

# New Zealand Law Society

## Submission on Anti-money Laundering and Countering Financing of Terrorism Bill

### Introduction

1. The New Zealand Law Society (NZLS) has engaged with government throughout the last few years with respect to the various stages of the development of the Bill, including providing detailed submissions on the Ministry of Justice's discussion paper *Money Laundering and New Zealand's Compliance with FATF Recommendations* in 2005, and further submissions with respect to the *Draft Anti-Money Laundering and Countering Financing of Terrorism Bill* released in 2008.
2. The Society continues to support the broad principles behind the Bill. It recognises, and is supportive of, the need to bring New Zealand's anti-money laundering and counter financing of terrorism (AML/CFT) regulatory regime into line with international standards. Additionally, the NZLS acknowledges the short-comings that have been present in the present regime, and is supportive of moves to strengthen the law in this area.
3. However, the Society has some concerns regarding the way in which the Bill presently sits, and those concerns, together with comments regarding matters arising in the Bill, are presented below.
4. This submission relates to eight topics:
  - Implementation of the Bill;
  - Definition of "Reporting Entity" and "Designated Non-Financial Businesses and Professionals" (DNFBPs);
  - Designation of Ministry (and Minister) responsible for administration of the new regime;
  - Beneficial ownership and reliance on another reporting entity's CDD;
  - Personal liability for senior managers;
  - Inclusion of civil and criminal immunity provisions;

- Inclusion of new powers for the Commissioner; and
- On-site inspections, “dwelling houses” and “marae”.

### **Implementation of the Bill**

5. NZLS understands that the Bill is intended to be the first tranche of new AML/CFT legislation, with a 2-year implementation period, post enactment. It is also understood that the idea of a trial, or non-prosecution, period similar to that implemented in Australia is not favoured. This gives rise to a number of concerns.
6. First, organisations that will be captured by tranche two of the legislation (such as lawyers, accountants, and real estate agents) may not have an opportunity to engage fully on their inclusion in the AML/CFT regime, if all that occurs is that the definition of “reporting entity” is widened to include them at the appropriate time.
7. Secondly, there is concern that a 2-year implementation period, post enactment, may not provide those organisations who are captured by the Bill (tranche one of the new regime) sufficient time to develop, implement and test, the new AML/CFT processes and procedures they will be required to implement. The concern in this regard is heightened by the apparent desire to make the implementation period run from the passage of the Bill, notwithstanding that the drafting of the regulations and guidelines will take some considerable time.
8. Finally, the relatively tight implementation timeframe proposed, and the likely absence of any non-prosecution grace period, will mean there will be little room for the Bill’s provisions to be assessed from a ‘workability’ point of view, post enactment. This, coupled with the nominal opportunity for tranche two organisations to submit in relation to the mechanics of their inclusion in the regime, means that there will likely be little analysis of the workability of the new regime once it is enacted.

### ***Recommendations***

9. That the 2 year implementation period run from the date the regulations are made effective by Order in Council, rather than the date upon which the Bill receives the Royal Assent.

10. That a formal review of the Bill be scheduled 18 to 24 months post-enactment. Although this review will likely occur after the introduction of tranche two organisations to the regime, it will nevertheless provide a guaranteed forum for the workability of the new regime to be examined, in the light of the operational experience developed over the first two years of the regime's operation, and will provide tranche two organisations with a chance to make submissions on the broader structure of the regime as well as to their inclusion in it.

### **Definitions of "Reporting Entity" and "DNFBPs"**

11. The Bill has been drafted to require "reporting entities" to undertake comprehensive customer due diligence (CDD) and to have an AML/CFT programme in place to help deter and detect money laundering and financing of terrorism. The definition of a reporting entity in clause 4 includes a financial institution, a casino, or any other person who is required to act as if it were a reporting entity.
12. As noted above, it is understood that the intention of Parliament is for the Bill to apply only to financial institutions and casinos as outlined in the definition of "reporting entity" in the first instance (tranche one of the new regime). It is the second tranche of the new regime which is intended to apply to further entities, including lawyers, accountants, and real estate agents. These proposed second tranche organisations are often referred to as Designated-Non Financial Businesses and Professionals (DNFBPs).
13. In the light of Parliament's intention, the definition of "financial institution" (and with it, "reporting entity") should not be open to an interpretation that includes legal professionals, or indeed any other DNFBP. However, at present the definition of "financial institution" includes a person who, in the ordinary course of business carries out a list of defined financial activities. The list (i) to (xii) contains activities such as "accepting deposits or other repayable funds from the public", "transferring money or value, for, or on behalf of a customer" and "investing, administering or managing funds or money on behalf of other persons". It is likely that solicitors operating trust accounts or solicitor nominee companies would fall under one or more of these listed financial activities. Trust accounts are operated in the majority of solicitor's firms across New Zealand and the purpose of them is to manage client's money and apply it to legal fees or other disbursements in the course of the solicitor-client relationship.

14. There is concern that other DNFBPs may also be captured by the present wording of the Bill. Such a result is undesirable, as the clear message which has been sent to all DNFBPs is that they will not be included in tranche one of the new AML/CFT regime. Accordingly, the Bill should be amended (or regulations drafted) to ensure that DNFBPs are not caught under the definition of “reporting entity”.

### ***Recommendations***

15. That a definition of Designated Non-Financial Businesses and Professionals be included in clause 4 of the Bill, expressly identifying lawyers, accountants, real estate agents, and other groups whom the Committee considers should be expressly excluded as reporting entities from tranche one of the regime.
16. That the definition of “financial institution” in clause 4 be amended to expressly exclude DNFBPs.

### **Designation of Ministry (and Minister) responsible for administration of the new regime**

17. Clause 4 of the Bill contains a definition for both “Minister” and “Ministry”. However, at present no particular Minister or Ministry has been placed in charge of enforcing and regulating the Bill. It would be desirable for this matter to be formally addressed, so that there is transparency as to which Ministry (and Minister) is responsible for the Bill moving forward.
18. Under the current legislative framework, and in the light of the work which has been done to date in developing and implementing the Bill, it is assumed that the Minister of Justice would be the most likely candidate to fill the role of Minister responsible. In particular, the Minister of Justice has produced the July 2009 Background Information Document and is also the Minister in charge of the Crimes Act 1961, the Proceeds of Crime Act 1991 and the Terrorism Suppression Act 2002. Furthermore, it appears that the Ministry of Justice has assumed the lead agency role throughout the development of the Bill in many respects.

### ***Recommendation***

19. That the Ministry of Justice, and the Minister of Justice, be designated as responsible for the Bill.

**Beneficial Ownership, and Reliance on another Reporting Entity's CDD**

20. Clause 14 (standard customer due diligence) and clause 22 (enhanced customer due diligence) will both require reporting entities to identify where someone is a beneficial owner of funds.
21. Although clause 4 provides some definition to the phrase “beneficial owner”, there is concern that the combined effect of clauses 4, 14 and 22 is unreasonably onerous on solicitors, and on the reporting entities with whom they operate trust accounts.
22. The present wording of clause 4 may lead reporting entities to a view that they are required to ascertain customer information for all of a solicitor’s clients for whom that solicitor passes monies through their solicitor’s trust account. In circumstances where solicitors are not a reporting entity (which will be the case until tranche two of the regime is implemented), such a view will require the reporting entity to undertake its own CDD of the solicitor’s clients. Such an outcome will be unwieldy, and unworkable, as the number of clients for whom a solicitor may transact is potentially quite significant.
23. A second concern is the apparent absolute nature of the obligation to obtain information as to beneficial ownership (subject only to an “effective control” or “threshold” proviso). As noted in previous submissions prior to the drafting of the Bill, the onus on obtaining information as to beneficial ownership should not be absolute – but rather tied to what a reasonably prudent solicitor would do in all of the circumstances. The reality is that solicitors routinely deal with a wide range of complex entities in terms of ownership and management. An unqualified obligation to identify all parties meeting the “effective control” or “threshold” tests who are related to a particular transaction is likely to be time consuming, costly, and unworkable in practice, particularly when it comes to dealings involving companies and trusts.

***Recommendations***

24. That reporting entities be exempt from undertaking CDD in relation to customers whose funds are being transacted through a solicitor’s trust account.

25. That the “threshold” set for determining beneficial interest under the clause 4 definition be set by regulations at a level equal to that set in Australia (25%).
26. That the obligation to identify beneficial owners of funds be limited to an obligation to take all of the prudent steps that a professional in all the circumstances the reporting entity in question finds themselves in would take.
27. The NZLS recognises that until such time as solicitors are brought into the new AML/CFT regime in tranche two, the recommendation above will continue to provide a blind-spot, whereby solicitors’ customers are not subject to comprehensive, mandatory, CDD. However, the Society fails to see how reporting entities can effectively manage such CDD obligations themselves, given that solicitors are not yet “reporting entities”, and one cannot rely on a third-party non-reporting entity’s CDD of its customers.

#### **Personal Liability for Senior Managers**

28. The Bill creates new criminal and civil liability provisions which apply to individuals who are “senior managers” of an organisation which fails to comply with its obligations. These are “Public Welfare Regulatory Provisions” (otherwise known as strict or absolute liability provisions) and create liability in situations even where the individual concerned had no intention to commit the action or omission at issue.
29. The passing of new liability provisions of this kind is desirable only in circumstances where there is no other way in which the conduct with which we are concerned can be dealt with. This is because liability under criminal law (in particular) should generally arise only where the individual concerned acted, or omitted to act, with intent. Society refrains from holding people criminally liable unless they acted wilfully.
30. The Society is concerned that deterrence and motivation for compliance with the requirements of the Bill can be generated without the need for these provisions and, accordingly, opposes their introduction. Specifically, it considers that so long as reporting entities themselves face considerable penalties should they fail to comply with the regime, then there is no need for strict or absolute liability provisions which could result in criminal consequences for individuals.

31. It is noted that such provisions are not required for compliance with FATF guidelines, and go beyond the liability regime implemented in Australia.

***Recommendation***

32. That the Bill's provisions creating liability for senior managers for their organisations' non-compliance with the regime be deleted.

**Inclusion of civil and criminal immunity provisions**

33. Both the current AML/CFT regime, and the new regime, put significant emphasis upon reporting entities to act as the eyes and ears of regulatory agencies. They are effectively the front line in the fight against money laundering and the financing of terrorism.
34. That said, reporting entities receive little by way of protection for their actions under either regime. For example, a bank which identifies suspicious transactions proceeding through a customer's account may file a suspicious transaction report, and will receive protection in relation to the filing of the same, but they are left caught as to what action they take next. If they wrongly freeze a customer's account they can be sued by the customer for failure to follow the customer's instructions, while if they wrongly allow the transactions to continue, they can be held criminally liable.
35. A more sophisticated regime, including allowance for civil and criminal immunity provisions, would be appropriate. Together with new powers for the Commissioner of Police (which are covered in paragraphs 37 to 41), such changes could make a positive difference for good corporate citizenry behaviour.

***Recommendations***

36. That provisions be included in the Bill, allowing for:
- reporting entities to have immunity from civil liability where they act *bona fide* to uphold a provision of the Bill; and
  - reporting entities to be immune from criminal prosecution where they notify their regulator of an action they wish to take which is potentially in breach of the Bill, and where the regulator does not prohibit them from so acting.

### **Inclusion of new powers for the Commissioner**

37. As noted above, NZLS considers that there is a role to play for the regulators to interact with reporting entities, in situations where a reporting entity may wish to carry out a transaction which it believes may be in breach of the Bill.
38. In the United Kingdom (and other jurisdictions) such provisions apply, allowing for certainty as to proposed actions.
39. However, for such a provision to work, the regulators (and in particular the Commissioner of Police) would require new powers enabling them to instruct reporting entities to freeze accounts, and to take certain actions, following the filing of an STR, or in other circumstances known to the regulator.

### ***Recommendations***

40. That the Commissioner of Police be empowered under the Bill to direct a reporting entity to take, or cease to take, certain action in relation to an account or a transaction, where the Commissioner has grounds to believe that the proceeds of crime may be involved in the transaction.
41. That a right of review of the Commissioner's decision be provided to any affected party, such right being exercisable by means of judicial review in the High Court.

### **On-Site Inspections, "Dwelling Houses" and "Marae"**

42. The provisions of clause 130, allowing for on-site inspections by AML/CFT supervisors, exclude the ability to enter a private dwelling or Marae. It is assumed that the distinction between private dwellings and Marae on the one hand, and other premises on the other hand, equates to a deference to the sanctity of private homes and Marae.
43. Recognising that the distinction has precedent in other areas of the law (for example, under the *Tax Administration Act* where the Commissioner of Inland Revenue is required to seek a judicial warrant for entry on to private dwellings in certain circumstances, yet can simply exercise a statutory power to enter business premises),

there is concern that on its face there appears to be no simple way for an AML/CFT supervisor to obtain permission to enter a private dwelling or Marae should that be necessary.

***Recommendation***

44. That the Bill be amended to provide that the AML/CFT supervisor has the power to obtain, by way of an inspection warrant from a District Court Judge, permission to enter upon premises that are private dwellings or Marae to carry out inspection duties under the regime.

**Conclusion**

45. The Society supports the passage of the Bill. In particular, it recognises the importance of this Bill to bring New Zealand in line with international standards.
46. However, the Society does have some concerns, and those have been noted above.

John Marshall QC

President

24.8.09