

MONEY LAUNDERING LAWYERS?



BY RON POL

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Lawyers are taking more interest in anti-money laundering obligations. It affects many of their clients, and their own businesses. *NewLaw* asks **Ron Pol** to explain what money laundering is really about.

THE LEGISLATION

Money laundering is a *Crimes Act* 1961 offence, with up to seven years imprisonment.

The *Financial Transactions Reporting Act* 1996 (FTRA) requires lawyers to report suspicious transactions.

In 2013, the *Anti-Money Laundering and Countering Financing of Terrorism Act* (AML/CFTA) strengthened reporting and other obligations for banks and other finance businesses. A temporary exemption from the new Act excludes lawyers and other 'gatekeeper' professions that facilitate many financial transactions, they remain subject to the FTRA.

These provisions, together with a suite of other laws, help meet New Zealand's treaty obligations to detect and deter criminal money flows.

If that sounds rather esoteric, it may help explain why reporting levels by lawyers and other 'gatekeeper' professionals remain extraordinarily low, even when by conservative official estimates at least \$1.5 billion of criminal funds wash through New Zealand's economy every year.

If the level of suspicious transaction reports are any indication, are banks really the only businesses who take these laws seriously, or are New Zealand professional services firms' systems so robust even in the absence of comprehensive legislation that there really is nothing to report?

And what does the legislation mean for the legal profession as an integral part of the justice community?

WHAT ANTI-MONEY LAUNDERING LAWS ARE REALLY ABOUT

Another way to describe these laws is with an image, and a story, both adapted from one of the country's top criminal intelligence officials.

An ordinary looking person, at the gates of your child's school. Selling drugs.

The story

Think about your net worth. Now, imagine a call from the IRD. Something along the lines "we are sorry about this, but over your working life we have taxed you at the wrong rate. It was our mistake, so you will not go to jail, but we need to ensure you pay the right amount of tax.

"We have calculated your overdue tax,



penalties, and interest. We also had a wee peek at your assets and bank accounts. The amount you owe is equivalent to the value of your house, cars, investments, and about 95 per cent of your bank accounts. We want to make this easy for you, so we have already transferred the funds. And that banging noise is probably the real estate agent with the 'For Sale' signs. If you look out the window, you should see your car on the transporter. They should have emptied the glove box and coin compartment, we're not heartless. Do you see the plastic bag by the letterbox? Excellent."

The IRD has taken nearly everything you have devoted your working life building up. How long would it take to get back to the same financial position?

That is the point, because that is the impact that a raft of legislation and new enforcement strategies are starting to have on New Zealand criminals.

The *Criminal Proceeds (Recovery) Act* 2009 lets Police seize assets like never before. The FTRA and AML/CFTA deliver intelligence to help make connections to identify and prosecute the criminals that sell drugs to your kids and commit other serious crimes that destroy New Zealander's lives.

Of course, some criminals don't mind the occasional prison term; a taxpayer-funded environment to hone criminal skills and build networks. Previous laws also enabled forfeiture, but not to the same level, or with anything like the current intelligence resources. The result was that most criminals when released would have been as fully cashed up from their previous offending as before incarceration, and step right back into business.

Cut that link, however, and - like your

imaginary experience with the IRD - without the ability to recapitalise their business it can take years for some of the country's most serious criminals to get their operations back to the same scale again. And that is another criminal business not selling vast quantities of drugs to your kids at the school gates.

Traditional reactive policing punished criminals based largely on drugs found in their possession, essentially their current inventory. Modern policing now 'follows the money', and seeks the proceeds of crime across the history of offending, with the express purpose of deterring and curtailing the capability of future offending.

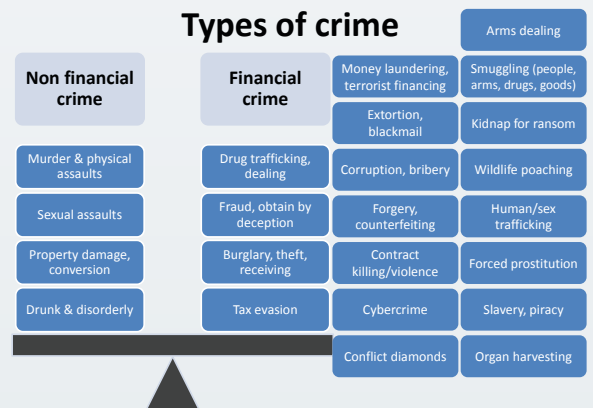
Following the money trail further is what anti-money laundering laws are all about; interdicting crime at even earlier stages, whenever criminals seek to use legitimate businesses to transform criminal proceeds into 'clean' money and assets.

MONEY LAUNDERING IS A FINANCIAL CRIME. IT IS NOT PHYSICALLY HURTING ANYONE, RIGHT?

Crimes motivated by profit generate criminal funds. For criminals to be able to benefit from that money - from the accumulation, use, and investment of their ill-gotten gains - it must first be laundered. This process requires the involvement of legitimate businesses, and often benefits from the involvement of other legitimate businesses. Those businesses include banks, lawyers, accountants and real estate firms.

This means that, for every serious crime that generates funds - including drug trafficking,

Types of crime



fraud, extortion, tax evasion, arms dealing, people smuggling, forced prostitution, kidnap for ransom, and many more - legitimate businesses are inevitably involved in the process.

ARE LAWYERS REALLY INVOLVED?

Criminal entrepreneurs and their money laundering associates take precautions when using professionals, sometimes using complex cover stories and subterfuge. Combined with the inherently criminal nature of money laundering activity, it is notoriously difficult to accurately quantify the extent of misuse of professional services businesses.

Nonetheless, the New Zealand government and authoritative international studies have found that criminals are increasingly seeking out lawyers' involvement. Modern money-laundering methods often require legal services, and the attractiveness of trust accounts as 'washing machines' for local and international criminal operations has also increased as the AML/CFTA has started closing down other money-laundering avenues.

LAWYERS' RISK

Professional services firms may be involved unwittingly, or may have failed to ask the right questions in the face of red flags that should have been obvious to any reasonable professional. This difference is becoming increasingly important.

International standards fix "wilfully blind" professionals with culpability. Claiming a lack of actual knowledge of criminality as a result of turning a blind eye to what is later found to have been obvious red flags may no longer be sufficient to avoid prosecution.

In New Zealand, the interplay between evolving international standards, complex legislation with multiple levels of knowledge and purpose, and existing case law on "wilful blindness" and the extent to which "recklessness" may bridge the gap has not yet been tested in this context.

In many jurisdictions, however, including New Zealand, a temporary exemption from comprehensive legislation paints a "weakest link" target on professional services firms; if the banks are increasingly impregnable, other means of entering the financial system - especially through firms trusted by the banks yet with less robust controls and staff unaware what to look for - clearly become increasingly attractive.

With almost unimaginable amounts of corrupt funds leaving Russia and China in recent months, are those wealthy new clients really the successful businessmen they seem? And is the well-spoken local businessman really a front for domestic organised crime networks?

In the modern context, failing to ask these questions - perhaps in the unexpressed hope of avoiding being fixed with actual knowledge of criminality - may no longer be prudent if the failure to spot red flags and ask questions may itself be characterised as wilful blindness; particularly in a new environment in which New Zealand businesses now generally have a much greater awareness of potential money laundering indicators.

PROPERTY: A RISK/DETECTION CONFLUENCE FOR LAWYERS?

The literature identifies areas in which lawyers' businesses are particularly vulnerable to misuse by criminals, including trusts, corporate structuring, tax advice, litigation, and international money flows.

Yet the exposure is perhaps most stark in areas with a confluence of high risk and easy detection. One of these is real estate, particularly within the current context in which the number of properties being forfeited as proceeds of crime is rapidly increasing.

When real property is forfeited under proceeds of crime legislation, even years later, it is a relatively easy task for investigators to identify the lawyers and real estate agents engaged in transactions subsequently found to have involved the use of criminal funds.

Although the legislation is complex, in the first instance a few simple questions based on broad principles can help identify whether further investigation, and potentially prosecution, may be warranted. See "Investigate professionals?" for a simplified decision tree process.



LAWYERS AS CORE MEMBERS OF THE JUSTICE COMMUNITY

Lawyers' obligations to take "all reasonable steps to prevent any person perpetrating a crime or fraud through the lawyer's practice" (Rules of Conduct and Client Care, Rule 11.4), combined with the ability to disclose confidential client information in certain circumstances (Rules 8.4(b) & (d), Rule 8.5) and FTRA duties to report suspicious transactions provide ample scope for lawyers as key members of the justice community actively to support efforts to cut serious crime that affects New Zealander's lives.

For some lawyers and accountants there may also be a golden lining. As these professions in effect help Police close down major crime operations (alongside banks already providing active support), some may be asked to provide criminal defence and forensic accounting services in relation to the investigations and trials of increasing numbers of serious criminals being stripped of their assets.

In a practical sense, for lawyers and other gatekeeper professions, the most effective way to meet existing legal obligations and help cut criminal financial flows is simply to ensure that all staff know what they should be looking for, and when appropriate to report suspicious transactions.



WHAT IS MONEY LAUNDERING?

Money laundering is not confined to criminals or offshore funds. It involves legitimate businesses and 'gatekeeper' professionals like lawyers, accountants and real estate agents who facilitate financial transactions.

Essentially, money laundering transforms the proceeds of criminal activity into legitimate funds.

At a technical level it involves a three-stage process which obscures the true ownership of criminal proceeds:

- **Placement** introduces criminal funds into the financial system.
- **Layering** involves apparently legitimate business activity such as transfers, loans and invoices.
- **Integration** includes buying assets and investments.

The integration of funds into the mainstream economy completes the process, but seemingly legitimate enterprises continue their commercial activities; and it becomes even more difficult for professional services businesses to identify the true source of clients' funds.

ANTI-MONEY LAUNDERING & COUNTERING FINANCING OF TERRORISM CONFERENCE 2014

10 & 11 July 2014, Te Papa, Wellington
Hosted by ACAMS and New Zealand Police

Learn about:

- Your existing legal obligations to identify and report 'suspicious transactions'
- Recent law changes making banks less susceptible to money laundering may have changed your vulnerabilities and risks
- Extensive new compliance obligations due to be extended to lawyers, accountants and real estate agents

Sessions include:

- Organised crime & money laundering in the real estate industry
- Lawyers, accountants & real estate agents - engaged to launder money through banks' back doors?
- Outsourcing and reliance on agency/ third party arrangements

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