New Zealand Law Society
Te Kāhui Ture o Aotearoa

Anti-Money Laundering and Countering Financing of Terrorism Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

28 March 2025

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**the Law Society**) welcomes the opportunity to comment on the Anti-Money Laundering and Countering Financing of Terrorism Amendment Bill (**the Bill**).

1.2 The Bill proposes amendments to the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (**the Act**). The amendments are aimed at providing regulatory relief for reporting entities, as well as clarifying existing obligations. The Law Society supports these aims.

1.3 This submission has been prepared with input from both the profession and the Professional Standards group within the Law Society.

2 General comment

2.1 The Law Society supports efforts to refocus AML/CFT obligations within a risk-based approach and to provide regulatory relief and additional clarity – without undermining the integrity of the AML/CFT regime. We acknowledge that further reform is intended as a part of workstream three within the AML/CFT work programme approved by Cabinet.[1]

2.2 This work is of importance to the legal profession and consumers of legal services. As noted in the 2024 National Risk Assessment, in 2022-2023 there were 1267 reporting entities in the law firm and conveyancing sector.[2] The legal sector is therefore widely impacted by AML/CFT regulation, though money movement across the sector is significantly less than that of the largest sector, banking. The sum gross value of transactions for bank is around 1500 times larger than that of law firms and conveyancers.[3]

2.3 This is a sector facing increasing costs. In 2024, the Law Society released a report on the costs of running a legal practice in New Zealand.[4] Prepared by KPMG, the report used the financial data of over 100 practices to identify the operational costs and challenges associated with running a legal practice. The report showed that in the last three years alone, the cost of running a legal practice has increased by 15.3% *each year*. These costs must necessarily be recovered (so far as is possible) from consumers.

2.4 Most legal practices are small businesses. For sole practitioners, and small–medium law firms, AML/CFT compliance was raised as a significant operational challenge. AML/CFT costs for sole practitioners increased by 35.4% over the last three years. That figure was 22.9% for small firms, and 172.9% for medium firms. Around 14% of respondents indicated that a reduced compliance burden would make the greatest difference for their business operations. Of these, most comments related to AML/CFT obligations.

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1 Cabinet Minute ECO-24-MIN-0220, 25 September 2024.

2 New Zealand Police Financial Intelligence Unit, National Risk Assessment (2024), https://www.police.govt.nz/sites/default/files/publications/fiu-nra2024.pdf, at 12.

3 *Ibid*.

4 The full report is available on our website: https://www.lawsociety.org.nz/assets/Cost-of-practice-survey/Law-Society-Costs-of-Practice-Report.pdf

2.5 Reform of the AML/CFT regime therefore has the potential to significantly impact reporting entities in the legal sector. In the 2021 statutory review of the Act, the Law Society outlined the experience of lawyers since implementation of the regime, and recommended consideration of where obligations could be appropriately reduced. The Law Society recommended that a cost/benefit analysis be undertaken.

2.6 While that does not appear to have been done, the need remains. We have received feedback from lawyers that while the cost of compliance is significant for both lawyers and clients, the prescriptive 'tick box', form-driven regime seems unlikely to capture any serious fraudulent or money laundering conduct, nor the funding of terrorism. We reiterate here the need for a comprehensive understanding of the compliance costs and benefits to inform future reform.

3 Definitions: clause 4

3.1 Clause 4 proposes to amend several of the definitions contained within section 5(1) of the Act. The Law Society has concerns about the proposed amendments to the definitions of 'beneficial owner' and 'designated non-financial business or profession' (**DNFBP**).

Beneficial owner

3.2 Currently, the Act defines a beneficial owner as 'the individual who' –

> *(a) has effective control of a customer or person on whose behalf a transaction is conducted; or*
>
> *(b) owns a prescribed threshold of the customer or person on whose behalf a transaction is conducted.*

3.3 Clause 4(1) of the Bill proposes to add to this definition, so that it includes an individual:

> *(i) with ultimate ownership or control of the customer, whether directly or indirectly; or*
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> *(ii) who, is a customer of a customer, and on whose behalf the transaction is conducted, but only if the individual meets the requirement set out in subparagraph (i).*

3.4 The Law Society acknowledges this drafting is consistent with the amendments made to the Anti-Money Laundering and Countering Financing of Terrorism (Definitions) Amendment Regulations in 2023 (**definitions Regulations**).[5] The Ministry of Justice consulted on those changes in February 2023, noting that:

> *The current definition of beneficial owner poses challenges for businesses and the regime overall. It does not include a person with "ultimate ownership or control". This may lead to certain persons not being identified as beneficial owners that should be, which means that businesses may not fully appreciate the risks*

5 Anti-Money Laundering and Countering Financing of Terrorism (Definitions) Amendment Regulations (No 2) 2023.

> *associated with the customer. Conversely, both limbs of the definition include a person on whose behalf a transaction is conducted (POWBATIC). This may result in other persons being caught by the definition unnecessarily such as customers of customers and significantly increases compliance costs for businesses.*

3.5 The amendments to the definitions Regulations were intended to address these issues, but could not address the primary issue, being the definition of beneficial ownership within the Act, which is itself unclear and can be confusing for reporting entities to apply. The Law Society suggests that, rather than simply inserting the changes made to the definitions Regulations, the definition in the Act should instead be amended for clarity.

3.6 Specifically, references to "person on whose behalf a transaction is conducted" are redundant, because that concept is now only captured if the person also meets the ultimate ownership or control test (so they would be a beneficial owner regardless of whether they are also a POWBATIC). The POWBATIC concept can therefore be deleted from the definition altogether, rather than excluding those references by way of the 'inclusion' approach in the proposed amendment. As noted above, that approach was taken as the principal Act was not, at the time, being amended.

3.7 As the Act is now being amended, we suggest the drafting should be corrected so it is easier to understand and follows a more conventional drafting approach. For example, the definition could be drafted along the following lines:

> *beneficial owner means the individual—*
>
> *(a) who has effective control of a customer;*
>
> *(b) with ultimate ownership or control of the customer, whether directly or indirectly; or*
>
> *(c) who owns a prescribed threshold of the customer.*

Designated non-financial business or profession

3.8 Clause 4(2)(b) of the Bill proposes to amend the definition of DNFBP by replacing the terms "engaging in or giving instructions" with "carrying out, preparing to carry out, or giving instructions."

3.9 The Law Society does not support this amendment, and recommends it is removed.

3.10 The amendment proposed by clause 4(2)(b) was included in the consultation documents associated with the 2021 Statutory Review, which considered the need for clarification of the phrase 'engaging in or giving instructions'. At that time, the Law Society submitted:[6]

> *The Law Society agrees that the meaning of the phrase "engaging in or giving instructions" in part (a)((vi) of the definition of "designated non-financial business*

6 This amendment was then included in the 2023 consultation materials for the proposed amendments to the definitions Regulations. The Law Society's submission raised concerns that – in the absence of an amendment to the principal Act – this would be ultra vires.

or profession" in section 5(1) of the Act could be clarified. However, the suggested solution of changing "engaging in" to "assisting a customer to prepare for" would make the definition less clear ("engaging in" is at least a bright line of activity and therefore easier to identify). More significantly, it would potentially and unjustifiably broaden the definition by catching advisory or other preparatory activities in a context where the ML/TF risk is posed by the actual implementation or transaction. The Law Society considers that the definition should read "carrying out or giving instructions on behalf of a customer to another person to carry out".

3.11 The Regulatory Impact Statement (**RIS**) does not address this proposed amendment. However, we note that perceptions of a 'gap' may be misconceived: the Act covers preparatory activities in that it mandates that AML/CFT due diligence is conducted in preparatory stages, before DNFBPs enter into activities captured by the Act.

3.12 The Law Society remains of the view that 'preparing to carry out' should not be included in the definition of DNFBP. Inclusion of these terms will:

(a) Risk expanding the scope of the AML/CFT Act beyond captured activities as set out in the primary provision: section 6(4)(c) of the Act. This will create uncertainty as the definition of DNFPB may then capture activities not captured by section 6(4)(c), leaving lawyers unclear as to whether obligations under the Act apply, and the extent to which, for example, their professional obligation of confidentiality[7] must be overridden for the purposes of Suspicious Activity Reporting. This creates a risk of regulatory uncertainty in two spheres: professional conduct and AML/CFT, with potentially significant consequences for both lawyer and client.

(b) risk extending compliance obligations to activities not intended to be captured by the Act, such as advisory work. For example, advice provided on relationship property matters prior to any transactional advice, and advice on the acquisition of real property (including tax and investment consequences, for example).

(c) create uncertainty about when to carry out customer due diligence (CDD).

(d) make it more challenging for reporting entities to apply internal oversight of CDD timing, thereby increasing compliance costs.

(e) increase the risk of a pecuniary penalty for non-compliance with what is now a more uncertain obligation.

(f) negatively impact consumers, including through delay to the commencement of advisory work, affecting the cashflow of the reporting entity (and potentially the consumer).

3.13 Such outcomes are contrary to the clarity and regulatory relief the Bill is seeking to achieve.

3.14 The Law Society recommends that clause 4(2)(b) is removed from the Bill.

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7 Rule 8, Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

4 Enhanced Customer Due Diligence: Clause 9

4.1 Clause 9 proposes to amend section 24 of the Act to provide that reporting entities are not required to conduct certain verification identity requirements in respect of customers or persons who are trusts,[8] if the reporting entity is satisfied that any risks have been mitigated by conducting standard due diligence and enhanced customer due diligence under sections 15, 16, 23 and 25 of the Act.

4.2 Clause 9 appears to respond partly to recommendation 125 of the Statutory Review, which recommended reviewing 'whether mandatory CDD remains necessary for all customers that are trusts or other vehicles for holding personal assets.' And, if not, repealing sections 22(1)(a)(i) and 22(1)(b)(i) of the Act.

4.3 The Law Society welcomes this amendment, which is the primary regulatory relief proposed by the Bill.

4.4 However, we note there may be a drafting error in proposed subsection 24(4)(b): it omits to exclude compliance with subsection 23(1)(a), relating to source of funds. The RIS is clear the amendment is intended to ensure that reporting entities are not required to verify information relating to the source of funds or source of wealth of a trust if satisfied any risks have been mitigated as per proposed section 24(4). While proposed section 24(4) looks to carve out section 23(1)(a) via the requirement in section 24(1)(b), proposed section 24(4)(b) still requires compliance with the entirety of section 23.

4.5 The Law Society recommends proposed subsection 24(4)(b) is amended as follows (amendment highlighted in bold):

> *enhance customer due diligence under sections 23 (**except 23(1)(a)**) and 25.*

4.6 In addition subsection 24(1)(b) ought to be amended as a consequence of the new section 24(4) as follows (amendments highlighted in bold):

> ***subject to subsection 24(4)**, according to the level of risk involved….*

4.7 Finally. we note the Statutory Review stated any amendment of this nature (though in the context of a recommended interim amendment to regulations) should be 'accompanied by guidance from supervisors regarding a risk-based approach.'9 If such guidance is to be developed, it will be critical to reporting entities' understanding of obligations. The Law Society urges that such guidance is prepared now, so reporting entities can review and comment on the draft guidance in advance of the Bill being enacted and the changes taking effect.

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8 Where they are trusts as described in section 22(1)(a)(i) or (b)(i) of the Act.

9 Ministry of Justice, *Report on the review of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009* (2022), available via https://www.justice.govt.nz/assets/Documents/Publications/AMLCFT-Statutory-Review-Final-Report-v2.pdf, Recommendation 125.

5 Risk assessments and guidance material: Clause 15

5.1 Clause 15 proposes to amend section 58 of the Act, to require that a reporting entity undertakes its risk assessment in accordance with 'any applicable guidance material relating to risk assessments that AML/CFT supervisors or the Commissioner produces.' This will replace the current position, which is that a reporting entity must 'have regard' to any applicable guidance.

5.2 The Law Society does not support this amendment and recommends it does not proceed as currently drafted.

5.3 The justification for this change is unclear. The RIS states it is intended to address the risk that a reporting entity, under the current provision, could consider but ultimately reject supervisor or Commissioner advice about national and/or sectoral risks.

5.4 However, the Statutory Review concluded that reporting entities generally have a good understanding of their risks and noted that the FATF considered New Zealand to have sound mechanisms for the provision of risk related information to reporting entities.[10] The primary issue identified by the Statutory Review was the (then) out-of-date National Risk Assessment, and the need for clarity to ensure risk assessments are not treated as a 'tick box' exercise.[11] The Statutory Review report also commented that:[12]

> *… we received a large amount of feedback that examples of best practice will greatly assist businesses, particularly s[13]mall businesses, to understand and comply with their obligations*

5.5 This indicates reporting entities are seeking more guidance to inform risk assessments, rather than a risk of such guidance being disregarded.

5.6 Beyond the lack of analysis and evidence to suggest the proposed amendment is necessary and justified, the Law Society has serious concerns that this will grant supervisors what is effectively a legislation making power. Wherever possible, mandatory obligations should be specified in legislation and not left to the determination of officials within documents that, for the most part, are not subject to any statutory constraints, requirements, or processes.

5.7 In addition, we note:

(a) 'Guidance material relating to risk assessments' is broader than guidance on the actual level and nature of risk identified by supervisors or the Commissioner on a national and/or sectoral basis. While the latter might be justified as a mandatory consideration, the inclusion of 'guidance' enables supervisors to issue prescriptive guidance about risk assessments in general, which reporting entities

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10 Above, n 9, at [129] – [130].
11 Above, n 9, at [131] – [133] and [325].
12 Above, n 9, at [328].
13 Or at least specified in codes of practice prepared pursuant to the stringent requirements of s 63 of the Act.

would be obliged to comply with, irrespective of industry or business suitability. This could undermine the intended risk-based nature of the AML/CFT regime.

(b) Whereas the Statutory Review recommended amending section 58 to provide clarity on factors relevant to some businesses versus those relevant to all, the proposed amendment does the opposite and is likely to increase uncertainty. It may be interpreted as requiring compliance with non-legislative guidance that is unsuitable in some respects for the AML/CFT risk profile of an individual reporting entity, and inconsistent with or more onerous than the Act requires. Though the amendment is qualified by use of the term 'applicable', that is the same language as currently features in section 58(2)(g) of the Act. There will be circumstances in which the applicability of any guidance is unclear, and the mandatory consideration of guidance – which is open to unconstrained change – will increase uncertainty.

(c) Failure to comply with section 58 will now be a civil liability act. Liability may arise as a consequence of not adequately taking into account the non-legislative (and potentially unsuitable) guidance of the supervisor. In the absence of some further requirement – such as the reporting entity's risk assessment *actually* being inadequate – the Law Society does not consider this to be appropriate.

(d) We note the risks of the above are heightened by the intended move to a single supervisor. The Department of Internal Affairs may require some period of transition and capability-building, before it can develop guidance suitable to sectors it does not currently supervise.

(e) Finally, supervisor resourcing will impact on the ability of the supervisors to regularly review and update guidance material. Where there are resourcing constraints or competing demands, there is a real risk of guidance not being regularly reviewed and updated, no longer being fit-for-purpose, and becoming a regulatory burden.

5.8 The Law Society therefore recommends that clause 15 is deleted from the Bill.

5.9 Should the Select Committee wish to bolster the existing requirements of section 58(2)(g), it could recommend instead that section 58(2)(g) is amended to include specific reference to the National Risk Assessment (NRA) and Sector Risk Assessments (SRA).

6 "Formal warning' to become 'censure': Clause 23

6.1 Clause 23 proposes to replace the current terminology of 'formal warning' with 'censure.'

6.2 The RIS explains the amendment as follows:

> *One of AML/CFT Act's purposes includes the deterrence of money laundering and terrorism financing. Making this small amendment to change the name from "formal warning" to "censure" will assist to ensure that existing mechanisms for enforcement under the AML/CFT Act carry their most effective punitive and deterrent impact.*

Issuing a censure is likely to have a greater reputational impact on businesses than a warning. A censure carries a form of punishment in the form of public criticism - in contrast, a warning implies that businesses have not yet been punished.

6.3 Respectfully, the Law Society disagrees with the characterisation of this as a 'small amendment,' and is of the view that the amendment as proposed is not appropriate.

6.4 Before issuing a formal warning, a supervisor must simply have 'reasonable grounds to believe that that person has engaged in conduct that constituted a civil liability act.'[14] The Anti-Money Laundering and Countering Financing of Terrorism (Requirements and Compliance) Regulations 2011 prescribe the form that the formal warning must take. The content of the warning is clear it is an allegation – it invites the recipient to contact the supervisor if the facts as stated in the notice are inaccurate or incomplete.

6.5 The Bill does not propose to amend the substantive content of that prescribed form, and it does not propose to alter the process by which the supervisor may issue the 'censure', for example to require an evidential finding and/or investigation process.

6.6 A censure is typically understood as a penalty that follows an evidential finding on conduct, effected by an order of the decision-making body, where there is a surrounding process of inquiry or investigation and an opportunity for the affected person to defend themselves (if they wish). [15] No such process is proposed in the Bill.

6.7 The proposed amendment appears intended to increase the likelihood of reputational risk, as a form of deterrence. In the absence of a finding (following a suitable process) that the alleged conduct has likely occurred and constitutes a civil liability act, this is not a fair and proportionate response. We acknowledge that as a lower-level response, such a procedure is likely not desirable. From a natural justice perspective, it may therefore be preferable to retain 'formal warnings' as first in the suite of enforcement provisions, followed by censures, which could be introduced in a new section 80A. Censures could apply following non-compliance with previously issued formal warnings or for failings that are of a more grave nature and where a formal warning would be insufficient.

6.8 The Law Society recommends the proposed change in terminology is removed from the Bill. If it is to be retained, we recommend the Bill is amended to provide for the process of investigation and finding that will precede the formal censure.

7 Recommendations

7.1 For ease of reference, the consolidated list of recommendations made by the Law Society is as follows:

(a) Delete clause 4(1) and instead consider amending the definition of beneficial ownership to provide clarity, as suggested at paragraph 3.7, above.

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14 Section 80(1) of the Act.

15 See, for example, section 156 of the Lawyers and Conveyancers Act 2006; sections 497 and 500 of the Education and Training Act 2020; section 101 of the Health Practitioners Competence Assurance Act 2003; sections 71 and 83 of the Social Workers Registration Act 2003.

(b) Delete clause 4(2)(b).

(c) Amend proposed sections 24(4)(b) and 24(1)(b) as set out at 4.5 and 4.6.

(d) Delete clause 15 and, if desired, insert into section 58(2)(g) of the Act, specific reference to the NRA and SRAs.

(e) Retain the terminology of 'formal warning' or, if the proposed amendment in clause 23 proceeds, insert into the Bill the process of investigation and finding that will precede a formal censure.

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