - b) You should obtain records via secure email to complete the audit as best you can.
 - c) These alternate arrangements will apply to this examination period only.
 - d) That we anticipate there may be a small number of practices that cannot accommodate a virtual examination (as they have paper based systems), we will need to look at those on a case by case basis. You should contact us on trustgroup@lsbc.vic.gov.au if this situation arises.

2. We will only be following up law practices in three situations

- Where the breaches revealed in your reports can amount to either unsatisfactory profession conduct or profession misconduct. This means where:
 - a) there are dormant balances of a very high monetary value, that is over \$50k or that are older than 3 years.
 - b) no reconciliations have been completed for the whole year.
 - c) there are deficiencies or overdrawn accounts that are of concern.
 - d) the trust records are not available or not being kept.
- Where an external intervention may be required, eg: in cases of fraud, criminality, incapacity of a sole principal.
- Where the wrong doing would cause significant harm to consumers, e.g. a report of a high risk category: gambling, alcohol abuse, highly disorganized person, health impairment, other personal or professional stressors – but it could be other things.

Feedback

63% minor or no trust accounting breaches

37% identified more serious breaches

2019
Trust Year End



Feedback from 2019 Trust Year End

Of the nearly 2000 reports lodged in 2019, 63% showed only minor or no trust accounting breaches, while the remaining 37%, (750 reports) identified more serious issues. This latter figure grew by 3% on last year's total, which we attribute to both an increase in the number of reports lodged as the number of law practices increased, and to improvements in the quality of reporting by you as we continued to evolve our reporting systems.

We followed up on all reports where more serious issues were identified. Examples of the actions we took to address serious issues included:

- 7 full investigations were conducted where very serious concerns were identified;
- 3 cases where restrictions on the law practice principal's Practising Certificate were considered;
- 100 visits to practices where reports indicated a medium level of risk;
- 150 desktop audits completed by firms for less serious issues; and
- 10 cases where we recommended the lawyers engage a bookkeeper.

What to watch out for



Areas for review in 2020 will reinforce the extensive work undertaken in 2019:

- Reconciliations not done
- Unpresented cheques
- Adjustments on reconciliations
- Dormant balances – where the last transaction on the ledger is over 12 months old and not a current matter
- Monies that should have been sent to Unclaimed Monies
- Irregularities not notified to our office
- Statements not sent to clients at 30 June
- Ledger accounts in the name of the law practice (buffer accounts).

Risk-based approach



We gave you this message last year and it is still important.

Although we will not be following up on more minor breaches – we still do want you to include them in your report. Your report is received electronically so all the data is captured and may prove significant, for example in future years or where there are other problems and the reports are scrutinised more closely.

A risk-based approach means that try to focus on more serious breaches – the big fish. Try not to get bogged down or worry to much about the little fish.

All should be reported but understand some of these may be considered ‘little fish’ problems –

- Delays during January/school holidays or because of the shift to remote working practices.
- Bookkeepers not attending the office on a regular basis.
- Small balances e.g. under \$20 that can't be sent to Unclaimed Monies.
- Minor technical breaches e.g. “or bearer” on cheques.
- Registers with no transactions.

- Registers with no addresses. This has been an issue with some clients who use LEAP.
- Computerised accounting system problems.

What's on our radar?



FYI - Current issues on the radar

The following trust account issues are on the radar for the National EE Working Group:

- E-conveyancing (ELNO) – how law practices are dealing with PEXA and Sympli.
- The rules do not take into consideration recording of transactions as the law practice may not know the account number or BSB which happens when using the PEXA source account.
- Intermixing – moneys received for disbursements.
- BPAY – rules do not take into consideration BPAY transactions as they do not have an account number or BSB.
- Registers with no transactions – inconsistency between the rules in regard to registers.
- Computerised accounting systems – a number of compliant systems are recording errors.
- EE Course Review – currently underway based on feedback that the course delivery and course manual were unclear.

- Uniform Law Changes - From 1 July 2020, Western Australia will now be part of the Uniform Law.

Where the LIV fits in



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As part of the changed landscape between the VLSB+C and the LIV, the two have created consultancy services. If you feel that a practice you are examining would benefit from these – please let them know, or remind them, of the services. This is for all solicitors in Victoria – they don't have to be LIV members.

LIV Trust & Practice Management Consulting Referrals

For any queries or referrals regarding the services please use the following contacts:

Trust Consulting

E: trustconsult@liv.asn.au

T: Marco Zanon 03 9607 9447

Practice Management Consulting

E: pmconsult@liv.asn.au

T: Peter Docherty 03 9607 9447

These services are being confidential, tailored to the individual needs of solicitors and delivered by peers or experts selected based on their areas of practice management.