

**Application by New Zealand Bar Association for a Reporting Entity Class Exemption  
for Barristers when instructed by a Solicitor**

**Overview**

1. The New Zealand Bar Association (“the Bar Association”) seeks from the Minister under s 157(1)(a) of the Anti-Money Laundering and Countering Finance of Terrorism Act 2009 (“the Act”) a reporting entity class exemption for a lawyer who holds a practising certificate as a barrister sole (referred to in this document as a “barrister”) when that barrister is instructed by:
  - (a) a lawyer who holds a practising certificate as a barrister and solicitor (referred to in this document as a “solicitor”); or
  - (b) the Crown.
  
2. By way of summary, the exemption is sought on the following basis:
  - (a) Through the application of the ‘intervention rule’ (and with the exception mentioned below) barristers can only be engaged by a solicitor.
  - (b) The only activity carried out by a barrister to which the Act will be likely to apply is involvement on the part of a barrister in the ordinary course of the barrister’s business in advising on or documenting a transaction involving real property (for example as a result of the settlement of litigation).
  - (c) In the case of work of that type, the barrister will invariably be instructed by a solicitor. That solicitor is the barrister’s client; not the solicitor’s client.
  - (d) The solicitor will be subject to the Act’s requirements already such that for a barrister to be involved as well would be doubling up; having regard in particular to the limited resources on the part of barristers who can only be in business by themselves.

The exception to the intervention rule is found in clause 14.5 of the Lawyers and Conveyancers Act (“Lawyers: Conduct and Client Care”) Rules 2008 (“the Client Care Rules”) under which, in the circumstances mentioned there (many of which involve the

need for Law Society approval), a barrister may accept instructions from a client directly. In any such case, the exemption that is sought would not apply to the barrister.

- (e) The grant of the exemption that is sought will have no impact on the achievement of the purpose and integrity of the Act and on the AML/CFT regulatory regime or on the prevention, detention, investigation and prosecution of offences.

### **The role of a barrister**

- 3. A lawyer may hold a practising certificate as either:
  - (a) a solicitor; or
  - (b) a barrister.
- 4. If a person chooses to practice as a barrister, then they are choosing to provide independent advocacy and/or advisory services and the Client Care Rules then impose on them a range of restrictions which are designed to ensure their independence from the clients who receive the benefit of their services (which is why barristers are commonly referred to as members of the “Independent Bar”). The “clients” are not the barrister’s clients but are the clients of the solicitor who instructs them. The contract of retainer remains in place between the client and the solicitor and a barrister can only become involved if instructed by the solicitor.
- 5. The relevant provisions from the Client Care Rules are these:
  - (a) clause 14.4 which provides that (subject to Rule 14.5 which is mentioned below) a barrister must not accept instructions to act for another person other than from an instructing lawyer (i.e. a solicitor);
  - (b) clause 14.2 provides, in full:
    - A lawyer who holds a practising certificate as a barrister sole must not –
    - a) practice as a solicitor; or
    - b) carry out the transactional aspects of conveyancing; or
    - c) act as a general agent or attorney in respect of a client’s affairs; or
    - d) undertake the work of a real estate agent; or

- e) receive or hold money or other valuable property for or on behalf of another person; or
  - f) practice in partnership or in an incorporated law firm unless the barrister sole is the only voting shareholder of the incorporated law firm.
- (c) under rule 14.3 a barrister may only practice from a set of rooms or chambers and join with other barristers in sharing secretarial and support services for their practices, including the employment of another lawyer who holds a practising certificate as a barrister.
6. As rule 14.3 foreshadows, barristers, while they must each be a sole trader, running their own business and accounts, may share a set of rooms or chambers with other barristers. In the larger cities, some chambers are sizeable. For example, in Auckland, Shortland Chambers has thirty-four members and Bankside Chambers has twenty-eight members. Wellington's largest chambers is Stout Street Chambers with twenty members. Otherwise, prominent sets of chambers in the three major cities tend to have around ten barristers sharing facilities. However, by far the majority of barristers in New Zealand will work either entirely alone or with one or two others. It is only the larger sets of chambers that tend to employ secretarial/PA assistance or junior barristers.
7. [Refer to data being collected on the composition of New Zealand chambers.]
8. In any event, whether a barrister practises as a member of a large chambers or entirely by themselves, their practice is their own, does not overlap with that of another barrister and their accounts are entirely separate. The only expenses that are shared in a set of chambers are those relating to the cost of the premises, any PA<sup>1</sup> and the cost of office equipment such as a photocopier. All other expenses are their own.
9. A barrister will accept instructions from a solicitor to represent the solicitor's client in a Court proceeding or, generally, to provide advice to the client. The solicitor will typically remain involved in the case. That involvement will often be active in the sense that the solicitor will work alongside the barrister, but the barrister will appear in Court or front a meeting or mediation. In some cases, the barrister will do virtually all of the work and will report to the solicitor from time to time. In either case however, the contract of retainer is between the

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<sup>1</sup> Although in some chambers with PAs, only some barristers will use the PA and contribute to the cost.

solicitor and the client and, unless there is an agreement to the contrary, the standard practice is for the barrister to invoice the solicitor for his or her work and for the solicitor to pass that onto the client as a disbursement to the solicitor's invoice.

10. Some barristers will, from time to time, receive instructions directly from the Crown to provide advice on a course of action or transaction; often from a solicitor within a Government department or the Crown Law Office but sometimes from an official or a Minister directly<sup>2</sup>.
11. A barrister may accept direct instructions – that is to say, instructions from someone who is not a solicitor – in the circumstances described in Rule 14.5 of the Client Care Rules. This point is mentioned for completeness because the exemption that is sought would not apply to any barrister acting on direct instructions. A copy of Rule 14.5 is attached as Appendix 1 (given the length of the Rule). By way of summary, a barrister sole may accept instructions directly if they are instructed or appointed by a Judge or if they are instructed to act in a judicial quasi-judicial capacity or if they are asked to provide a legal opinion or to provide advice on a pro bono basis. Direct instructions may be accepted also if a person has met certain prescribed Law Society requirements to represent a person charged with an offence (other than in any prosecution by the Serious Fraud Office, the Financial Markets Authority or the Commerce Commission), for any person who has been granted legal aid, in a Family Court proceeding, in an employment law matter or in a civil matter which does not involve a proceeding before the District Court, the High Court, the Court of Appeal or the Supreme Court.

#### **The limited types of a barrister's work that fall within the scope of the Act**

12. Of the broad range of work undertaken by barristers, only an extremely narrow area (an area in which most barristers will not be involved at all) has the potential to fall within activities covered by the Act.
13. The Bar Association has considered carefully the circumstances in which the activities of barristers might be caught by the Act. It has obtained advice on the point by Derek Johnson, an eminent commercial barrister and a former senior commercial partner of Russell McVeagh. That advice has been peer reviewed by John Dixon QC and Paul Radich QC. A copy has been provided to the Ministry previously, but a further copy is attached as Appendix 2 for ease of reference.

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<sup>2</sup> Under Rule 14.5.2 (j) of the Client Care Rules, an instructing solicitor is not needed if the service is the provision by the barrister of a legal opinion.

14. The essential points from that analysis are as follows:
- (a) Under s 6(4)(c), the Act will apply to a “law firm” only to the extent that the activities carried out by that firm are activities described in the definition of “designated non-financial business or profession” in s 5(1) of the Act.
  - (b) A “law firm” is defined in s 5 of the Act to include a barrister who is practising on his or her own account in sole practice.
  - (c) The definition of “designated non-financial business or profession” in s 5 of the Act includes any barrister who, in the ordinary course of his or her practice, “engages in, or gives instructions on behalf of a customer to another person” for a range of activities that include the following:
    - (i) any conveyancing to effect a transaction within the meaning of s 4(1) of the Real Estate Agents Act 2008. “Conveyancing” is defined in the Lawyers and Conveyancers Act 2006 (in so far as is relevant for present purposes) to mean legal work carried out for the purpose of effecting or documenting any transaction or prospective transaction involving an estate, interest or right in any real property;
    - (ii) a transaction within the meaning of s 4(1) of the Real Estate Agents Act 2008. “Transaction” under that provision requires the “deposit, withdrawal, exchange or transfer of funds”;
    - (iii) the transfer of a beneficial interest in land or other real property;
    - (iv) a transaction relating to the sale or purchase of a business or the creation or operation of a legal person.
15. If a barrister is involved in advising on or documenting a litigation settlement or other transaction involving real property (for example, a settlement of a matrimonial property dispute providing for the transfer of the matrimonial home from both parties to one spouse) or otherwise becomes engaged with effecting or documenting any transaction involving real property then they may fall within the definition of “designated non-financial business or profession” under s 5 of the Act<sup>3</sup>. However, that is the only type of work on the part of a

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<sup>3</sup> Paragraph (a)(vi)(A) of the Definition of “Designated Non-financial Business or profession” in s 5 of the Act.

barrister likely to be caught by the Act. A “transaction” under s 4 of the Real Estate Agents Act will only catch the activities of a barrister where the barrister engages personally in the deposit, withdrawal, exchange or transfer of funds and it would be highly unusual for a barrister in the course of their practice to personally be engaging in any such activity.

16. Equally, it would be highly unusual for a barrister to be involved in the transfer of a beneficial interest in land or property because this part a definition does not include reference to engaging in “conveyancing” so will not bring a barrister within the scope of the Act when they are simply involved in the documentation of, or review or negotiation of the documentation for, the transfer of a beneficial interest in land or other real property.
17. Given the extremely limited area of practice for barristers which has any potential of coming within the scope of the Act, and given that the exemption is sought for activities where a barrister has an instructing solicitor on the work in question, it is the Bar Association’s view that the AML/CFT regime will not be affected if the exemption was to be granted.

**Matters to which the Minister must have regard before deciding to grant an exemption**

18. Under s 157(3) of the Act, before deciding to grant an exemption and whether to attach any conditions to the exemption, the Minister is to have regard to the six factors that are then set out each is addressed below:

***(b) the intent and purpose of the Act and any regulations***

19. The purpose of the Act, in s 3, is to detect and deter money laundering and the financing of terrorism, to maintain and enhance New Zealand’s international reputation by adopting, where appropriate in the New Zealand context, recommendations issued by the Financial Action Taskforce and to contribute to public confidence in the financial system.
20. Because the exemption sought does not compromise obligations under the Act – because they are held by the instructing solicitor – and seeks only to remove double reporting in circumstances where the regulatory burden on a barrister would be disproportionate, it is the Bar Association’s view that there will be no net adverse effect in terms of the purpose of the Act.
21. Equally, the intent and purpose of regulations made under the Act will not be affected. The regulations made under the Act on which some comment is warranted are those set out below.

*Anti-Money Laundering and Countering Financing of Terrorism (Cross-Border Transportation of Cash) Regulations 2010*

22. These regulations prescribe the information that is to be included within reporting requirements under s 70(b) of the Act and therefore does not raise any matter that would have a bearing on this application.

*Anti-Money Laundering and Countering Financing of Terrorism (Definitions) Regulations 2011*

23. While the exemption sought would have no impact on the intent and purpose of these regulations, two provisions are relevant.
24. The first is reg 18 which provides that a person who would be a reporting entity under the Act but who only performs relevant services that are exempt from all provisions of the Act is declared not to be a reporting entity under the Act after all. Given the very narrow type of activity that might be caught under the Act in the case of a barrister and the fact that an instructing solicitor will be involved in any event, the same net position will apply as that which underlies the reason for Regulation 18.
25. The second is reg 20, in which it is declared that a person is not a reporting entity for the purposes of the Act by reason only that the person carries out a relevant service in the ordinary course of the person's business as a lawyer. This regulation reinforces s 6 of the Act in providing that the Act only applies to a lawyer to the extent that the lawyer carries out an activity within the definition of designated non-financial business or profession and, as discussed above, the extent of the application of that definition to barristers is particularly limited.

*Anti-Money Laundering and Countering Financing of Terrorism (Prescribed Transactions) Regulations 2016*

26. These regulations prescribe the details that are to be included in the report that is required by s 48A of the Act for transactions prescribed by reg 6. Any such report for any such transaction would be prepared by a barrister's instructing solicitor.

*Anti-Money Laundering and Countering Financing of Terrorism (Requirements and Compliance) Regulations 2011*

27. As with the Prescribed Transactions Regulations, the suspicious transaction reports and annual AML/CFT report, which these regulations prescribe, will be completed by a barrister's instructing solicitor.

28. The prescribed content of these reports include indicators as to the way in which they are ill-suited to the practice of a barrister. For example, in paragraphs 2 and 3 of the ‘Details to be Contained in Suspicious Transaction Reports’ in Schedule 1 the focus is on the report writer’s “customer”, to a “person acting on behalf of any such customer” and to “beneficial owners of a customer”. Paragraph 5 refers to customers that are trusts. The “client” or “customer” of a barrister, in the circumstances to which the exemption that is sought will apply, will be an instructing solicitor.

29. Similarly, clause 5.8 of the AML/CFT report in Schedule 2 relates to “new customers” and “existing customers”. The same point applies. Similarly, part 7 of the report relates to “customers/members” and, generally speaking, the report does not reflect in any way the characteristics of the work that a barrister would undertake with an instructing solicitor involved.

***(c) the risk of money laundering and the financing of terrorism associated with the reporting entity, including the services offered by the reporting entity***

30. Once more, given the very limited services offered by barristers that could come within the ambit of the Act and the fact that the exemption is sought only when instructing solicitors or the Crown are involved, the risk is regarded by the Bar Association as being nil, or negligible at most.

***(d) the impacts on prevention, detection, investigation and prosecution of offences***

31. On the same basis as that expressed in relation to paragraph (c), the impacts are regarded by the Bar Association as being nil, or negligible at most.

***(e) the level of regulatory burden to which the reporting entity would be subjected in the absence of an exemption***

32. Because barristers are required to practice alone, whether in chambers with others or not, the burden of the Act’s requirements would be significant to the point of being overwhelming and would in the Bar Association’s view be unreasonably disproportionate to any benefits that could be obtained in the absence of an exemption.

33. For a sole trader to be required to:



- (a) before conducting due diligence or establishing an AML/CFT programme, conduct an assessment in writing of the risk of money laundering and financing of terrorism that he or she may reasonably expect to face in the course of his or her practice<sup>4</sup>;
- (b) keep that risk assessment up to date<sup>5</sup>;
- (c) establish, implement and maintain a written AML/CFT programme<sup>6</sup>;
- (d) appoint an AML/CFT compliance officer<sup>7</sup>;
- (e) prepare and provide to his supervisor an annual report on the risk assessment and the AML/CFT programme<sup>8</sup>;
- (f) have its risk assessment and AML/CFT programme audited by an external auditor to at least every two years<sup>9</sup>;
- (g) undertake prescriptive customer due diligence and verification obligations<sup>10</sup>;
- (h) maintain prescribed records<sup>11</sup>;
- (i) make suspicious activity reports and comply with prescribed transaction reporting obligations<sup>12</sup>

would impose a burden of such a nature that would not be warranted in circumstances where the intent and purpose of the provisions of the Act and the regulations would not be served by including barristers who are instructed by a solicitor.

***(f) whether the exemption would cause an unfair advantage for the reporting entity or disadvantage third party reporting entities***

34. The Bar Association can think of no unfair advantage or disadvantage. There are no service providers of a similar nature to a barrister working with an instructing solicitor who would be affected.

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<sup>4</sup> s 58 of the Act.  
<sup>5</sup> s 59 of the Act.  
<sup>6</sup> ss 56(1) and 57 of the Act.  
<sup>7</sup> ss 56(2) and (3) of the Act.  
<sup>8</sup> s 60 of the Act.  
<sup>9</sup> s 59(2) of the Act.  
<sup>10</sup> sub-Part 1, part 2 of the Act.  
<sup>11</sup> ss 49 – 52 of the Act.  
<sup>12</sup> sub-Part 2A and Part 2 of the Act.

***(g) the overall impact the exemption would have on the integrity of, and compliance with the AML/CFT regulatory regime***

35. For all of the reasons given, there would in the Bar Association's clear view, be no impact on the integrity of and compliance with the regime.
  
36. The Bar Association has advised its members of the extent to which the Act applies to their work. A copy of that advice is attached as Appendix 3. In the event that the exemption is granted, the advice will be updated. Barristers will be made aware that, if they are advising on or documenting a transaction involving real property, then they will be subject to the Act's requirements unless, in the case an exemption is granted, they have an instructing solicitor or are instructed directly by the Crown.

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