

17 February 2017

AML/CFT Consultation Team
Ministry of Justice
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By email: aml@justice.govt.nz

AML/CFT Phase 2 reforms - Exposure Draft Bill - supplementary submission

The New Zealand Law Society has identified some further concerns in relation to the Exposure Draft Bill (**Exposure Draft**). The following submissions are supplementary to the Law Society's submissions dated 27 January 2017.

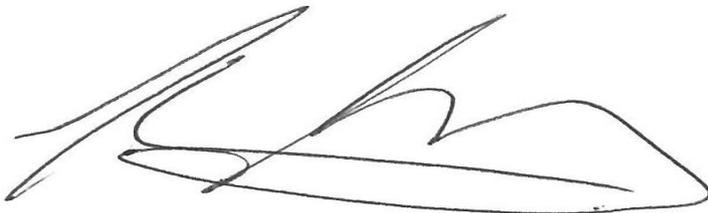
- 1 The Law Society is concerned at the broad definition of “designated non-financial business or profession” (**DNFBP**) in the Exposure Draft, insofar as it applies to lawyers. Every lawyer who in the ordinary course of business carries on any of the listed activities would come within the definition, and accordingly would be a reporting entity under section 5 of the principal Act.
- 2 There are three categories under which a lawyer may practise:
 - a on his or her own account (this includes partners in a non-incorporated law firm, lawyer directors and shareholders in an incorporated law firm, and lawyers in sole practice);
 - b as an employee of a law firm;
 - c as an employee of a non-lawyer (in-house lawyers).
- 3 The Law Society submits there is a strong case for exempting from the definition of DNFBP lawyers who are employees of law firms or non-lawyer entities. Staff lawyers are under the direction and supervision of their employer and it would seem inappropriate to impose directly on them the obligations contained in the Act, including the requirements to:
 - a formulate a risk assessment which complies with section 58 of the Act;
 - b develop an AML/CFT programme with a compliance officer;
 - c appoint a compliance officer;
 - d review the above programmes;
 - e have the compliance arrangements audited when requested by the supervisor;
 - f make suspicious activity reports directly to the FIU and retain copies of these and other specified records.

- 4 In virtually all cases it would be entirely impractical for a staff lawyer to comply with the above requirements. Instead, these should be complied with by the employer if the employer is a DNFBP. In the case of in-house lawyers this position was endorsed in the August 2016 consultation paper (at page 13), where it was noted that “there is no intention to capture activities of businesses’ in-house lawyers, as they do not provide services to external clients”.
- 5 Further, the Law Society submits that each law firm (whether incorporated or unincorporated) should be responsible for complying with the requirements set out in paragraph 3 and that this should satisfy the obligations of the individual lawyer principals in the law firm (whether partners or, in the case of an incorporated law firm, directors or shareholders).
- 6 It would be entirely unsatisfactory to require each individual lawyer partner in an unincorporated law firm and each lawyer director/shareholder in an incorporated law firm to make individual arrangements and assume responsibility for all the requirements set out in paragraph 3 above. These should be undertaken by the law firm itself.
- 7 Finally, under clause 5(1)(a) of the Exposure Draft, an incorporated law firm is a DNFBP, but an unincorporated law firm is not. Whilst it is acknowledged that an unincorporated law firm does not in law constitute a separate entity from its partners, nevertheless the definition of DNFBP could be expanded to include a partnership of lawyers. This would mean that for AML purposes law firms are treated in the same way, whether they are incorporated or unincorporated.

It is relevant that clause 42(3) of the Exposure Draft states that for the purposes of the definition of “privileged communication” references to a lawyer include a firm in which the lawyer is a partner.
- 8 The Law Society submits that the above matters would best be addressed by appropriate amendments to the Exposure Draft. The Law Society would be happy to provide assistance in drafting the amendments.

If you would like to discuss the above, please contact the Law Society’s General Manager Regulatory, Mary Ollivier (mary.ollivier@lawsociety.org.nz).

Yours faithfully

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

Kathryn Beck
President