



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Anti-Money Laundering and Countering Financing of Terrorism Amendment Bill

20/04/2017

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1. Introduction

- 1.1 The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the Anti-Money Laundering and Countering Financing of Terrorism Amendment Bill (Bill).
- 1.2 The Law Society accepts that the New Zealand legal profession is not immune from the mischief which the AML/CFT regime is designed to deter and detect and that the legal profession has a responsibility to co-operate in the global response to money laundering and terrorist financing.
- 1.3 At the same time, there is a significant tension between the obligations of lawyers to their clients, the traditional lawyer-client relationship and the role of lawyers as trusted advisers and their role as informants under the new regime.
- 1.4 While the Law Society supports the aims of the Bill, it is concerned about the impact of the proposed implementation date for lawyers, and a number of other practical issues that the Bill raises.
- 1.5 The Law Society's submissions are set out below and address the following issues:
 - 1.5.1 Timing of Phase 2 for the legal profession
 - 1.5.2 Other persons and entities providing legal services
 - 1.5.3 Definition of designated non-financial business or profession
 - 1.5.4 Definition of law firm
 - 1.5.5 Definition of high-value dealers
 - 1.5.6 Supervisor
 - 1.5.7 Suspicious activity reports
 - 1.5.8 Reliance on other reporting entities or persons in another country.

2. Timing of Phase 2 for the legal profession (Clause 6 – Application of Act to reporting entities)

- 2.1 The Bill provides that the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (Principal Act) will apply to a law firm, a conveyancing practitioner, or an incorporated conveyancing firm not later than 1 July 2018, to an accounting practice not later than 1 October 2018, to a real estate agent not later than 1 January 2019, and to the New Zealand Racing Board or high-value dealer no later than 1 August 2019 (proposed section 6(2)(a)).
- 2.2 The Law Society's view has particular regard to the number of law firms that will need to set up new systems and processes. The Law Society recommends that the Phase 2 lead-in period should be at least the same as for real estate agents. During the lead-in period, lawyers will continue to be subject to their existing obligations under the Financial Transactions Reporting Act 1996 of identity verification, record keeping and reporting of certain suspicious transactions. Further, under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 a lawyer must not assist any person in an activity that the lawyer knows is fraudulent or criminal and must not knowingly assist in the concealment of fraud or crime.
- 2.3 Reasons for the Law Society's recommendation include the following:
 - (a) Unlike banks, insurers, casinos, and other financial institutions which are well-resourced with compliance teams due to their prudential or other requirements, lawyers (including even the largest commercial law firms) are not currently resourced to

prepare for and implement compliance on the scale required by the proposed AML/CFT reforms.

- (b) There is likely to be a shortage of compliance experts with AML/CFT experience available to the New Zealand market. Accordingly, the ability of the legal services sector to hire external compliance expertise will be limited.
- (c) It is understood that even the most sophisticated and well-resourced Phase 1 reporting entities found it challenging to implement their AML/CFT compliance processes within the two-year period they were afforded. For many, compliance is still being developed.
- (d) As lawyers are not currently resourced or experienced in AML/CFT compliance the legal services sector will have to develop capability in existing staff and systems from scratch. This will involve:
 - i. ensuring the relevant staff have an in-depth understanding of the AML/CFT Act, the regulations and the existing guidance, in addition to the new reforms;
 - ii. implementing appropriate internal systems and training across the firm or practice;
 - iii. liaising (where applicable) with the firm's risk committee and board;
 - iv. factoring the cost of the new systems, and any additional compliance staff hired, into financial planning and budgeting;
 - v. liaising with insurers as to the impact of civil liability penalties on professional indemnity policies; and
 - vi. as a profession, developing a dialogue with the sector's AML/CFT supervisor, once the supervisor is appointed.
- (e) Since the AML/CFT regime is principles-based, it will be important that applicable regulations, codes and guidance on Phase 2 are available well in advance of the effective date for compliance.

- 2.4 The Law Society does not consider there is a case for Phase 2 applying to the legal profession in advance of any of the other occupations. It is submitted that if anything, Phase 2 should apply to other occupations in advance of lawyers.
- 2.5 Lawyers are already subject to a number of unique ethical and legal duties as a result of their role within the justice system, the rules they must adhere to and the work they undertake. Clients of lawyers (unlike those of any other occupation groups) have the benefit of legal professional privilege. It is generally accepted that legal professional privilege is an important element in a democracy.
- 2.6 Reconciling lawyers' obligations under Phase 2 with lawyers' ethical duties and legal professional privilege is, to say the least, challenging. This issue is unique to the legal profession and careful consideration and guidance as to how lawyers will balance their ethical duties with their AML/CFT obligations is required.
- 2.7 The Law Society considers that the availability of the regulations still to be developed will be essential to any business developing procedures to ensure that they meet their obligations under the Principal Act. A longer implementation period will allow this essential work to be done.

Recommendations

- That other occupation groups should become subject to Phase 2 in advance of the legal profession; and
- That the implementation date in proposed new section 6(2)(a) of the Principal Act should be **not earlier** than 1 January 2019.

3. Other persons and entities providing legal services

- 3.1 Clause 6 of the Bill does not specify when the Principal Act would apply to persons or entities other than those referred to, namely lawyers, conveyancers, accountants, real estate agents, NZ Racing Board and high-value dealers.
- 3.2 A growing number of services under the general heading of legal work may be carried out by non-lawyers. The only legal work that may be undertaken exclusively by lawyers is defined in section 6 of the Lawyers and Conveyancers Act 2006 – the ‘reserved areas of work’. As the consulting/services sector continues to develop, there will be an acceleration of the current trends under which a growing range of unregulated legal work service providers develop an ever wider range of specialties under labels such as ‘compliance’ and ‘transaction support’.
- 3.3 Accordingly, most of the activities set out in clause 5 of the Bill may be carried out by non-lawyers.
- 3.4 Persons seeking to avoid the checks and other compliance measures required by Phase 2 could well become aware of this position and instruct non-lawyers in relation to their activities.

Recommendation

- That the AML/CFT Act should also apply to persons and entities providing services as set out above, and at an earlier rather than later date.

4. Definition of designated non-financial business or profession (Clause 5 – Section 5 amended (interpretation))

Activities

- 4.1 The scope of services provided by lawyers which will come within the AML/CFT Act is set out in the definition of ‘designated non-financial business or profession’ in clause 5 of the Bill.
- 4.2 It is crucial that the legislation clearly defines the activities to which it applies. The definition of ‘designated non-financial business or profession’ refers to “giving instructions” (at (a)(vi)). It should be made clear that this refers to a law firm giving instructions to a third party, if this is what is intended.
- 4.3 There will be real, practical difficulties in complying with a regime that applies to so many commonplace activities. Difficult judgement calls may have to be made in a very short space of time, where the effect of slowing or stopping the progress of a transaction will have significant economic consequences.

Recommendation

- That the definition of ‘designated non-financial business or profession’ (at (a)(vi)) be amended to make it clear that this refers to a law firm giving instructions to a third party, if this is what is intended.

- 4.4 In addition, the Law Society understands that in the definition of ‘designated non-financial business or profession’, the activities set out in subparagraphs (i) to (vii) are to qualify all of the occupation groups referred to and not just a trust and company service provider. The provision needs amendment to make this clear.

Recommendation

- That in the definition of ‘designated non-financial business or profession’ a comma should be inserted after ‘trust and company service provider’.

Barristers

- 4.5 The definition of ‘designated non-financial business or profession’ in clause 5(1) of the Bill includes a lawyer. ‘Lawyer’ has the meaning given to it by section 6 of the Lawyers and Conveyancers Act 2006.
- 4.6 That Act defines ‘lawyer’ as a person who holds a current practising certificate as a barrister or as a barrister and solicitor. Accordingly, a barrister can come within the definition of a designated non-financial business or profession. It follows that a barrister will be a reporting entity under the Bill.
- 4.7 Barristers sole may consider that they should be exempted from the definition of ‘designated non-financial business or profession’ or excluded by regulations under clause 5(1)(c) of the Bill. Some arguments in support of this view would be as follows:
- Barristers do not have trust accounts.
 - Unlike each of the other listed occupation groups, barristers are unable to receive or hold money or other valuable property on behalf of anyone.
 - They may not practise as a solicitor or carry out transactional aspects of conveyancing.
 - They may not practise in partnership and may only practise as a sole practitioner or sole director of an incorporated barrister’s practice. Many barristers do not employ anyone. Complying with all the Phase 2 requirements could be very onerous for them.
 - Most barristers do not in the ordinary course of business carry out any of the listed activities set out in the definition of ‘designated non-financial business or profession’.
 - In many cases barristers have an instructing solicitor who will be a reporting entity and will have carried out the due diligence requirements of the AML/CFT Act.
 - Barristers, like other lawyers, must not assist a client in an activity that the barrister knows is fraudulent or criminal, must not knowingly assist in the concealment of fraud or crime, and must disclose confidential information which relates to the anticipated or proposed commission of a crime punishable by imprisonment for three years or more.

5. Definition of law firm (Clause 5 – Section 5 amended (interpretation))

- 5.1 Sub-part (a) of the definition of ‘designated non-financial business or profession’ refers to a law firm. ‘Law firm’ is further defined as:
- (a) a barrister and solicitor practising on own account:
 - (b) in relation to 2 or more lawyers practising on the barrister’s or solicitor’s own account:
 - (c) an incorporated law firm.

- 5.2 This appears to be intended to distinguish barristers and other lawyers in sole practice from lawyers practising in partnership. However, each of the partners in a partnership is practising on his or her own account and each will be captured by this definition.
- 5.3 The Law Society suggests that sub-part (a) be amended to read “a lawyer in sole practice on his or her own account”. This proposed amendment will ensure that partners are addressed only in part (b) of the definition.

Recommendation

- That subparagraph (a) of the definition of ‘law firm’ be amended to read “a lawyer in sole practice on his or her own account”.

6. Definition of high-value dealers (Clause 5 – Section 5 amended (interpretation))

- 6.1 The definition of ‘high-value dealer’ is very wide. It refers to “a person who is in trade and in the ordinary course of business buys or sells ... by way of a cash transaction or a series of related cash transactions if the total value ... is equal to or above the applicable threshold value.”
- 6.2 For many of the businesses that fall within the definition of high-value dealer, a high value transaction may well be unusual. The definition of “high value dealer” would be improved if it included assessment criteria to identify when a business should identify itself as a “high value dealer”.
- 6.3 Standard customer due diligence requirements should be restricted to suspicious activities or cash transactions above the relevant prescribed transaction level only. On the current definition, this is not clear.

Recommendation

- That the definition of ‘high value dealer’ include assessment criteria to identify when a business should identify itself as a ‘high value dealer’.

7. Supervisor (Clause 36 – Section 30 amended (AML/CFT supervisors))

- 7.1 Clause 36 provides that for designated non-financial businesses or professions and high-value dealers, the Department for Internal Affairs, or another AML/CFT supervisor prescribed for the purpose, is the relevant AML/CFT supervisor.
- 7.2 The Law Society considers it is well placed to develop very quickly the necessary experience in AML/CFT supervision and has the capability to do this very effectively. The Law Society is thoroughly familiar with all aspects of the legal profession and understands the unique features of the legal profession and the practice of law.
- 7.3 The Law Society has a very competent inspectorate which carries out on-site inspections of law firms that operate trust accounts using a risk-based approach (based on the AS/NZ ISO 31000 2009 Risk Management Standard). Its function could readily be expanded to include AML/CFT supervision matters, in a manner which would be much more efficient and cost effective than could be achieved by a separate supervisor.
- 7.4 Neither the Law Society nor the legal profession wish to see dual regulation of the profession. This would increase compliance costs which would ultimately be borne by consumers of legal services.
- 7.5 Under section 65 of the Lawyers and Conveyancers Act 2006, one of the functions of the Law Society is to control and regulate the practice by lawyers of the profession of the law. Also, under section 65, the Law Society is required to uphold the fundamental obligations imposed on

lawyers which include the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand.

- 7.6 As required by the Lawyers and Conveyancers Act, the Law Society maintains a complaints and discipline system, a Register of all lawyers, manages the Lawyers' Fidelity Fund, and carries out numerous other regulatory functions, which places it in a unique position to supervise the legal profession in AML/CFT matters. It has a clear, well-functioning communication channel to all lawyers.

Recommendation

- That the Law Society should be prescribed as the supervisor for the legal profession pursuant to proposed new section 130(1)(c) of the Principal Act.

8. Suspicious activity reports (Clause 18 – Subpart 2 of Part 2 replaced)

Protection of persons reporting suspicious activities (proposed new section 44)

- 8.1 Under proposed new section 44(2) of the Principal Act, a lawyer who reports a suspicious activity is protected from civil, criminal or disciplinary proceedings in respect of the report unless the information was disclosed in bad faith.
- 8.2 Having regard to the significance of legal professional privilege, the Law Society questions the protection from disciplinary proceedings where a lawyer acting other than in bad faith chooses to release privileged information. In the event that the lawyer is not obliged to, there would not seem to be any reason why the lawyer should be exempted from the complaints and disciplinary procedures of the Lawyers and Conveyancers Act in cases raising conduct concerns.

Recommendation

- That proposed section 44(2) should be amended by omitting the reference to disciplinary proceedings when the person concerned is a lawyer.

Reporting suspicious activity (proposed new section 40)

- 8.3 Proposed new section 40(3) of the Principal Act would require a reporting entity to report an activity 'as soon as practicable but no later than three working days after forming its suspicions'.
- 8.4 A difficulty with this provision is that the expression 'forming its suspicions' is imprecise. A lawyer may consider that a matter may amount to a suspicious activity, but may wish to take advice and/or make further enquiries before deciding whether it crosses the threshold and amounts to a suspicious activity. Further, it is submitted that three working days could in many cases be an unduly short period to prepare what may be a time-consuming suspicious activity report. A lawyer may need to give careful consideration to precisely what information should be disclosed in the report, including whether any privileged information should be disclosed. It may be necessary for the lawyer to take independent legal advice.

Recommendation

- That proposed new section 40(3) is amended by:
 - (a) substituting "after concluding that a matter constitutes a suspicious activity" for "after forming its suspicions"; and
 - (b) substituting a seven working day requirement rather than three working days.

Legal professional privilege (proposed new section 42)

- 8.5 The amended definition of 'privileged communication' in proposed section 42 now provides that a communication is not a privileged communication "if there is a prima facie case" that the communication is made (etc) for a dishonest purpose or to enable or aid the commission of an offence (proposed section 42(2)(a)). Currently, the Act excludes communications that are not made (etc) for any of such purposes.
- 8.6 This amendment to the Bill appears to be intended to incorporate the provisions of section 67 of the Evidence Act 2006, under which a Judge must disallow a claim to privilege if the "prima facie case" threshold is met. It is important to recognise, however, that a Judge will not disallow a privilege under section 67 without a proper consideration of the evidence and hearing from the affected parties. A lawyer operating under the regime created by the Bill may well have less information on which to make the assessment.

Recommendation

- That proposed section 42(2)(a) be amended from "if there is a prima facie case" to "if it is reasonable for the lawyer to believe there is a prima facie case".

Compliance

- 8.7 The AML/CFT regime will involve additional compliance costs, particularly for small and medium sized law firms. It would be useful if the AML/CFT supervisor could proactively provide training and education to enable reporting entities to minimize their compliance burden.
- 9. Reliance on other reporting entities or persons in another country (Clause 15 – proposed new section 33(3A))**
- 9.1 Additional complexity arises in relation to instructions from foreign law firms to provide advice on behalf of that firm's clients. These instructions may involve no transfer of funds or assets. It would be difficult for New Zealand law firms to undertake due diligence on the foreign law firm or the underlying client in most cases.

Recommendation

- That instructions from a foreign law firm to provide advice on behalf of that firm's client be excluded from the scope of the legal services regulated by the Bill to the extent the instructions came from a law firm operating in a jurisdiction with a comparable AML/CFT regime.

10. Conclusion

10.1 The Law Society would welcome an opportunity to be heard in support of its submission.

A handwritten signature in black ink, appearing to be 'K. Beck', written in a cursive style.

Kathryn Beck
President
20 April 2017