

20 March 2020

AML/CFT Exemptions Team
Ministry of Justice
Wellington

By email: amlcft.exemptions@justice.govt.nz

Anti-Money Laundering and Countering Financing of Terrorism Act 2009 – response to draft class exemption notice

The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) has seen and endorses the New Zealand Bar Association (**NZBA**) letter of 20 March 2020, commenting on the Ministry of Justice's January 2020 draft class exemption notice for barristers (**draft exemption**).

The Law Society agrees with the NZBA conclusion that the proposed draft exemption notice does not engage with the fundamental issue of who the 'customer' is for AML purposes, in the context of the unique relationship between a barrister and their instructing solicitor. Under the intervention rule the customer is in almost all cases the instructing solicitor, not the individual or entity. Accordingly, AML obligations in relation to the underlying client should be recognised as resting on the instructing solicitor only.

The Law Society's view continues to be as stated in its submission of 13 March 2019 (copy **attached**): requiring AML reporting by barristers would impose an unnecessary and duplicative compliance burden that is disproportionate to any risk. This duplication is also potentially a consumer issue. Many lawyers will be unable to absorb the compliance costs involved in both instructing solicitor and barrister attending to AML requirements (for example, for EDD) and are likely to have to pass a portion onto consumers.

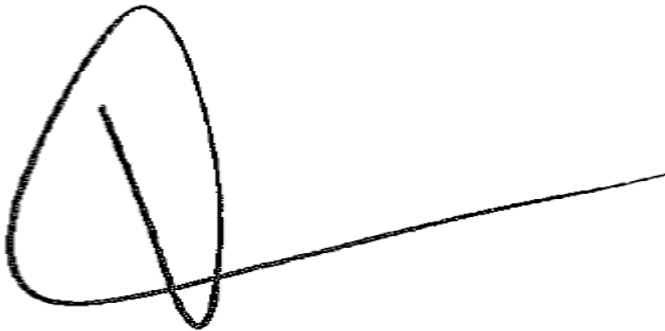
For these reasons, the Law Society continues to support the preferred approach set out in Appendix A to its March 2019 submission. The draft option set out in Appendix A reflects the realities of legal practice and would support the practical operation of the Act.

We also endorse the NZBA request that a meeting be convened with representatives from the Ministry, the Department of Internal Affairs, the Law Society and NZBA to discuss and resolve the

profession's concerns. Contact can be made in the first instance through the Law Society's senior regulatory solicitor, Charlotte Walker (charlotte.walker@lawsociety.org.nz).

We look forward to hearing from you.

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized loop on the left and a long, thin horizontal stroke extending to the right.

Andrew Logan
NZLS Vice President

Encl (1)

13 March 2019

AML/CFT Exemptions team
Ministry of Justice
Wellington

By email: amlcft.exemptions@justice.govt.nz

Re: AML/CFT – further consultation on proposed class exemption for barristers sole

Thank you for the *Second consultation paper on proposed class exemption: to a barrister (sole), January 2019* (2nd consultation paper) regarding the New Zealand Bar Association (NZBA) application for an AML/CFT Act 2009 (the Act) class exemption for barristers sole (barristers).

The Ministry has analysed submissions received from the first round of consultation in September – October 2018 and has asked additional questions and sought feedback on two potential options for the exemption.

Overview

The New Zealand Law Society has reviewed its initial submission of 23 October 2018, which supported the proposed class exemption for barristers,¹ and has considered the additional questions and two potential options for exemption. The questions and potential options have also been discussed with practitioners familiar with the realities of legal practice including the practical application of the intervention rule and the day-to-day compliance requirements of the AML/CFT regime for the legal profession.

Having given the matter further consideration, the Law Society remains of the view that the limited exemption sought for barristers is appropriate. The Law Society notes that, as the exemption would only apply where a barrister is instructed by a solicitor and the relevant barrister is carrying out "captured activities", the exemption is in practice very limited in scope.

This submission highlights the unique relationship that exists between a barrister and their instructing solicitor when acting for a client and the distinct features of barristerial practice. The nature and practicalities of this relationship indicate that the risk of money laundering going undetected and unreported appears low and the compliance burden for barristers is unnecessary and disproportionate to any risk.

The reasons for this view were set out in our October 2018 submission and are reiterated below for completeness. Additional information is also provided about the requirements of the Lawyers and Conveyancers Act 2006 and associated Rules, and the nature of legal practice and compliance with AML/CFT obligations.

¹ Proposed class exemption for barristers sole: NZLS submission 23.10.18, available at http://www.lawsociety.org.nz/_data/assets/pdf_file/0006/127923/l-MoJ-AMLCFT-NZBA-exemption-appn-barristers-sole-23-10-18.pdf.

For the reasons given below, the Law Society considers that option 1 would be acceptable in principle, with some amendments to reflect the realities of legal practice and the practical operation of the Act. Our suggestions for appropriate changes to option 1 are set out in **Appendix A** for consideration. Key changes are that:

1. The requirement to undertake EDD (enhanced due diligence) and SAR (suspicious activity reporting) should rest on instructing solicitors rather than barristers. There are three reasons for placing this responsibility on solicitors:
 - a. It reflects the unique nature of the relationship between instructing solicitors and barristers, as discussed below.
 - b. Solicitors who have AML/CFT compliance obligations are most likely to have compliance and reporting systems in place (including registration on the NZ Police goAML Web system). Requiring barristers to replicate those would be an unnecessary (and onerous) duplication.
 - c. Instructing solicitors will be best placed to undertake a section 22A enhanced due diligence exercise, while minimising the risks of tipping-off.
2. Option 1 has also been amended to record that the solicitor may not be required to carry out due diligence on an "existing customer" as at 1 July 2018, where there has been no material change in the nature or purpose of the business relationship.
3. It should also be sufficient that the information obtained be available to the barrister on request (it should not be required to be delivered in every instance).

Details of the exemption sought and the Ministry's preliminary analysis in the 2nd consultation paper are set out below, to provide context for the Law Society's responses to the additional questions and potential options for exemption.

Summary of the exemption proposed by NZBA

The NZBA has proposed the following exemption:

Where a barrister qualifies as a reporting entity, an exemption is requested in circumstances when that barrister is instructed by:

- a lawyer who holds a practising certificate as a barrister and solicitor (solicitor), but who is not an in-house lawyer (other than an in-house lawyer employed by the Crown); or
- the Crown

The NZBA has not sought an exemption where:

- a barrister receives instructions directly from a client; or
- a barrister performs the activities listed under the definition of a designated non-financial business or profession under section 5 of the Act (outside of the instructions of a lawyer).

In these instances, it is proposed that a barrister will remain subject to all obligations prescribed by the Act.

Ministry of Justice: preliminary analysis, follow-up questions and potential exemption options

1. Suspicious activity reporting

“If an exemption were granted, it is proposed to still require barristers to undertake suspicious activity reporting in line with Part 2, Sub-part 2 of the Act.

This would be achieved by way of a partial exemption from the Act, where the sections relating to suspicious activities would be carved out from the exemption and continue to apply to barristers.

This is because barristers may come across a suspicious activity in the course of their appointment that the instructing solicitor may not necessarily spot.

In some instances, once the instructions have been made to the barrister by the solicitor, the solicitor takes a passive role and is no longer involved in the granular detail of the work. In these cases, the barrister could detect suspicious activities which the solicitor may not be able to detect.

If a full exemption were granted to barristers, barristers would be under no obligation to report the suspicious activity and there is a risk an offence may remain unreported. This would be contrary to the intent and purpose of the Act.

The detection of a suspicious activity further triggers the obligation to conduct enhanced customer due diligence in respect of that activity, in line with section 22A of the Act. The application of section 22A further invokes sections 23 and 24 of the Act.

[The Ministry is] of the view that when a suspicion is formed by the barrister, the barrister is best placed to undertake enhanced due diligence (as opposed to the solicitor), as they have the day-to-day relationship with the client at this point.

This will not affect the obligation of a solicitor to file a suspicious activity report when a suspicion is formed by the solicitor on the same client the barrister has been instructed on.”

Questions:

- (a) Do you agree with the assumption that barristers may come across suspicious activities that the solicitor may not come across, and should therefore be required to report suspicious activities in line with sections 39A to 48 of the Act?
- (b) Do you agree that barristers should subsequently also be subject to sections 22A to 24 of the Act?
- (c) If the instructing solicitor and the barrister form the same suspicion, who should be required to file the suspicious activity report and undertake enhanced customer due diligence on the customer in line with sections 22A to 24 of the Act?

New Zealand Law Society response:

In the Law Society’s view, circumstances may occasionally arise where a barrister does become aware of potentially suspicious activities. For the reasons given below, the appropriate response would be to inform the instructing solicitor. The instructing solicitor would then be responsible as a reporting entity for filing an SAR. This reflects the nature of barristerial practice and the unique relationship that exists between a barrister and instructing solicitor in the course of providing legal services to a client:

- The application of the AML/CFT Act to the work of barristers will be rare, as barristers are prohibited by r 14.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 from carrying out transactional aspects of conveyancing and receiving or holding money or other valuable property for or on behalf of another person.
- Where instructed by a solicitor, the solicitor is the barrister’s only client (for the purposes of the AML/CFT Act).² The barrister may only act for the lay client through the mediation of the instructing solicitor:

“Barristers consider themselves more detached than solicitors. Such a view comes from the manner in which barristers work. Usually a barrister will be retained only once it is clear that a matter will go to court and the barrister will not deal directly with the lay client. Any meetings between the barrister and the lay client will be held in the solicitor’s presence. The solicitor is an intermediary (and buffer) between the lay client and the barrister.”³
- The instructing solicitor is the reporting entity under the Act and can be expected to have carried out the necessary due diligence in respect of the lay client.
- An instructing solicitor as an established reporting entity is better resourced and prepared to file an SAR in circumstances where a suspicion is formed (see discussion below in respect of compliance burden and cost). As mentioned above, this includes access to the goAML Web system.
- In the event that a barrister undertaking “captured activities” under the AML/CFT regime does become aware of potentially suspicious activities, the barrister’s ethical obligations⁴ will require the suspicion to be reported to the instructing solicitor.
- If the barrister was required to undertake the enhanced due diligence required in order to file an SAR, the risk of tipping-off would be heightened. A client could be alerted to the forming of a suspicion by an ‘out of the blue’ request for detailed information at an advanced stage in the retainer when no initial information had been sought by the barrister. This would be

² This reflects the longstanding rule that a barrister must accept instructions only from a solicitor and may not accept instructions directly from a non-lawyer client. This is known as the ‘intervention rule’ and is codified in r 14.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (RCCC). There are exceptions to the intervention rule. However, these situations are outside the scope of the exemption sought. An example of the unique nature of the relationship is also reflected in r 10.7 which places responsibility for the fees of a barrister sole on the instructing solicitor, in the absence of an express agreement to the contrary. As the footnote to the RCCC notes, the rule is necessary because a barrister cannot sue for their fees (see fn 14 to the RCCC and *Atkinson v Pengelly* [1995] 3 NZLR 104).

³ *Ethics, Professional Responsibility and the Lawyer*, 3rd ed. (2016), Lexis Nexis, D. Webb, K. Dalziel, K. Cook, at [15.10.1].

⁴ Barristers, like other lawyers, must not assist a client in an activity that the barrister knows is fraudulent or criminal, and must not knowingly assist in the concealment of fraud or crime (see r 2.4 of the RCCC). A lawyer also has certain mandatory disclosure obligations (r 8.2 requires a lawyer to disclose confidential information which relates to the anticipated or proposed commission of a crime punishable by imprisonment for three years or more). Disclosure must only be to an appropriate person. Under an exemption placing the obligation on an instructing solicitor to file an SAR where a suspicion arises, the solicitor would be an ‘appropriate person’ for the purposes of this rule triggering the disclosure obligation.

inconsistent with the confidentiality required under the AML/CFT regime and could frustrate the objectives of the regime.

2. Compliance burden for instructing solicitors

“One submission noted that an exemption for barristers places heavy reliance on the instructing solicitor being a reporting entity subject to the Act’s requirements. There is concern about a potential increased compliance burden on solicitors, who may also be sole practitioners with limited resources.

As you will see from the two proposed exemption options, any potential exemption will require that CDD [customer due diligence] has been conducted by the instructing solicitor and relevant customer identity information provided to the barristers by the instructing solicitor.”

Questions:

- (a) What are solicitors’ views on a barristers’ reliance on the instructing solicitor to conduct CDD and provide the barrister with relevant customer identity information?
- (b) If this is considered an additional burden, are solicitors willing to take on this burden?

New Zealand Law Society response:

As already noted, the proposed exemption is premised on the basis that the instructing solicitor is the reporting entity under the Act. As a reporting entity the solicitor will be required to have carried out the necessary due diligence in respect of the lay client prior to establishing the business relationship. In addition, the Law Society considers that it is sufficient for the instructing solicitor to be prepared to provide the results of the due diligence enquiries to the relevant barrister upon request. There seems to be no good reason for the solicitor to be obliged to hand the information to the barrister simply to invoke the exemption.

3. Compliance burden and cost for barristers

“The applicant has stated that the consequences for barristers (if subject to the Act) will be significant as the compliance obligations will be onerous. The first round of consultation questions already sought feedback on why the compliance obligations are too burdensome and onerous.

The responses to this question have not provided any compelling evidence that compliance would be too burdensome and onerous.

One point to consider is that barristers are not the only sole practitioners subject to the Act and that there are numerous solicitors and accountants who operate on their own and are also subject to the AML/CFT regime. There are also multiple small Phase 1 businesses that are reporting entities. Some of these may have smaller profit margins than barristers.”

Questions:

- (a) What makes the compliance burden disproportionate for barristers, compared to other sole practitioners or small businesses subject to the Act?
- (b) What makes the compliance obligations too onerous for barristers?

New Zealand Law Society response:

As stated in its earlier submission, the Law Society endorses the NZBA submission that the consequences for barristers subject to the intervention rule will be significant.

The AML/CFT compliance obligations since 1 July 2018 have proven to be resource intensive for law firms, and having a barrister perform what are likely to be the same compliance obligations as their instructing solicitor is unnecessary duplication. It is difficult to see how such duplication meets the objects of the Act. Its primary impact is likely to be additional costs and delay imposed on the instructing solicitor's client for no net benefit. This raises concerns about the impact on legal consumers and their access to legal services.

The infrastructure of a barristerial practice also differs from that of a law firm or solicitor sole practitioner. A barrister may practise from a 'set of rooms' alone or with employed barrister(s) or from chambers. The latter is a collection of independent self-employed barristers who may share some administrative and support services in respect of their individual practices.⁵ Due to the nature of barristerial practice, the back-office functions of a barrister's practice are generally more limited than those of lawyers practising as solicitors. This reflects, in part, the fact that a barrister cannot be involved in the transactional aspects of conveyancing or receipt and handling of client funds. Because of the nature of their work, solicitors are routinely subject to a number of compliance-based regimes (such as Landonline registration, trust accounting regulations under the Lawyers and Conveyancers Act 2006 and FATCA and AEOI/CRS obligations). For this reason, law firms including solicitors in sole practice will frequently have established in-house compliance procedures. Conversely, the work traditionally undertaken by barristers is unlikely to require any comprehensive compliance infrastructure.

Accordingly, the practical administrative burden and resources required to establish procedures, conduct the required customer due diligence checks and file SARs will be significant for a barrister. The burden is amplified by the fact that the situations in which a barrister may be carrying out any "captured activities" will likely be limited and infrequent. The burden may not only fall on barristers but also on their clients who will already be subject to AML/CFT procedures via their relationship with the instructing solicitor.

4. Exemption options for consultation

The Ministry has identified two potential options for exemptions.

Question:

- (a) Please provide feedback on the two options, including on the practical consequences of the partial scope of the exemptions and attached conditions.

⁵ See: r 14.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

New Zealand Law Society response:

As noted earlier, the Law Society considers option 1 would be acceptable in principle, with amendments to reflect the realities of legal practice and the practical operation of the Act (see Appendix A).

The Law Society appreciates that officials may not be familiar with some of the nuances of the instructing solicitor/barrister relationship and that further discussion and explanation may be needed. We would appreciate the opportunity to meet with the Ministry of Justice to discuss the matters raised in this submission. Contact can be made in the first instance through the Law Society's Law Reform Manager, Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz / 04 463 2912).

Yours faithfully



Kathryn Beck
President

Appendix A: New Zealand Law Society proposed amendments to option 1

Appendix A: NZLS proposed amendments to option 1

Option 1

Barristers will be exempt from the following sections of the Act: 10 to 39, 39A to 42, 48A to 49, 51 to 52, 56 to 61 and 68 to 71.

The exemption is made subject to the following conditions:

- The instructing solicitor is a reporting entity subject to the Act;
- The instructing solicitor confirms to the barrister that they have conducted customer due diligence as required by the Act and regulations, or that the relevant client was an existing customer at 1 July 2018 in respect of which no customer due diligence is required under the Act, and the customer due diligence information collected by that instructing solicitor, or on the solicitor's behalf, in each case in accordance with the Act, will be provided to the barrister upon request;
- The barrister has no cause to believe the solicitor has not conducted customer due diligence procedures to at least the standard required by the Act and regulations; and
- The barrister must, upon forming a view that a retainer may give rise to a suspicious activity, promptly advise the instructing solicitor of his/her view and provide sufficient information to the instructing solicitor to enable the instructing solicitor to determine whether they have formed a suspicion and are required to discharge their obligations under sections 40 and 41 of the Act.

Features of the exemption:

- The instructing solicitor remains liable for its own obligations under the Act.
- No liability for the barrister in relation to customer due diligence provided all of the conditions of the exemption have been met.
- No liability for the barrister in relation to filing an SAR, conducting EDD under sections 22A – 24 or record keeping, provided the conditions of the exemption are met.