NEW SOUTH WALES
BAR ASSOCIATION

NSW Bar Association Response to Questions on Notice: Drafting Suggestions

This submission supplies suggested drafting for a provision to reflect the position of the Attorney General's Department (**AGD**) that "Barristers acting on instructions from a solicitor on behalf of a client are not intended to be captured" by the AML regime (AGD Supplementary Submission, page 7).

Proposed drafting

Senator Scarr asked for a formulation that would reflect the above position (Proof Committee Hansard, Senate, Legal and Constitutional Affairs Legislation Committee, 30 October 2024, p 4). The NSWBA proposes the following formulation:

> For the purposes of Table 6, a barrister does not assist a person or otherwise act for or on behalf of a person where the barrister is engaged to do so by a solicitor who is a reporting entity.

Senator Shoebridge asked for a formulation that would require barristers to obtain a warranty from solicitors that they will comply with the AML regime (Proof Committee Hansard, 30 October 2024, p 7). The NSWBA proposes the following formulation:

> For the purposes of Table 6, a barrister does not assist a person or otherwise act for or on behalf of a person where the barrister is engaged to do so by a solicitor who is a reporting entity. A barrister so engaged must obtain confirmation that the solicitor accepts it is a reporting entity and will comply with its obligations as a reporting entity under this Act.

The need for such a provision

The need for a provision that clearly specifies that barristers acting on instructions from a solicitor on behalf of a client are not captured by the AML regime is underscored by evidence given by AGD officers to the Committee concerning the operation of the AML regime. Some of that evidence misstates the effect of Table 6 (pp66ff of the Bill).

Three aspects of that evidence in particular require correction.

First, the suggestion that barristers doing pro bono work generally do not provide designated services because they are not advising on *"complex corporate structures"* (Proof Committee Hansard, 30 October 2024, p 60). This suggestion is not correct. Table 6 extends well beyond advice on complex corporate

structures. Item 1, for instance, may capture advice as to the sale or transfer of real estate; and item 2 may capture advice as to the sale or transfer of shares in a company. Transactions of that kind do not require complex structures; and barristers advise on them routinely.

Secondly, the suggestion that generally barristers' work will not be captured because *"a lot [of barristers] won't…provide advice in these sorts of areas"* (Proof Committee Hansard, 30 October 2024, p 54).[1] This too is incorrect. Paragraphs [51]-[85] of the NSWBA Submission (Submission 17) outline, on an item by item basis, specific examples of barristers' work which is likely to be captured by each of items 1, 2, 4 and 6 of Table 6. The NSWBA encourages the Committee to read those paragraphs closely. They demonstrate the breadth and variety of ways in which the AML regime is likely to apply to routine work done by barristers, whether by way of advice, mediation or court work.

Thirdly, the suggestion that barristers practising in the areas of family law and criminal law don't provide designated services (Proof Committee Hansard, 30 October 2024, p 54). This too is incorrect. The NSWBA Submission specifically identifies the ways in which family law and criminal law practitioners may provide services falling within Table 6: see paras [59] and [77]-[84]. As explained in greater detail in that submission, property settlements in family law proceedings may be resolved by the making of a binding financial agreement that does not involve Court orders. Advice on those matters is likely to be caught by item 1 of Table 6 and fall outside the exemption in subpara (c). Further, criminal law practitioners can be called on to advise on the sale or transfer of assets for the purpose of formulating bail conditions; settlements in the context of confiscation and forfeiture proceedings; or prospective dealings in property affected by an apprehended domestic violence order. Again, work of this kind has the potential to be caught by items 1 and 2 of Table 6 and fall outside the exemption in subpara (c) of each item.

[1] Ms Warnes: "…We think there might be situations where barristers do perform those designated services. There was quite a bit of discussion about the UK model. Barristers are certainly captured there. The reason there is not a blanket exemption is because we can envisage circumstances where barristers might provide designated services. Do we think it is highly unlikely that they will? Yes. Do most barristers even provide advice in these sorts of areas? I am sure some do; a lot won't." Proof Committee Hansard, 30 October 2024, p 54).

A provision of the kind proposed above would remove a lacuna from the present drafting where barristers are engaged by solicitors who are already bound by AML obligations in respect of the client. This is a reasonable and proportionate measure to reduce duplication and unnecessary costs for clients that does not materially increase AML-CTF risk, or exempt barristers from the regime when they are accepting briefs directly from clients.

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NSW Bar Association Response to Questions on Notice: United Kingdom - Anti-Money Laundering and Counter-Terrorism Financing Laws

Members of the Legal and Constitutional Affairs Legislation Committee enquired as to whether Australia should consider adopting elements of the United Kingdom's approach to the regulation of money laundering and terrorism financing. The NSW Bar Association submits that the UK model is not a preferable approach, for the following reasons:

a) A combination of HM Treasury-approved guidance and court authority has the effect that a large proportion of the advisory and advocacy services provided by barristers will not come within aspects of the AML/CTF legislation. That does not provide consistency and certainty in the way that a legislative exemption would.

b) The AML/CTF legislation contains a reliance provision for client due diligence, but its terms do not operate to relieve barristers of the burden of undertaking due diligence already performed by solicitors.

c) The suspicious matter reporting and tipping off offences are more appropriately targeted to money laundering and terrorism financing than s 41 of the AML/CTF Act, but do not otherwise offer clear solutions and certainty regarding the fundamental and irresolvable ethical issues arising from barristers being obliged to make a suspicious matter report and the inability to disclose that fact.

Primary AML/CTF requirements

The *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* (**UK Regulations**) cl 12 applies to independent legal professionals who:

(a) provide services in relation to enumerated matters that are similar in content to the proposed Table 6 services; and

(b) "participate[s] in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction."

Barristers caught by the Regulation must undertake a risk assessment and implement policies, controls and procedures to address ML/TF risk, undertake customer due diligence, and comply with record keeping and data protection requirements. The obligations are overseen by the Bar Standards Board as delegate of the UK Bar Councils.

The Legal Sector Affinity Group (**LSAG**) has issued *Anti-Money Laundering Guidance for the Legal Sector Part 2A: Specific Guidance for Barristers & Advocates 2021* (**AML Guidance**), which provides official guidance to barristers in relation to their obligations under the UK Regulations. Once approved by HM Treasury, the court is required to consider compliance with the AML Guidance in assessing whether a person committed an offence or took all reasonable steps and exercised all due diligence to avoid committing the offence against the legislation addressed in this note.

The AML Guidance indicates the following matters relevant to the discharge of barristers' obligations under the UK Regulations.

Application to legal advice

The AML Guidance provides: "*The provision of legal advice by a barrister or advocate, instructed to advise or give an opinion in relation to specific aspects of a transaction and not otherwise carrying out or participating in the transaction, would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. This guidance is consistent with the interpretation previously approved by HM Treasury.*"[1]

The guidance in this respect is unclear but appears to suggest that most advice delivered by barristers in respect of transactions will not attract the operation of the UK Regulation. However, that position is

[1] AML Guidance at [23].

dependent on the opinion of HM Treasury as to the interpretation of cl 12 of the UK Regulation, which without express legislative support may change.

Reliance Provision

The UK Regulations provide that a person such as a barrister may rely on a third party such as an instructing solicitor to apply any of the customer due diligence measures required by cll 28(2) to (6) and (10), or to carry out the requirement to report discrepancies in clause 30A, but, notwithstanding the barrister's reliance on the instructing solicitor, the barrister remains liable for any failure to apply such measures.[2] Additionally, the barrister must:

(a) obtain from the solicitor all the information needed to satisfy CDD requirements; and

(b) make arrangements with the solicitor to make compliance records available on request.[3]

The AML Guidance provides in relation to the provision: "*You remain legally responsible for the regulatory compliance of the checks undertaken and therefore for any failings in them. You must therefore ensure that you have complied with Regulation 39 and obtained the necessary "information" to satisfy, on a risk-based approach, the CDD obligations upon you. 33. You should note that simply obtaining copies of the CDD material obtained by the person instructing you does not meet the 'Reliance' requirements of Regulation 39. Even where you do obtain copy documents, the obligation upon you is to ensure that the information provided to you permits you to meet the requirements of Regulation-compliant CDD.*"

Therefore, the reliance provision relates only to information gathering and not to the CDD obligation. It is not recommended that the United Kingdom's approach be adopted. It would not avoid duplication in the work done by solicitors as the barrister retains CDD obligations, including the obligation to obtain further information.

[2] UK Regulation, cl 39(1).
[3] UK Regulation, cl 39(2).

Disclosure, tipping off, and legal professional privilege

Suspicious matter reporting obligation

Section 330 of the *Proceeds of Crime Act 2002* (**POCA**) makes it an offence to fail to disclose information received in the course of a business in the regulated sector (including independent legal professionals who are 'relevant persons' in the UK Regulations), concerning knowledge, or a suspicion on reasonable grounds, that another person is engaged in money laundering.[4] A barrister must make the relevant disclosure (known as a Suspicious Activity Report (**SAR**) to the National Crime Authority.

Similar obligations are provided in respect of terrorism financing by s 21A of the *Terrorism Act 2000.*

However, there is Court of Appeal authority to the effect that the POCA does not apply to participation in litigation or a form of alternative dispute resolution: *Bowman v. Fels* [2005] 1 WLR 3083.

Moreover, the UK provisions are narrower than s 41 of the AML/CTF Act in the sense that they apply only to suspicions about money laundering and terrorism financing. Section 41 is cast in far broader terms with the apparent intention to facilitate general criminal and financial intelligence.

Privileged Circumstances and Legal Professional Privilege

Both POCE and the *Terrorism Act 2000* provide that if the relevant information comes to a professional legal adviser in privileged circumstances, the professional legal advisor does not commit an offence.[5] Privileged circumstances cannot be claimed in circumstances where information is communicated or given with the intention of furthering a criminal purpose.[6]

[4] Money laundering is defined in s 340(11), POCA.
[5] POCA s 330(6)(b), (10).
[6] POCA s 330(11).

The AML Guidance advises that the "*concept of 'privileged circumstances' is one created and defined by POCA. It is distinct from and more restricted than the common law protection of legal professional privilege that applies in relation to communications in connection with litigation and, separately, to communications in relation to legal advice by a barrister or advocate.*"[7]

The LSAG addresses the tension between the disclosure obligations under POCA and the duties of client confidentiality and to protect legal professional privilege,[8] and outlines a process to assist legal practitioners making a decision as to whether to disclose under the POCA, which is summarised as follows[9]:

> "*If the communication is covered by legal professional privilege and the crime/fraud exception does not apply, you cannot make a disclosure under POCA.*
>
> *If the communication was received in privileged circumstances and the crime/fraud exception does not apply, you are exempt from the relevant provisions of POCA, which includes making a disclosure under POCA.*
>
> *If neither of these situations applies, the communication may still be confidential. However, the material is disclosable under POCA and can be disclosed, whether as an authorised disclosure, or to avoid breaching section 330. Sections 337 and 339ZF of POCA permit you to make such a disclosure and provides that you will not be in breach of your professional duty of confidentiality when you do so.*"

Accordingly, the UK legislation expressly relieves a legal practitioner from professional ethical obligations in relation to suspicious matter reports concerning confidential information. For the reasons articulated in the NSWBA Submission, that is not a satisfactory outcome in the interests of the administration of justice.

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[7] AML Guidance at [250]; See Legal Sector Affinity Group, "Anti-Money Laundering Guidance for the Legal Sector", 2023, at [13.6] for the differences between privileged circumstances and legal professional privilege.
[8] Legal Sector Affinity Group, "Anti-Money Laundering Guidance for the Legal Sector", 2023, at [13.7].
[9] Ibid, at [13.8.2].

Tipping Off

Section 333A of the POCA and section 21D of the *Terrorism Act 2000* provide that it is an offence to disclose that an SAR has been made in circumstances where it is likely to prejudice any investigation that might be conducted following the SAR.

Section 333D(2) of POCA and s 21G(2) of the *Terrorism Act 2000* provide that the offence is not committed by a professional legal adviser if they make a disclosure to their client and it is made for the purpose of dissuading the client from engaging in conduct amounting to an offence.

Section 342 of the POCA provides that it is an offence for a person to make a disclosure which is likely to prejudice an investigation that they know or suspect is being, or is about to be, conducted in relation to money laundering, confiscation, civil recovery, detained cash or exploitation proceeds.

It is a defence under subsection 342(4) of the POCA if the disclosure is made by a professional legal adviser to a client, or a client's representative, in connection with giving legal advice to the client or to any person in connection with legal proceedings or contemplated legal proceedings. However, this defence does not apply where a disclosure is made with the intention of furthering a criminal purpose.[10]

The LSAG has advised that the fact that a SAR has been made should not be revealed to a client given that it could constitute an offence under section 342 of the POCA.[11]

[10] POCA s 342(5).
[11] AML Guidance, Annex 2 - AML FAQs at [13].