

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009

**Second consultation paper on proposed
class exemption; to a barrister (sole)**

January 2019



New Zealand Government

About this paper

Following an application made by the New Zealand Bar Association (the “Applicant”), the Ministry of Justice is considering the need for a class exemption from the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (the “Act”) for barristers sole, when instructed by a solicitor or the Crown.

To inform the Ministry’s analysis of the proposed exemption, the Ministry has sought the views of the legal industry in a first Consultation Paper sent in September 2018.

The views expressed in the submissions and the subsequent analysis have informed a number of additional questions and helped form two potential options for class exemptions.

The aim of this paper is to seek the views of the legal industry on these additional questions, as well as on the two options for exemptions.

How to have your say.

You can either:

- email a submission to amlcft.exemptions@justice.govt.nz
- post a written submission to AML/CFT Exemptions team, Ministry of Justice, SX10088, Wellington, New Zealand

Please send us your views by 5pm on Wednesday 27 February 2019.

Personal information and confidentiality

We will hold your personal information in accordance with the Privacy Act 1993.

We accept submissions made in confidence or anonymously. Please clearly indicate if you want your submission to be treated as confidential.

We may be asked to release submissions in accordance with the Official Information Act 1982 and the Privacy Act 1993. These laws have provisions to protect sensitive information given in confidence, but we can’t guarantee the information will be withheld. However, we won’t release individuals’ contact details.

Overview

Application of the Act to a barrister sole

As of 1 July 2018, a barrister sole (“barrister”) is a reporting entity under the Act only if the barrister is captured by the definition of a law firm under the Act, and performs one or more of the activities listed under limbs (a)(i)-(vi) of the definition of “designated non-financial business or profession” in section 5 of the Act. The second qualifier is that this activity must be carried out in the barristers’ ordinary course of business.

Designated non-financial business or profession means:

(a) a law firm, a conveyancing practitioner, an incorporated conveyancing firm, an accounting practice, a real estate agent, or a trust and company service provider, who, in the ordinary course of business, carries out 1 or more of the following activities:

(i) acting as a formation agent of legal persons or legal arrangements:

(ii) acting as, or arranging for a person to act as, a nominee director or nominee shareholder or trustee in relation to legal persons or legal arrangements:

(iii) providing a registered office or a business address, a correspondence address, or an administrative address for a company, a partnership, or for any other legal person or arrangement, unless the office or address is provided solely as an ancillary service to the provision of other services (being services that do not constitute an activity listed in this subparagraph or subparagraphs (i), (ii), and (iv) to (vi)):

(iv) managing client funds (other than sums paid as fees for professional services), accounts, securities, or other assets:

(v) providing real estate agency work (within the meaning of section 4(1) of the Real Estate Agents Act 2008) to effect a transaction (within the meaning of section 4(1) of the Real Estate Agents Act 2008):

(vi) engaging in or giving instructions on behalf of a customer to another person for—

(A) any conveyancing (within the meaning of section 6 of the Lawyers and Conveyancers Act 2006) to effect a transaction (within the meaning of section 4(1) of the Real Estate Agents Act 2008), namely,—

- the sale, the purchase, or any other disposal or acquisition of a freehold estate or interest in land:
- the grant, sale, or purchase or any other disposal or acquisition of a leasehold estate or interest in land (other than a tenancy to which the Residential Tenancies Act 1986 applies):
- the grant, sale, or purchase or any other disposal or acquisition of a licence that is registrable under the Land Transfer Act 1952:
- the grant, sale, or purchase or any other disposal or acquisition of an occupation right agreement within the meaning of section 5 of the Retirement Villages Act 2003:

(B) a transaction (within the meaning of section 4(1) of the Real Estate Agents Act 2008); or

(C) the transfer of a beneficial interest in land or other real property; or

(D) a transaction on behalf of any person in relation to the buying, transferring, or selling of a business or legal person (for example, a company) and any other legal arrangement; or

(E) a transaction on behalf of a customer in relation to creating, operating, and managing a legal person (for example, a company) and any other legal arrangement; and

(b) includes a person or class of persons declared by regulations to be a designated non-financial business or profession for the purposes of this Act; but

(c) excludes a person or class of persons declared by regulations not to be a designated non-financial business or profession for the purposes of this Act.

Ordinary course of business:

The barrister must perform one or more of the listed activities in the barristers' ordinary course of business to qualify as a reporting entity under the Act.

The Department of Internal Affairs has provided guidance titled 'Ordinary Course of Business' to assist reporting entities in determining the application of the Act to their business.

Scope:

Based on data held by the Department of Internal Affairs, it is likely that the number of barristers who are reporting entities for the purposes of the Act is limited.

Summary of the exemption proposed by the New Zealand Bar Association

The applicant has proposed the following exemption:

Where a barrister qualifies as a reporting entity, an exemption is requested in circumstances when that 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

For clarity, the applicant has not sought an exemption where:

- a barrister receives instructions directly from a client; or
- a barrister performs the activities listed under the definition of a designated non-financial business or profession under section 5 of the Act (outside of the instructions of a lawyer).

In these instances, it is proposed that a barrister will remain subject to all obligations prescribed by the Act.

Follow – up consultation questions and exemption options

1. Suspicious activity reporting

If an exemption were granted, it is proposed to still require barristers to undertake suspicious activity reporting in line with Part 2, Sub-part 2 of the Act.

This would be achieved by way of a partial exemption from the Act, where the sections relating to suspicious activities would be carved out from the exemption and continue to apply to barristers.

This is because barristers may come across a suspicious activity in the course of their appointment that the instructing solicitor may not necessarily spot.

In some instances, once the instructions have been made to the barrister by the solicitor, the solicitor takes a passive role and is no longer involved in the granular detail of the work. In these cases, the barrister could detect suspicious activities which the solicitor may not be able to detect.

If a full exemption were granted to barristers, barristers would be under no obligation to report the suspicious activity and there is a risk an offence may remain unreported. This would be contrary to the intent and purpose of the Act.

The detection of a suspicious activity further triggers the obligation to conduct enhanced customer due diligence in respect of that activity, in line with section 22A of the Act. The application of section 22A further invokes sections 23 and 24 of the Act.

We are of the view that when a suspicion is formed by the barrister, the barrister is best placed to undertake enhanced due diligence (as opposed to the solicitor), as they have the day-to-day relationship with the client at this point.

This will not affect the obligation of a solicitor to file a suspicious activity report when a suspicion is formed by the solicitor on the same client the barrister has been instructed on.



Questions

- a) Do you agree with the assumption that barristers may come across suspicious activities that the solicitor may not come across, and should therefore be required to report suspicious activities in line with sections 39A to 48 of the Act?
- b) Do you agree that barristers should subsequently also be subject to sections 22A to 24 of the Act?
- c) If the instructing solicitor and the barrister form the same suspicion, who should be required to file the suspicious activity report and undertake enhanced customer due diligence on the customer in line with sections 22A to 24 of the Act?

We are interested on hearing the views of solicitors and barristers on question c).

2. Compliance burden for instructing solicitors

One submission noted that an exemption for barristers places heavy reliance on the instructing solicitor being a reporting entity subject to the Act's requirements. There is concern about a potential increased compliance burden on solicitors, who may also be sole practitioners with limited resources.

As you will see from the two proposed exemption options below, any potential exemption will require that CDD has been conducted by the instructing solicitor and relevant customer identity information provided to the barristers by the instructing solicitor.



Questions

- a) We are seeking the views of solicitors: What are solicitors views on a barristers' reliance on the instructing solicitor to conduct CDD and provide the barrister with relevant customer identity information?
- b) If this is considered an additional burden, are solicitors willing to take on this burden?

3. Compliance burden and cost for barristers

The applicant has stated that the consequences for barristers (if subject to the Act) will be significant as the compliance obligations will be onerous. The first round of consultation questions already sought feedback on why the compliance obligations are too burdensome and onerous.

The responses to this question have not provided any compelling evidence that compliance would be too burdensome and onerous.

One point to consider is that barristers are not the only sole practitioners subject to the Act and that there are numerous solicitors and accountants who operate on their own and are also subject to the AML/CFT regime. There are also multiple small Phase 1 businesses that are reporting entities. Some of these may have smaller profit margins than barristers.



Questions

- a) What makes the compliance burden disproportionate for barristers, compared to other sole practitioners or small businesses subject to the Act?
- b) What makes the compliance obligations too onerous for barristers?

We would appreciate detailed responses with examples or factual evidence.

4. Exemption options for consultation

The Ministry has identified two potential options for exemptions and is seeking feedback on both options.

It should be noted that these options are put forward for consultation in order to understand practical consequences associated with the exempt sections and conditions attached. They are by no means a guarantee or commitment that the Ministry will recommend any of the below potential exemptions to the Minister. This is partially because any proposed exemption will also depend on the Department of Internal Affairs's risk assessment.

a) Option 1

Barristers will be exempt from the following sections of the Act: 10 to 22, 25 to 39, 48A to 49, 51 to 52, 56 to 61 and 68 to 71.

The exemption is made subject to the following conditions:

- The instructing solicitor is a reporting entity subject to all obligations under the Act;
- The instructing solicitor has consented to conducting customer due diligence for the barrister and to providing all information collected for customer due diligence purposes in accordance with the Act, to the barrister;
- The barrister is acting in good faith when relying on the solicitor to conduct customer due diligence, and has reasonable cause to believe the solicitor has conducted customer due diligence procedures to at least the standard required by the Act and regulations; and
- The barrister must not carry out any captured activity without having received the customer due diligence information from the instructing solicitor.

Features of the exemption:

- The solicitor remains liable for its own obligations under the Act.
- No liability for the barrister in relation to customer due diligence provided all of the conditions of the exemption have been met.
- A barrister instructed by a solicitor is exempt from all customer due diligence obligations, except for those under sections 22A-24 of the Act. In the event of an activity requiring a suspicious activity report, the barrister is fully responsible for conducting enhanced customer due diligence in line with sections 22A-24.
- The barrister must file suspicious activity reports (s39A-48), conduct enhanced due diligence in the event of an activity requiring a suspicious activity report (s22A-24), and keep records of suspicious activity reports (s49A) as well as identity and verification records (s50).

b) Option 2

Barristers will be exempt from the following sections of the Act: 10 to 22, 25 to 31, 48A to 48C.

The exemption is made subject to the following conditions:

- The instructing solicitor is a reporting entity subject to all obligations under the Act;
- The instructing solicitor has consented to conducting customer due diligence for the barrister and to providing all information collected for customer due diligence purposes in accordance with the Act, to the barrister;
- The barrister is acting in good faith when relying on the solicitor to conduct customer due diligence, and has reasonable cause to believe the solicitor has

conducted customer due diligence procedures to at least the standard required by the Act and regulations; and

- The barrister must not carry out any captured activity without having received the customer due diligence information from the instructing solicitor.

Features of the exemption:

- The solicitor remains liable for its own obligations under the Act.
- No liability for the barrister in relation to customer due diligence provided all of the conditions of the exemption have been met.
- A barrister instructed by a solicitor is exempt for all customer due diligence obligations, except for those under sections 22A-24 of the Act. In the event of an activity requiring a suspicious activity report, the barrister is fully responsible for conducting enhanced customer due diligence in line with sections 22A-24.
- The barrister is subject to all other compliance obligations: conducting a risk assessment (s58), developing an AML/CFT programme (s56-57), conducting enhanced customer due diligence when a suspicious activity report is required (s22A-24), submitting suspicious activity reports to the FIU (s39A-48), auditing their risk assessment and AML/CFT programme every two years (s59), producing an annual report (s60) and record keeping (s49 – 55).



Questions

- a) Please provide feedback on the two options, including on the practical consequences of the partial scope of the exemptions and attached conditions.

Please feel free to provide comment on any other aspects we have not touched on.

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