



**SUBMISSION**

**TO THE**

**MINISTRY OF JUSTICE**

**ON THE**

**CONSULTATION PAPER ON PHASE TWO OF THE AML/CFT ACT:  
IMPROVING NEW ZEALAND'S ABILITY TO TACKLE  
MONEY LAUNDERING AND TERRORIST FINANCING**

## **INTRODUCTION**

This submission is from Umbrella Law Limited (Umbrella Law).

We can be contacted at:

Umbrella Law  
Unit 2, 725 High Street  
LOWER HUTT

Telephone: 04 567 9356

Mobile: 021 675 736

Contact person: Sarah Parsons, Principal & Director

## **GENERAL COMMENTS**

Umbrella Law appreciates the opportunity to comment on the Ministry of Justice's consultation paper on Phase Two of the AML/CFT Act: improving New Zealand's ability to tackle money laundering and terrorist financing (consultation paper).

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act) sets out the current AML/CFT legislative obligations imposed in New Zealand. This is complemented and supplemented by the Crimes Act 1061, Misuse of Drugs Act 1975, Criminal Proceeds (Recovery) Act 2009, Terrorism Suppression Act 2002 (TSA), regulations in respect of United Nations sanctions made under the United Nations Act 1946, Extradition Act 1999 and Mutual Assistance in Criminal Matters Act 1982.

The legal obligations proposed to be imposed by the AML/CFT Act on Phase Two entities entail completion of a full AML/CFT risk assessment, establishment and implementation of an internal AML/CFT compliance programme and appointment of an AML/CFT compliance officer. Following on from these initial requirements, the legal obligations necessitate the administration and maintenance of the AML/CFT compliance programme and regular reviews and audits of both the AML/CFT risk assessment and AML/CFT compliance programme.

Each such requirement ensures that the AML/CFT risk assessment remains current and the AML/CFT compliance programme remains up-to-date, practicable, adequate and effective to address any risks outlined in the risk assessment and/or any changes to the AML/CFT legislation.

Existing obligations remain in place to ensure that clients are not involved in or facilitating terrorist financing; and are not on any list against which sanctions have been issued by the United Nations Security Council and persons or entities designated as a terrorist entity under the TSA.

Umbrella Law agrees in principle with the proposals to proceed with Phase Two and enhance the current AML/CFT Act. We agree with the aims and intent and support the continuation of the risk based approach.

Obviously, as the devil is in the detail, we will be interested in the decisions and method of incorporation and supervision ultimately followed – as well as measures aimed at limiting any 'displacement effect'.

## **SPECIFIC COMMENTS – PHASE TWO ‘ENTITIES’**

Commentary regarding the proposals and questions is provided below.

### **Lawyers**

#### *Questions*

1. *How should AML/CFT requirements apply to the legal services sector to help ensure the Act addresses the risks specific to it? For example, which business activities should the requirements apply to? At what stage in a business relationship should checks, assessments and suspicious transaction reports be done?*
2. *Is the existing mechanism that protects legal professional privilege appropriate for responding to money laundering and terrorist financing, and for the legal profession to comply with its expected obligations under the Act? If not, what else is required?*

#### Services/Business activities

It is proposed in the consultation paper that lawyers will be subject to AML/CFT requirements when providing the following services in the ordinary course of business:

- acting as a formation agent of legal persons or arrangements
- arranging for a person to act as a nominee director or nominee shareholder or trustee in relation to legal persons or arrangements
- providing a registered office, a business address, a correspondence address, or an administrative address for a company, a partnership, or any other legal person or arrangement
- managing client funds, accounts, securities or other assets
- preparing for or carrying out real estate transactions on behalf of a customer
- preparing for or carrying out transactions for customers related to creating, operating or managing companies.

There is usefulness in ensuring that the definition of services to be caught by the regime and provided by lawyers, accountants and trust and company service providers align. This limits any ‘displacement effect’.

As well, “conveyancing services as part of the sale and/or purchase of real estate” is also undertaken by lawyers – who are also entitled to undertake real estate agency work if they choose to do so. It is not overtly clear that “preparing for or carrying out real estate transactions on behalf of a customer” captures all these relevant aspects/services.

There will need to be alignment of identity verification requirements for Land Online and AML/CFT purposes.

In identifying specific services for which customer due diligence (CDD) will be required, it will need to be clear whether lawyers only undertake CDD in those situations, or as they provide those services, they must then undertake CDD on all of their clients.

Undertaking CDD will be easier to do up front with clients, rather than later in the course of the transaction or activity to be undertaken.

It would also be good to clarify whether the services identified are intended to capture services such as the preparation of wills and/or enduring power of attorney documents (property and/or personal care and welfare) and estate administration.

### Lawyer type

In terms of types of lawyers, we agree that barristers sole be excluded (subject to any dispensation granted by the New Zealand Law Society).

Exclusion of in-house lawyers where they are employees and limited in the nature of the work they may do is agreed. Care though may be required for lawyers engaged on a contract for services basis as they may enter into such an arrangement with more than one entity client and can practise on their own account outside the hours of such engagements.

It will be important to ensure obligations on lawyer nominee companies (providing mortgages), lawyers undertaking real estate agency work; and those supplying safe custody for valuable items (particularly during administration of an estate).

### Ability to terminate relationship

It will be important to ensure there are no unintended hooks for lawyers in meeting the requirement to terminate a client relationship due to lack of CDD. The duty to complete retainer is quite an important one and can only be terminated for good cause.

Clarity that good cause to refuse to act (new clients)/terminate (existing clients) includes a failure on part of a client to meet requests related to meeting customer due diligence requirements within a reasonable time period would be a useful measure (including within the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Rules))

### Building on existing regulatory measures

There are specific measures connected to lawyers trust accounts – including ensuring you are paying out to the correct party. Any supervision, monitoring and reporting would need to align with existing requirements and obligations located in for example, Lawyers and Conveyancers Act (Trust Account) Regulations 2008 and the Lawyers Trust Accounting Guidelines.

Incorporation of an additional certification connected to AML/CFT obligations in monthly and quarterly trust account reporting is one option.

### Legal professional privilege

Within the Rules, an overriding duty of a lawyer is as an officer of the court.

At this juncture, the existing legislative protection of legal professional privilege in the AML/CFT Act (which is consistent with the FTR Act) is sufficient.

It will be good to have the New Zealand Law Society publish guidance on the interaction between legal privilege and suspicious transaction reporting. Care required to ensure alignment of Rules related to (non-)disclosure with requirements to report suspicions under AML/CFT Act provisions.

## **Accountants**

### *Questions*

1. *How should AML/CFT requirements apply to the accounting sector to help ensure the Act addresses the risks specific to it? For example, which business activities should the requirements apply to? At what stage in a business relationship should checks, assessments and suspicious transaction reports be done? Who should be responsible for doing them?*
2. *Given the level of risk associated with advisory and assurance services (for example, tax advice, bookkeeping and auditing), should these activities be*

*subject to AML/CFT obligations even where the business is not involved in a transaction for their client?*

As per commentary above, care will be needed to limit any 'displacement effect'.

We agree with an approach that recognises that these professionals may, at times, be best placed to detect suspicious activity. Accordingly, the obligations should extend to at least bookkeeping and auditing.

### **Real estate and conveyancing**

#### *Questions*

1. *How should AML/CFT requirements apply to the real estate and conveyancing sectors to help ensure the Act addresses the risks specific to them? For example, which business activities should the requirements apply to? At what stage in a business relationship should checks, assessments and suspicious transaction reports be done? Who should be responsible for doing them?*
2. *Should businesses in the real estate sector that engage in property development have obligations under the Act? If yes, in what circumstances?*
3. *At what stage should a client of a real estate agent become a customer for the purposes of customer due diligence?*

We consider the option of applying CDD at the point of entering into agreement (such as an agency agreement) to act on behalf of the client in a transaction (for example, upon accepting instructions from a client) is the best time. This will be easier in relation to vendor clients. Trying to obtain the necessary information and documentation at a later stage may impact (by holding up, for example) the steps involved in progressing a sale or purchase.

If a real estate agency is also involved in property development, then the agency will need to ensure that there is clarity around the source of funds used to develop (prior to sale) and that the agency complies with AML/CFT requirements when selling the properties either for sale with completed buildings or further development (beyond ensuring services are in place for each property, for instance).

Any rules regarding conduct and client care as they apply to real estate agents will need to be considered with work completed to ensure alignment.

### **High value goods**

1. *Should the Act apply to all dealers of high-value goods or just particular ones?*
2. *What is the appropriate threshold for cash transactions that would trigger AML/CFT customer due diligence and reporting requirements? Please tell us why.*

Option 1 connected to the new prescribed transaction reporting requirements is supported as long as there is discretion integrated into the AML/CFT legislative measures to regulate to add to the list of particular dealers. This will ensure the AML/CFT regime is (and AML/CFT supervisors and stakeholders (such as Ministry of Justice and Police) are) able to move appropriately, relatively quickly and effectively where new trends or uses of (illicit) cash arise.

## **Gambling sector**

### *Questions*

1. *How should AML/CFT requirements apply to the gambling sector to help ensure the Act addresses the risks specific to it? For example, which business activities should the requirements apply to? At what stage in a business relationship should checks, assessments and suspicious transaction reports be done? Who should be responsible for doing them?*
2. *Should there be a threshold that would trigger AML/CFT customer due diligence and reporting requirements for cash transactions related to gambling and betting activities with customers who don't have an account with the gambling 'provider'? If so, what would be an appropriate threshold? Please tell us why.*

It would seem appropriate to ensure threshold align across the sector. This would again limit any potential 'displacement effect'.

## **SPECIFIC COMMENTS – SUPERVISION MODEL**

### *Questions*

1. *Do you think any of our existing sector supervisors (the Reserve Bank, the Financial Markets Authority and the Department of Internal Affairs) are appropriate agencies for the supervision of Phase Two businesses? If not, what other agencies do you think should be considered? Please tell us why.*
2. *Are there other advantages or disadvantages to the options in addition to those outlined above?*

From a lawyer's perspective, we would like to see Self Regulatory Organisations (SROs) take on responsibility for certain designated non-financial businesses and professions (DNFBPs). New Zealand has a relatively small number of self-regulatory bodies. This would involve lawyers (New Zealand Law Society), accountants (Chartered Accounts Australia and New Zealand (NZICA)) and real estate agents (Real Estate Agents Authority). Some form of representation on the AML/CFT Advisory Group/National Coordination Committee (or its equivalent) would be necessary. Appropriate safeguards in terms of any potential conflicts of interest will need to be put in place.

The remainder of those within the gambling sector noted in the consultation paper would likely fall within the remit of Department of Internal Affairs (DIA). Casinos are already regulated by DIA.

Oversight and supervision of the dealers in high value items is the 'sector' that then presents the most 'issues' in terms of which supervisor. Bullion and its safe deposit likely fits within the remit of the Reserve Bank. The remainder could be supervised by DIA (subject to resourcing).

The suggestions above will (as noted in the consultation paper) leverage off existing understanding of, and relationships with, respective regulated sectors. This includes regular communications and existing reporting and monitoring activities.

## **SPECIFIC COMMENTS – IMPLEMENTATION PERIOD AND COSTS**

### *Questions*

1. *What is the necessary lead-in period for businesses in your sector to implement measures they will need to put in place to meet their AML/CFT obligations?*
2. *Where possible, please tell us how you calculated how long it will take to develop and put in place AML/CFT requirements.*

### Implementation period

Any time frame will need to take into account:

- ensuring sufficient budget and IT and people resources
- completion of a full AML/CFT risk assessment
- establishment and implementation of an internal AML/CFT compliance programme
- appointment of an AML/CFT compliance officer
- review and assessment of existing customers by Phase Two entities
- initial training for existing staff.

It will also need to consider the different stages of awareness of AML/CFT and its impact on business as usual of the various DNFBPs noted in the consultation paper. Dealers in high value items are likely to require the most effort to bring up to speed.

For this reason, a two year implementation period is suggested.

(An alternative approach, leveraging on sectors that should already have a reasonable awareness, would be to have staggered implementation periods. In such a case, the period applicable to lawyers and accountants must be the same.)

### Costs

We will be interested in any report back following completion of the separate business compliance cost survey.

## **SPECIFIC COMMENTS – ENHANCING THE AML/CFT ACT**

### ***Question(s): Expanded reporting to the Police FIU***

1. *Should the current requirement to report suspicious transactions be expanded to reporting suspicious activities? Please tell us why or why not.*

Yes. Current terminology can appear limiting in terms of the type of transaction(s) and activity that should be captured when identifying a transaction or activity that falls outside the nature and extent of the business relationship that a client advised or has undertaken to date.

### ***Question(s): Information sharing***

1. *Should industry regulators be able to share AML/CFT-related information with government agencies?*
2. *Should AML/CFT supervisors be able to share customers' AML/CFT-related personal information with government agencies?*
3. *What are appropriate circumstances under which the FIU can share financial intelligence with government agencies (such as sector supervisors, industry regulators, intelligence agencies, IRD and Customs) and reporting entities? What protections should apply?*
4. *What restrictions should be placed on information sharing?*

We agree there is a need to incorporate an ability to expand the information sharing capabilities of those involved in ensuring AML/CFT compliance and the detection of potential criminal activity. It would enable the FIU and supervisors/SROs to more quickly communicate new, or altering, trends of money laundering and/or terrorist financing; and/or ensure that a party identified as particularly high risk is not able to simply shop around until an entity takes them on as a client.

Care though is required – exchange in good faith; information verified to extent possible before being unduly relied upon by recipient(s) and for AML/CFT compliance/enforcement purposes. In terms of reporting entities, the contact point should be the AML/CFT compliance officer.

It would be useful to enable limited information sharing between reporting entities using the appointed AML/CFT compliance officer for situations or circumstances where time is of essence (but also only where such advice has been (or is being) provided to the FIU (reporting) or the relevant AML/CFT supervisor or SRO.

**Question(s): *Reliance on third parties***

1. *Are the existing provisions that allow reporting entities to rely on third parties to meet their AML/CFT obligations sufficient and appropriate? If not, what changes should be made?*

This aspect will be of greater interest once it becomes clear how and when the DNFBPs will fall under the AML/CFT regime.

Sections 32 to 4 of the AML/CFT Act have their own specific limitations – including the acceptable approach to using them from the perspective of the AML/CFT supervisors and Ministry of Justice.

**Question(s): *Trust and company service providers***

1. *Should the scope of the provision requiring persons providing trust and company services to comply with the AML/CFT Act be extended to activities carried out in the ordinary course of business, rather than just when they're the only or principal part of a business?*

Yes. It is important to ensure all who provide trust and company services are required to comply. This will limit the noted 'displacement effect' occurring.

**Question(s): *Simplified customer due diligence***

1. *Should the simplified customer due diligence provisions be extended to the types of low-risk institutions proposed? If not, why?*
2. *Should we consider extending the provisions to any other institutions?*

Yes. The proposal aligns well with the existing types of entities falling within this category.

At this stage, we do not have any suggestions regarding other institutions to which the extension could be granted.



## **CONSULTATION**

Umbrella Law is happy to discuss any of the comments in further detail.

Further, we are keen to be involved in any consultation in respect of Phase Two and/or enhancing the current AML/CFT legislation. Our interest extends to regulations, codes of practice and/or guidance promulgated or issued as a result of the AML/CFT legislation.

***Umbrella Law Limited***  
***19 September 2016***