aml

From: [redacted]@slaw.co.nz>
Sent: Thursday, 2 December 2021 3:57 pm
To: aml
Subject: AML/CFT Consultation
Attachments: 20211202155235.pdf

Please see attached submission.

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AML/CFT Act Consultation

October 2021

Introduction

1. I am making a submission in my capacity as a practising property/commercial lawyer practice and the Compliance Officer for my firm. The views are my own, but reflect those of the principals of the firm and, to my knowledge, are shared by a large number of legal practitioners.
2. I have perused the Consultation Document. Much of it seems to be irrelevant to legal practice and I do not intend to address it. I do note a concern that any consultation document that poses questions presupposes that it has correctly identified the issues that need to be addressed.

The Issue

3. Largely, my comments will be addressed to Part 1 and the risk-based approach to regulation: questions 1.7 – 1.13.
4. Our firm is a small property/commercial practice, consisting of 2 principals, a senior staff solicitor, a legal executive and an administrator.
    a. The principals each have approximately 40 years practice experience;
    b. the senior solicitor has been with the firm over 10 years;
    c. the legal executive is a Fellow of the Institute of Legal Executives and has practiced as a legal executive for most of her working life;
    d. The administrator has over 20 years experience in the role.
5. We operate subject to the Lawyers and Conveyancers Act 2006 and the Lawyers and Conveyancers (Trust Account) Regulations 2008. While I accept that that does not guarantee ethical or financial compliance, it does, largely, engender observance of good practice throughout the profession.
6. In the case of our firm, we are audited regularly and while minor and specific issues may be identified, there has never been a major issue identified. The process is, as noted, governed by regulations, and it is possible to contrast this with the money

laundering regime which, in my experience, appears to be heavily policy and process driven and regulated.

The Risk of Money Laundering

7. I do not have sufficient knowledge of international regulation to be able to critically comment on section 58: it is our experience of its application that I wish to address.
8. We are required to –
    a. produce a risk assessment;
    b. design a compliance programme, including due diligence process;
    c. institute policies.
9. While it might be thought that this is appropriate so as to allow flexibility and recognise that legal firms vary in size, mode of operation and the complexity of transactions that they deal with, that is not our experience in practice. Our experience of the Department of Internal Affairs (DIA) administration of the legislation is a "one size fits all" approach to documentation and process, whether the legal firm is a large national firm or a small local practice. We appear to be required to have in place similar systems and processes, notwithstanding that size of transactions and scope for money laundering may differ considerably.
10. This is, of course, inconsistent with administrative law principles, which recognise that provided an organisation acts reasonably, how it chooses to regulate its affairs is its own business.
11. It is also inconsistent with the administrative law principle that policy is a guideline and each case has to be assessed against policy on its individual merits. Where appropriate, policy must give way.
12. Our experience of the DIA approach is that there is only one way, which is its way. To our knowledge it is of sufficient concern to members of the legal profession that judicial review of the DIA approach is being considered.
13. An example is its approach to inherent risk. I recognise that in the nature of the legal conveyancing practice there is an inherent risk of money laundering. But an issue we have experienced with DIA is whether that risk is the same in a firm of our size and transaction scale as it might be in another firm, and whether we – with our experience as legal practitioners – are better placed to assess that risk than DIA staff who may

have little or no practical knowledge or experience of legal practice but insist that their risk assessment should apply.

14. We understand, for example, that DIA's assessment takes into account international experience in environments which may bear little or no resemblance to New Zealand or local practice but for which no allowance seems to have been made.

Consequences

15. This all has practical consequences.
    a. It requires us to instigate and apply practices which may have little or no relevance to day-to-day operations and are no more effective than the precautions we would normally take.
    b. The processes and DIA's approach are more complex than they need to be. I contrast trust account audit, which is regulated but allows firms to adopt their own (compliant) processes.
    c. Compliance involves considerable time, which is a cost which has to be either absorbed or passed on to clients.
    d. It engenders uncertainty and stress.
    e. We have been audited and, like many other firms, found to be substantially non-compliant notwithstanding that we spent considerable time customising documentation and did not simply follow template documentation. We have addressed the issues and resubmitted documentation, only to have that documentation then assessed by DIA personnel other than the original auditors, who took a different view and raised further issues.

17. In the time the regime has operated, we have not experienced or even been aware of a possibility of money laundering.
18. Even at a macro level, according to an article published in the National Business Review, the level of money laundering occurring is approximately the same as the cost of compliance, at $1.2 billion. A system with a cost-benefit ratio of 1:1 is clearly not effective or economic.
19. In our case, the cost-benefit is wholly out of proportion.

20. It may seem simplistic and harsh, but, as noted earlier, our knowledge and experience suggest that it is not the legislation that is the issue, but the way that it is applied by DIA as regulator. That has to change.
21. I do not have an answer except to point to trust account regulation. I suggest it would be preferable to operate under a system that is governed by regulations rather than one which is at the variable direction of public servants.

STEPHENS LAWYERS

2 December 2021