

Anti-Money Laundering and Countering Financing of Terrorism Act: Application to Barristers

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An overview

From 1 July 2018, the Anti-Money Laundering and Countering Financing of Terrorism Act (the Act) will apply to any involvement that a barrister has, in the ordinary course of the barrister's business, in advising on, documenting or effecting a transaction involving real property.

Unless the barrister chooses to avoid becoming involved in work of that sort (for example, by leaving work of that nature to their instructing solicitor, or to another solicitor) he or she will be subject to the compliance obligations in the Act.

The Bar Association is applying to the Minister of Justice for an exemption from the requirements of the Act in circumstances in which a barrister is acting on instructions from an instructing solicitor or directly from the Crown. But, unless and until the exemption is in place (or if it is in place and a barrister is acting on direct instructions), barristers need to be aware that it is possible that aspects of their practice will be subject to the Act.

The application of the Act

The Act will apply to "law firms" on 1 July 2018. A "law firm" is defined in s 5 of the Act to include a barrister.

However, under s 6(4)(c), the Act applies to a barrister only to the extent that the activities carried out by the barrister are described in the definition of "designated non-financial business or profession" in s 5 of the Act.

Under s 5, (as relevant here) a "designated non-financial business or profession" means a barrister who, in the ordinary course of business, carries out one or more of the activities that are then listed.

The Bar Association has considered the application of the s 5 activities with care and has obtained, and had peer-reviewed, advice on the point. As a result, its position is that, of the listed activities in the definition, only those set out below are of potential relevance to a barrister and, of them, only the first seems particularly likely to have any application to a barrister.

Transactions involving estates, interests or rights and real property

Subparagraphs (a)(vi)(A) and (B) of the definition of "designated non-financial business or profession" relate to transactions (within the meaning of s 4(1) of the Real Estate Agents Act 2008) involving real property. Subparagraph (A) captures a barrister who engages in (or gives instructions on behalf of a client to another person for) any "conveyancing" to effect a transaction involving real property.

The term "conveyancing", as defined in the Lawyers and Conveyancers Act 2006, involves 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.

Subparagraph (B) captures a 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 transaction involving real property. It seems unlikely a barrister would, in the ordinary course of his or her practice, personally engage in any real estate transaction or give instructions on behalf of a client to another person for a real estate transaction. However, if a barrister were, in the ordinary course of their practice, to give instructions on behalf of a client to another person (for example a real estate agent or a nominee for the client) for a real estate transaction, that will likely amount to the conduct of a designated non-financial business or profession by the barrister and be caught by the Act.

Consequently, any involvement by a barrister, in the ordinary course of their business, in:

- (a) 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 or the other spouse);
- (b) becoming otherwise engaged in any legal work associated with effecting or



documenting any transaction involving real property; or

- (c) giving instructions on behalf of a client to another person for a real estate transaction or to undertake any of the activities in paragraphs (a) or (b) above, would be likely to amount to the conduct of a designated non-financial business or profession by the barrister and be caught by the Act as a result.

Transfers of beneficial interests in land or other real property

Subparagraph (a)(vi)(C) of the definition would capture a barrister who, in the ordinary course of their business, engages in the transfer of beneficial interests in land for other real property or gives instructions on behalf of a client to any other person to do so.

This subparagraph, unlike subparagraph (A), does not capture a barrister engaging in “conveyancing” in connection with the transfer of the beneficial interest in land or other real property. Consequently, it is unlikely to bring a barrister within the scope of the Act when he or she is simply involved in the documentation of, or review or negotiation of the documentation for, the transfer of the beneficial interest in land for other real property.

Under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the “Client Care Rules”) a barrister may not hold valuable property on behalf of others. Consequently, it seems highly unlikely a barrister will, in the ordinary course of their business, hold, or engage in the transfer of, a beneficial interest in land or real property. If, however, a barrister were, in the ordinary course of their practice, to give instructions on behalf of a client to any other person to transfer a beneficial interest in land or real property, that would likely bring the barrister within the scope of the Act.

Other “transactions”

Subparagraphs (D) and (E) of the definition will bring within the AML regime any barrister who engages in (or gives instructions on behalf of a client to another person for) a “transaction” either:

- (a) on behalf of any person in connection with the sale, purchase or transfer of a business, a company or other legal person or trust, partnership or charitable entity; or
- (b) on behalf of a client in connection with the creation, operation or management of any company or other legal person or trust, partnership or charitable entity.

While at first blush this sounds to be a broad category, the Act defines “transaction” to mean “any deposit, withdrawal, exchange or transfer of funds...” Accordingly, the activities described in these subparagraphs will only catch the activities of a barrister where, in the ordinary course of business, they engage personally in any actual deposit, withdrawal, exchange or transfer of funds or, alternatively, give instructions on behalf of a client to another person to deposit, withdraw, exchange or transfer funds in connection with one of the activities in paragraph (a) or (b) above. Typically, it would be unusual for a barrister in the ordinary course of their practice to be engaging personally in the deposit, withdrawal, exchange or transfer of funds and so, for this reason, a barrister is unlikely to fall within the scope of the activities described in these sub paragraphs.

If a barrister were, in the ordinary course of business, to give instructions to another person on behalf of a client for the deposit, withdrawal, exchange or transfer of funds in connection with one of the activities in paragraph (a) or (b) above, that will likely amount to the conduct of a designated non-financial business or profession by the barrister and be caught by the Act.

Other activities

The definition of a designated non-financial business or profession also captures certain other activities which are not generally undertaken by barristers. However, if a barrister were, in the ordinary course of their business, to undertake one of these activities, that would also amount to the conduct of a designated non-financial business or profession by the barrister and be caught by the Act. The relevant activities are:

- (a) acting as a formation agent of companies or other legal persons or of a trust, partnership, charitable entity or any other prescribed arrangement;
- (b) acting, or arranging for a person to act as, a nominee director or nominee shareholder or trustee in relation to any company or other legal person or in relation to a trust, partnership, charitable entity or other prescribed arrangement;
- (c) providing a registered office or a business address, a correspondence address, or an administrative address for a company or a partnership or for any other legal person, trust, partnership or other prescribed arrangement, unless the office or address is provided solely as an ancillary service to the provision of other services (that do not otherwise give rise to a designated non-financial business or profession).



Under the Client Care Rules a barrister may not receive or hold money or other valuable property for or on behalf of any other person. If, contrary to this prohibition in the Client Care Rules, a barrister were, in the ordinary course of their business, to manage client funds (other than sums paid as fees for professional services), accounts, securities or other assets, that would also be caught by the Act.

The net effect

For these reasons, in the event that, in the ordinary course of a barrister's business, he or she advises on, documents or is otherwise involved in documenting a transaction involving real property or undertakes any other activity which constitutes a designated non-financial business or profession, then the Act is likely to apply to that work or activity.

As a consequence, the barrister will, in relation to that work or activity, have to meet the Act's compliance obligations which, at a high level, will require the barrister to:

- (a) conduct a written assessment 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 (s 58);
- (b) keep that risk assessment up-to-date (s 59);
- (c) create a written AML/CFT programme based on the risk assessment (ss 56(1) and 57);
- (d) appoint an AML/CFT compliance officer to maintain the AML/CFT programme (s 56(2) and (3));
- (e) prepare and provide to his or her AML/CFT supervisor (the Department of Internal Affairs or another supervisor prescribed for the purpose (s 130)) an annual report on the risk assessment and AML/CFT programme (s 60);
- (f) have the risk assessment and AML/CFT programme audited by an external auditor at least every two years (s 59(2));
- (g) undertake customer due diligence and verification obligations (Subpart 1, Part 2);
- (h) maintain prescribed records (ss 49 – 52);
- (i) make suspicious activity reports (s 40) and comply with Prescribed Transaction Reporting obligations (subpart 2A, Part 2).

The Law Society's guidance on AML/CFT compliance and the specimen compliance

documents and templates it has created should, if a barrister become subject to the Act, be used.¹

Alternatively, a barrister might choose, as a consequence of the potential application of the Act in the ways described, to take steps to ensure that activities of the sort that might fall within the scope of the Act are not undertaken by them in the ordinary course of business. The barrister might, for example, ensure their instructing solicitor, or another solicitor, looks after those aspects of their work that might otherwise see them having involvement in advising on, documenting or effecting a transaction involving real property or otherwise undertaking a designated non-financial business or profession.

An exemption has been sought

The Bar Association is applying to the Minister of Justice under s 157 of the Act for an exemption from the requirements of the Act in circumstances in which a barrister acts on direct instructions from:

- (a) an instructing solicitor; or
- (b) the Crown.

If the exemption is granted, then the Act will only apply to a barrister if he or she was acting on direct instructions under rule 14.5 of the Client Care Rules on work which, in the ordinary course of business, would see them being involved in advising on, documenting or effecting a transaction involving real property.

The exemption process, which will result in the creation of a legislative instrument, will take several months to be completed and the Bar Association will advise members of its progress during that time. Members will be notified when the exemption application, which describes more fully the application of the Act to barristers, is available on the NZBA website.

If any activities of a barrister fall within the scope of the Act then, until such time as any exemption is obtained, he or she will need to comply fully with the requirements of the Act. Both NZLS and ADLS are providing detailed training on the requirements for compliance with the Act.

If members have any questions about or comments on the content of this article or the exemption, they are asked in the first instance to email them to the NZBA Executive Director, at melissa.perkin@nzbar.org.nz. 

** The NZBA Council would like to express its appreciation to Paul Radich and Derek Johnston for their work on the AML/CFT issues.*

¹<http://www.lawsociety.org.nz/news-and-communications/news/law-society-gives-guidance-on-amlcft-compliance-documents>

