

Anti-Money Laundering



Money laundering legislation requires lawyers to report suspicions – or does it?

Even with a fact scenario in which a lawyer knows that a serious criminal money laundering transaction is intended, it was quickly acknowledged on both sides of the debate that the FTRA – which supposedly requires lawyers to report suspicious transactions – failed to apply. It emerged that even if the “modern” AML/CFT Act currently applied to lawyers, it too would be ineffective. For example:

- The FTRA requires lawyers only to report suspicious “transactions” that have been conducted or sought to be conducted. It doesn’t cover the full range of even the most obviously suspicious “activities” proscribed in some other jurisdictions. The debate revealed that New Zealand’s legislation seems mostly content for authorities to chase illusory shadows after the event – when the funds may already be lost through a dizzying jaunt through multiple jurisdictions sufficient to dissuade even the most assiduous pursuit – instead of seeking to prevent and deter money laundering (and its underlying associated criminality and multiplicity of victims) at the earliest stage.
- Even if there had been a “transaction” – with the money laundering process well under way, and even with the lawyer’s knowledge of criminality – lawyers are obliged by the FTRA only to report transactions conducted or sought to be conducted “through” their businesses. This suggests that a simple house purchase in which funds flow through a firm’s trust account will be caught. But multi-million dollar developments – funded by extortion, tax evasion, theft, fraud and drug sales in the local community, perhaps even including some to the lawyers’ own children – may not trigger legislative obligations for legal professionals even to report transactions they know involves underlying criminality and money laundering, if the lawyer “merely” advised. Similarly with accountants advising on transactions in which tainted funds may not pass through their own businesses. Even with suspicion or actual knowledge of the criminal source of funds, FTRA reporting obligations may not apply. (There is, however, a little known sting in the tail of the legislation, in which anyone who structures a transaction to

Lawyers’ ethics plugs leaky legislation

By Ron Pol

A RECENT DEBATE CONDUCTED BY THE Law Society’s Wellington branch revealed that lawyers’ ethical rules may be more effective than specialist legislation which tries to stop criminals using law firm trust accounts and other methods to launder at least \$1.5 billion of organised crime proceeds washing through the New Zealand economy each year.

So called “gate keeper” professions – the lawyers, accountants and real estate agents who structure, implement and facilitate tens of thousands of financial transactions each year – are temporarily exempt from specialist legislation designed to detect and deter money-laundering, the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act).

However, as reported earlier (see “Stop criminals misusing legal services”, *LawTalk* 824, and “Mitigate risks for business

advantage”, *LawTalk* 825), the AML/CFT Act has made lawyers’ trust accounts more attractive to criminals laundering their ill-gotten gains, and more difficult for lawyers to avoid becoming implicated in criminal activity.

Although limited in scope, and described by an international monitoring body as “seriously deficient”, the AML/CFT Act’s predecessor, the Financial Transactions Reporting Act 1996 (FTRA), is intended in the meantime to provide a basic backstop for lawyers, accountants and real estate agents. Until their temporary exemption from the AML/CFT Act is lifted, the FTRA requires each of those professions to report suspicious transactions.

The fact situation at the core of the Law Society debate – in which a lawyer has actual knowledge of a client’s intention to undertake money laundering activities – reveals that some of the legislation intended to meet New Zealand’s international obligations to detect and deter money laundering has more holes than Swiss cheese.

avoid application of the Act commits an offence: ss101 and 108, AML/CFT Act.)

- Although client confidentiality and legal professional privilege are important pillars of the legal profession, lawyers know that neither applies in relation to the commission of crime. Yet provisions within the specialist legislation which seeks to detect the serious crime of money laundering seems curiously to differ from the usual circumstances in which privilege fails to adhere. It was suggested that for privilege not to apply in some circumstances, it may require a lawyer to *know*, with *certainty*, the *actual purpose* of another person (their client) – each element of which may prove an insurmountable barrier. Under the legislation at least, a lawyer may believe – or assert – that confidentiality and privilege remains even in the face of what seems obvious and almost certain criminality.
- And if a lawyer – with actual knowledge of proscribed criminal activity and a transaction conducted through their practice – decides to report a suspicious transaction, if the above arguments are mounted by an aggrieved client, the lawyer may not enjoy the legislative protections that typically accompany the very reports that the legislation purportedly requires of them.
- Curiously, the debate also revealed that even if the more extensive provisions of the AML/CFT Act already applied to lawyers, it too might not have triggered reporting obligations even in the face of a wide range of obvious criminal activities of which lawyers may become aware. This is because, although the FTRA was crafted in a different era, many of the historic definitions simply carry through into the “modern” AML/CFT Act. This means that gaps in the early stage FTRA have been amplified in a modern era; in which globalisation and instantaneous multi-jurisdictional funds transfer exponentially expand the impact of those gaps in the modern context.
- The definition of money laundering itself, in s243 of the Crimes Act, adds further layers

of complexity; and a veritable “pick ‘n mix” of technical defences for any well resourced or sophisticated criminal organisation or drug dealer. For example, complex definitions add layers of intent, such as evidence of a purpose to conceal, even beyond overwhelming evidence of predicate criminality and the actual concealment of the resulting property in question.

Lawyers’ ethics to the rescue

The specialist anti-money laundering legislation may be shot through with holes big enough to drive the proverbial 18 wheeler through without touching the sides, but the debate reinforced that some of the gaps might fortuitously be plugged by lawyers’ own rules of conduct.

Consistent with lawyers’ fundamental obligations to uphold the rule of law and administration of justice (s4, Lawyers and Conveyancers Act 2006, and R2, Conduct and Client Care Rules), lawyers:

- must not assist any person in an activity the lawyer knows to be fraudulent or criminal (Rule 2.4);
- must not knowingly assist in the concealment of fraud or crime (Rule 2.4);
- must disclose confidential information which relates to the anticipated or proposed commission of a crime punishable by imprisonment for three years or more [Money laundering attracts imprisonment up to seven years] (Rule 8.2(a)); and
- may disclose confidential information which relates to the anticipated commission of a crime or fraud (Rule 8.4(b)).

It therefore seems in many cases that it may only be lawyers’ ethical obligations which act as an effective barrier against the misuse by criminals of lawyers’ trust accounts and services; and that this may also offer the only real protection for lawyers who choose to report suspicious transactions.

As a lawyer, it is strangely refreshing, yet wearing my anti-money laundering hat it is somewhat disconcerting, that the legal profession appears to constitute a stronger

defence against money laundering and the impact of serious crime not as a result of but in spite of New Zealand’s specialist anti-money laundering legislation.

Accountants and real estate agents out in the cold?

If lawyers are comforted by the protections afforded by their own professional rules notwithstanding gaps in the legislative framework intended to detect and deter money laundering, their accounting and real estate colleagues may not fare so well.

The “seriously deficient” FTRA reporting requirements also apply to those professions, yet arguably without sufficiently equivalent provisions in their own rules of conduct, accountants and real estate agents may find themselves “between a rock and a hard place” when faced with even the most obvious red flags indicative of money laundering.

This is because, although failure to report suspicious transactions is an offence, reporting genuine suspicions may not always provide protection from breach of contract or confidentiality claims by aggrieved clients.

However, the debate also revealed that legislative confusion and uncertainty offers a veritable wealth of defences for resourceful lawyers to deploy on behalf of any of their colleagues in any of those professions unlucky enough to become mired in allegations of not meeting their anti-money laundering obligations.

Nonetheless, it may not reflect well on New Zealand’s reputation on the international stage if legislation intended to detect and deter money laundering instead operates to confuse or dissuade some professionals from reporting genuinely suspicious activities.

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