

23 October 2018

AML/CFT Consultation Team
Ministry of Justice
DX SX10088
Wellington

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

RE: Proposed Class Exemption for barristers sole

The New Zealand Law Society (Law Society) appreciates the opportunity to respond to *The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 – Consultation Paper on Proposed Class Exemption; to a barrister (sole)* (consultation paper).

The consultation paper addresses the need for a class exemption from the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act) following an application made on behalf of the New Zealand Bar Association (NZBA).

Overview

The NZBA exemption application, for barristers advising on or documenting transactions involving real property, has been circulated to the profession and feedback has been provided by the Law Society's Commercial and Business Law Committee and from lawyers familiar with the AML/CFT legislation.

On the basis of that feedback, the Law Society supports the NZBA exemption application. The Law Society agrees with the rationale for the class exemption as outlined in the consultation paper. The exemption sought is limited in scope and reflects situations in which the risk of money laundering going undetected and unreported appears low and the compliance burden is disproportionate to any risk. We note that the exemption application is consistent with the Law Society's submission in 2017 on the AML/CFT Bill, that barristers sole may consider 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. The reasons for this are set out in full below:¹

Barristers

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.

¹ NZLS submission dated 20.4.17, at [4.5] – [4.7]: available at http://www.lawsociety.org.nz/_data/assets/pdf_file/0016/110716/AML-CFT-Amendment-Bill-20-4-17.pdf.

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.

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.

These comments are consistent with the rationale put forward by the NZBA for a limited exemption when a 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.

Specific comments

Q1: The Application of the AML/CFT Act to the work of barristers

The Law Society endorses the NZBA submission that the application of the AML/CFT Act to the work of barristers will be rare, as barristers are prohibited by rule 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.

Q2: Where a barrister is instructed by a solicitor

The Law Society endorses the NZBA's position that, where instructed by a solicitor, the solicitor is the barrister's only customer (for the purposes of the AML/CFT Act). 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.² This is known as the ‘intervention rule’ and it is codified in r 14.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. If a barrister has an instructing solicitor, the solicitor is responsible for complying with trust accounting requirements, if any.³ There are exceptions to the intervention rule. However, these situations are outside the scope of the exemption sought.

The corollary to this is that when the intervention rule applies, an instructing solicitor would be responsible as a reporting entity for fulfilling AML/CFT obligations in respect of the non-lawyer client.

Consequently, the Law Society also supports the NZBA’s submission that an exemption is appropriate in circumstances where the intervention rule applies.

Q3: Where a barrister is instructed by the Crown

For similar reasons to the previous point, the Law Society supports the NZBA position that the exemption should extend to instructions received directly from the Crown (whether from a solicitor within a Crown agency or a Minister or from a public servant). The Law Society observes that a barrister is unlikely to be undertaking ‘captured activities’ under the AML/CFT Act for the Crown. In the event of any barrister undertaking ‘captured activities’ for the Crown, the very limited risk would be disproportionate to the compliance burden in the circumstances.

Q4: Regulatory burden

The Law Society agrees with the NZBA’s submission that the consequences for barristers subject to the intervention rule or instructed by the Crown (if subject to AML/CFT obligations) will be significant. The compliance obligations are resource intensive, 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 AML/CFT Act. Its primary impact is likely to be additional costs and delay imposed on the instructing solicitor’s client for no net benefit.

Q5: The reliance provisions

The definition of ‘designated business group’ in section 5 of the AML/CFT Act and in particular the specific criteria in subparagraph d) do not accurately reflect the organisation or structure of the legal profession in New Zealand. In particular, barristerial practice would not squarely fit within the required criteria in subparagraph d) of the definition.

In addition, the ability to rely on other reporting entities provided for in section 33 extends only to ‘customer due diligence’ requirements and the barrister would still need to fulfil other resource intensive compliance obligations under the Act, such as record-keeping and data capture for annual reporting purposes.

For these reasons, it does not appear that the provisions at sections 32-34 would provide any significant relief from the regulatory burden.

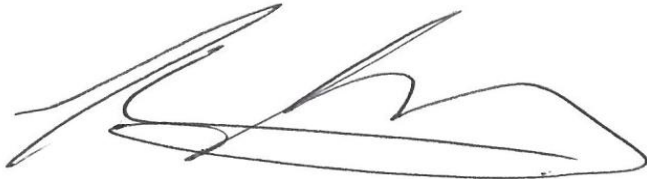
² See Matthew Palmer (ed) *Professional Responsibility in New Zealand* (online loose-leaf ed., Lexis Nexis) at 150,035.

³ See *ibid* and *TG v NP* (LCRO 190/2011, 1 February 2013).

Concluding comments

We hope these comments have been helpful to the Ministry. If further discussion would assist, contact can be made in the first instance via the General Manager Regulatory, Neil Mallon (neil.mallon@lawsociety.org.nz / 04 463 2922).

Yours faithfully

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

Kathryn Beck
President