p +64 9 307 7865
contact@calibrepartners.co.nz

AML/CFT consultation team
Ministry of Justice
SX 10088
WELLINGTON

17 December 2021

By email: aml@justice.govt.nz

Kei te rangatira, tēnā koe

Statutory review of the AML/CF Act

Calibre Partners is a corporate advisory firm comprising accounting and finance professionals. We employ less than 20 and are classified as a small business (per MBIE).

In particular, our four owners/directors are Principals with Chartered Accounting and Public Practice qualifications. We are also Licensed Insolvency Practitioners. We are also members of RITANZ. RITANZ is the professional body for insolvency practitioners and for those working in the field of business restructuring and turnaround, and corporate and personal insolvency in New Zealand.

Accountants are heavily regulated by professional standards of the New Zealand Institute of Chartered Accountants (NZICA).

We acknowledge our role in preventing abuse of the financial system. We also wish to advocate for obligations that are proportionate to the risk within a practice.

As insolvency practitioners (used interchangeably in our submission with 'licensed insolvency practitioners' or 'LIP's'), we are specialists licenced under the Insolvency Practitioners Regulation Act 2019 that can accept formal insolvency appointments.

Therefore some of our activities are captured by the AML/CFT regime. Captured activities relevant to LIP reporting entities are essentially (abridged):

- Managing funds;
- Taking control of and realising company assets;
- Distributing funds to creditors and potentially (rarely) beneficial owners; and
- Providing a registered office.

LIP's take formal appointments where, they stand in the shoes of the company/client or act as the company's agent. This is distinct difference as an LIP is not your typical bookkeeper or accountant; LIP's usually do not act on behalf of the client's instructions or beneficial owner's instruction for the captured activities. If beneficial owner's do instruct us, and their business is insolvent, it is rare the beneficial owners will see any financial return. Beneficial owners do not control the business or its finances once an LIP is appointed over their company.

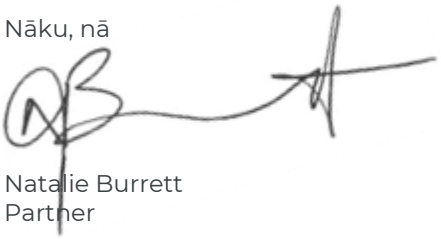
Our submission is focused on key areas relevant to our business and where we consider we can add value, as detailed in Appendix A.

We consider that any changes to be made to the Act should be on the basis of preserving, if not enhancing, the risk-based and activity-based focus of the regime.

We would be happy to consult with MOJ and DIA as part of the review process in 2022.

Should you have any questions about our submission or wish to discuss it with us, please contact me via email at nburrett@calibrepartners.com or phone +64 9 307 7865.

Nāku, nā



Natalie Burrett
Partner

Appendix A

Note reference to insolvency practitioners is used interchangeably with 'licensed insolvency practitioners' or 'LIP's'. Reference to "CA's" is referring to Chartered Accountants.

Institutional arrangements and stewardship

Purpose of the AML/CFT Act

We broadly consider the foundations of the Act are correct. We do not consider any changes are needed to the purpose of the AML/CFT Act. If changes are considered, these should be accompanied by a full evidence-based cost/benefit analysis.

We do not consider that the Act strikes the right balance between allowing a risk based approach and ensuring that obligations are clear for businesses. We question the "one size fits all" approach for the Act on reporting entities and consider that the nature, size and complexity of a reporting entitiy's business should be taken into consideration.

This is particularly relevant for insolvency practitioners, a subsector of accountant reporting entities. LIP's are a unique type of accountant with some of their activities being captured by the AML/CFT regime. This is the very nature of the activity-based regime. Such captured activities are the formal appointments where, as LIP's, we stand in the shoes of the company/client – a distinct difference as an LIP who has accepted a formal appointment (e.g. as a receiver, liquidator of Volunatary Administrator) is that we do not act on behalf of the client's instructions or beneficial owner's instruction for the captured activities.

Captured activities relevant to LIP reporting entities are essentially (abridged):

- Managing funds;
- Taking control of and realising company assets;
- Distributing funds to creditors and potentially beneficial owners; and
- Providing a registered office.

The Act is a risk-based regime, and we note that DIA considers accountants have an assessed overall inherent risk of medium-high . Generally, accountants captured as a reporting entity solely for insolvency practitioner service lines (above) assess their residual risk, after AML/CFT control measures are put in place, as lower than medium-high (but determined on a case-by-case basis by LIP reporting entities, dependent on the risk assessment undertaken).

We have taken into consideration DIA's Regulatory Findings Report for the 2019/2020 reporting year. Despite such responses on issue, we consider there are some shortcomings and ambiguity in the legislation that gives rise to some critical issues and extra compliance for the unique position of LIP's in the regime. We consider that a better balance in complying with the Act is to consider less prescriptive requirements and the application of Best Practice Guidelines balanced with the residual risk of reporting entities after applying AML/CFT control measures for certain aspects of the Act. This could be adopted for example in ongoing customer due diligence.

We comment further on this in the below sections. We would be happy to consult with MOJ and DIA as part of the review process in the new year.

Risk-based approach to regulation

We support the risk-based approach to AML/CFT regulation. We consider that any changes made to the Act should only be made for the purpose of preserving (at minimum) and enhancing the risk-based and activity-based attributes of the regime. We are concerned that some of the activities for proposed capture would have the effect of bringing the entire accounting profession into scope of the Act, which would run counter to the intent of this regime. This is discussed further below.

Over 98% of 'Suspicious Activity Reports' (SARs) to the FIU are made by banks and money remitters. However, there are a significant number of reporting entities subject to the compliance requirements under the Act as Designated Non-Financial Businesses and Professions (DNFBPs). Whilst we support the inclusion of the accounting profession within the Act, as above we consider the compliance obligations could be more closely aligned to the associated risks and could better leverage the existing professional and ethical obligations of NZICA. Whilst some of the compliance obligations for Calibre Partners as a reporting entity are based on the size and complexity of our operations, there is still a significant 'minimum level' of compliance obligation.

As insolvency practitioners, given our unique custodian role as an agent of our client, we consider there should be consideration given to some exceptions around our reporting entity requirements.

Information sharing

We broadly support information sharing between the various agencies.

Licensing and registration

We question the need to establish a registration or licensing regime. We strongly oppose requirements of additional regulation and compliance on the accounting sector, which is robustly regulated already, in the absence of a cost-benefit analysis and evidence to support such an approach. As CA's and LIP's we are already subject to the NZICA Code of Ethics, professional and ethical standards, quality review oversight, fit and proper checks and a robust professional conduct/discipline process.

The Insolvency Practitioners Regulation Act 2019 (IPRA) came into force on 1 September 2020 creating a register of licensed insolvency practitioners.

Accredited bodies such as NZICA carry out frontline regulation of insolvency practitioners under IPRA. CA ANZ members already are required to hold Certificates of Public Practice (a further registration measure) if that is relevant to the nature of their business. Licensed Insolvency Practitioners hold licences and pay fees to practice and we support licensing information being shared between agencies and/or being seen as an exemption from further licensing requirements under the Act. Further costs imposed on already heavily regulated industries such as LIPs are likely to be an administrative burden and disproportionate to the risk of reporting entities.

Scope of the AML/CFT Act

Potential new activities

We are concerned by the activities that the Consultation Document mentions could be captured by the regime. As noted above, any potential extensions to the regime should be supported by a full cost/benefit analysis.

- Acting as a secretary of a company or partner in a partnership

Seeking to capture activities based on the title or description of a role is inconsistent with the activities-based nature of the regime. If the intent is to capture the activities typically undertaken by persons in a particular role or with a particular title, we strongly recommend that the relevant activities be defined and specified. Otherwise, individuals could seek to sidestep the capture of an activity by using a different title for the person undertaking the role.

One of the aims of the AML/CFT is to focus on activities that pose undue risk. Further evidence is required as to the Act's goals and objectives and rationale for inclusion of additional activities.

Supervision, regulation and enforcement

Offences and Penalties, Sanctions for employees, directors and senior management

The penalties in the Act apply to businesses themselves.

We consider this is adequate. Businesses who make compliance decisions within reporting entities are likely to be the business owners. We do not consider that enforcement or penalties for persons (Compliance Officers, employees or senior management) is suitable or necessary to dissuade non-compliance.

Regulating auditors, consultants, and agents

There are several issues with the current assurance regime under the AML/CFT Act.

First, the lack of minimum requirements for both the auditor and the assurance engagement and the lack of a register for approved AML auditors. This results in AML/CFT audits of differing standards and quality and relies on the entity to make the appropriate decision regarding the appointment of their auditor.

The guidance suggests reporting entities should consider the experience and qualifications of the auditors, but there is no guidance as to what the supervisors consider acceptable. The lack of minimum standards and requirements is likely to result in significant variations in the cost and quality of AML audits.

For example, audits under the Act meet the definition of an 'assurance engagement' in the New Zealand Institute of Chartered Accountant (NZICA) Rules. Those rules apply to our members, Chartered Accountants. Only Chartered Accountants who hold a Certificate of Public Practice and meet the independence criteria can carry out audits under the Act. Due to the independence requirements, our members are unable to undertake reciprocal audits. Our members must also comply with other requirements such as the NZICA Code of Ethics, our continuing professional development rules and practice reviews. Conversely, non-members of CA ANZ, who can also perform audits under the Act, are not subject to these additional requirements and standards.

Further, the DIA, as supervisor of the reporting entities within the accounting profession, also undertakes desk-based review and on-site inspections. To ensure the effectiveness and efficiency of the regime, we consider it important to review the interactions between this supervisory oversight and the audit requirement to ensure the two processes are complementary and avoid duplicated effort.

In our view the assurance of reporting entities' compliance with the regime would be much more effective if minimum requirements (qualifications/experience) were determined for AML auditors and audit engagements and a register of approved auditors were made available.

Preventative measures

Customer due diligence

CDD ID requirements – determining the client

One of the challenges for us as insolvency practitioners complying with CDD obligations is obtaining identification for the beneficial owner of a customer. In a formal insolvency context, other than shareholder-initiated voluntary liquidations, appointment will often occur without the benefit of any direct contact with the entity prior to being appointed and where the beneficial owner(s) are unlikely to be cooperative. It is not always possible to carry out all of the 3 aspects of CDD:

- A customer i.e. the insolvent entity;
- A beneficial owner of the customer i.e. the shareholders or controlling parties; and
- Any person acting on behalf of a customer i.e. secured creditor representative.

In an insolvency context:

- Obtaining ID on a customer and any person acting on behalf of a customer is relatively straightforward.
- It is not always possible to obtain CDD for owners or effective controllers of the customer.

Often following appointment, LIP's have very little to do with shareholders or beneficial owners as they no longer have any control of the company, the LIP's customer. We note that insolvency usually renders the legal ownership or effective control of a typical customer i.e. the owners of an entity, valueless. It is generally accepted in the industry that at least simplified CDD would occur on a beneficial owner of the customer (again, determined on a case-by-case basis by LIP reporting entities, dependent on the risk assessment undertaken).

In considering the effectiveness of the Act, we feel there should be consideration of special circumstance exemptions in the case of insolvency practitioners in having to conduct CDD in the current prescribed form on all 3 aspects of client determination. A suggestion would be that the insolvency practitioner should be able to rely on ID already held by a person acting on behalf of a customer i.e. usually a secured creditor or financier, or lawyer, or that two of the three aspects of CDD is enough.

In addition, as noted above, CDD is currently required to be conducted on any person acting on behalf of a customer (i.e. secured creditor representative). Insolvency appointments are often from that same representative acting for the same secured creditor multiple times during the year. IDCVOP procedures require reporting entities to maintain current copies of ID (less than 3 months old) which can mean asking for and obtaining the same ID multiple times during the year. This provides unnecessary additional compliance costs (which reduces funds available to creditors) and we consider it would be more appropriate that a new CDD be obtained at the time of cyclical audits, or at the time the secured creditor representative changes.

In addition, while ongoing CDD is required for clients as above, it should not be necessary for LIP's to undertake "ongoing CDD" in respect of companies i.e. the client to which they have been appointed. The LIP is in sole control of the entity and its assets from the date of appointment rendering ongoing CDD as irrelevant. This has been a challenge to date.

We consider that CDD is a key area where a collective response and collaborative approach could increase both the effectiveness and efficiency of the AML/CFT Act. We encourage you to consider developing a centralised ID verification process, performed once, that can be leveraged by all reporting entities.

Whilst many customers are now broadly comfortable with the process of CDD, if enhanced CDD is required, customers are typically more concerned, in particular, with respect to possible breaches of their privacy.

Finally, we are aware that there is considerable support for the removal of the customer address verification requirement which we support also.

Prescribed transaction reports

As noted, licensed insolvency practitioners are in most cases distinct from bookkeepers or accountants whereby the usual bookkeeping and accountant relationship requires third party / beneficiary instructions made on client's behalf.

Payments made by independent LIP accountants acting in creditors or a class of creditor's best interests further enhanced by priority of repayment by statutory distributions often are not acting in beneficiaries' favour (shareholders or related parties who see no return on insolvency). Rather LIP's stand in the shoes of the client.

An area of the regime that is difficult to navigate and apply for accountants, specifically our insolvency practitioners is prescribed transaction reporting. A wire transfer is defined as a transaction that is carried out "on behalf of a person (the originator) through a reporting entity". In the normal course of an insolvency, the insolvency practitioner stands in the stead of the business. Accordingly, the practitioner will initiate (originate) payments. A vast majority of the time, these will be from a specific bank account or accounts held in the company's name. We consider that the practitioner is, in those instances, the originator and the company's banking institution the ordering institution. We consider that the bank would file a PTR where any payment was made offshore for more than $1,000 (international fund transfer/IFT).

There are however, instances where a particular company in insolvency may not have the necessary account established to make an offshore payment. For example, an AUD denominated bank account to enable payments to Australian based creditors (e.g. ongoing supplier payments if the insolvent is a trading business, or to investors or secured creditors). In those instances, depending on its risk-based analysis and the irregular nature of the payment, the practitioner may instruct the payment be made into the firm's trust account, from where it is paid out to the relevant beneficiary institution.

There are mixed views in the industry among practitioners on the application. However, the ambiguous view is an interpretation that there is no difference in principle to whether an LIP makes payment to an overseas based supplier or creditor via a bank account in the insolvent's name or via a trust account.

We are aware that in its guidance to accountants, the DIA has provided an example of an ordering institution being "an accountant that holds client funds in a trust account or has authority to move funds from a client's own bank account, and transfers those funds (including via the formal banking system) to an overseas beneficiary bank." The insolvency practitioner stands in the company's stead but is still the reporting entity.

In addition, there is the overlay of accountants' statutory legislation relevant to accountants playing their part as reporting entities standing in the stead of the company/client, rather than acting at the instruction of a client. This includes CA ANZ Code of Ethics, WE Code of Conduct and IPRA 'Serious Concerns' provisions, together with the recently released Insolvency Standards, which come into force 1 November 2021.

Given this, it would be helpful in its review for the Ministry to consider these challenges, particularly the requirements of the insolvency practitioner and PTR obligations, and the specific circumstances where it believes those obligations are triggered. We appreciate the complimentary reporting argument (not double reporting) as noted in the Best Practice Guidelines for accountants recently however would the DIA consider increasing the payment threshold for use of LIP trust accounts e.g. more than $10,000 for IFT's to trigger requirement (rather than the current $1,000), noting that payments of more than $1,000 will continue to be reported by the Bank as the ordering institution. We do acknowledge that $1,000 is in line with international practice.

Internal, policies, procedures, and controls

The current section 57 requirements are overly prescriptive and lack the ability to be appropriately tailored for the size and nature of the entity and their clients. For example, an AML Compliance Programme is required to include policies, procedures and controls for the circumstances in which Simplified Customer Due Diligence ("Simplified CDD") might be undertaken. It would seem excessive for their compliance programmes to have to include policies, procedures and controls for some of the foundation reporting requirements of the regime.

Suspicious activity reporting

We consider that greater clarity is provided regarding SAR expectations. We also note that the GoAML system requires extensive information to be collected before a SAR can be submitted. The parameters of online reporting could be simplified to ensure reporting is user friendly.

Other issues or topics

Privacy and protection of information

There needs to be an appropriate balance between privacy and secrecy. Further, in line with our comments earlier regarding a collaborative approach, it is important that the Privacy Act operates in concert with the AML/CFT Act.

Harnessing technology to improve regulatory effectiveness

We strongly recommend the goAML technology and platform should be significantly enhanced as it is currently not user friendly, is difficult to navigate and use in its current state.

Harmonisation with Australian regulation

We support harmonisation with Australian regulation. We note that the Senate Legal and Constitutional Affairs References Committee has recently conducted an inquiry into the adequacy and effectiveness of the Australian regime and is due to report back in March 2022. We encourage Officials to continue to monitor developments in Australia and seek to align the regime with that of Australia where possible.