

The Proceeds of Crime Act – Considerations Regarding The Duties of Attorneys

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Position of the GOJ regarding the Proceeds of Crime Act (POCA) – implementation of task force headed by BOJ

- Attorneys are to be brought within the regulated sector under Proceeds of Crime Act and Terrorism Prevention Act
- Process of consultation with General Legal Council and Jamaica Bar Association as to how this can best be achieved.
- No decisions have been made.
- Views in this paper are personal.

Method of Extending POCA to Attorneys

- Proceeds of Crime (Money Laundering Prevention) Regulations 2007 already applicable to financial institutions
- s 94 and the Fourth Schedule of the Act - Minister is empowered to designate that Attorneys are non-financial institutions coming under the Act and existing regulations
- Alternatively specific regulations can be made
- This issue not yet settled

Background to POCA – What Are The FATF 40 + 9 Recommendations

Scope of the extension of POCA to lawyers

FATF Recommendation 12 (d) and (e):

- d) Lawyers, notaries, other independent Legal Professionals and accounts when they prepare for or carry out transactions for their client concerning the following activities:
- buying and selling of real estate;
 - managing of client money, securities or other assets;
 - management of bank, savings or securities accounts;
 - organization or contributions for the creation, operation or management of companies;
 - creation, operation or management of legal persons or arrangements, and buying and selling of business activities;
- e) Trust and company service providers when they prepare for or carry out transactions for a client concerning the activities listed in the definition in the Glossary.”

FATF Recommendation 16 :-

- a) Lawyers, notaries, other independent Legal Professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in Recommendation 12(d)...
- c) Trust and company service providers should be required to report suspicious transactions for a client when, on behalf of or for a client, they engage in a transaction in relation to the activities referred to Recommendation 12(e).

Lawyers, notaries, other independent Legal Professionals and accountants acting as independent Legal Professionals, are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.

The Impact of the Extension of POCA to The Legal Profession

Substantive statutory offence - Concealment

Section 92 : Concealment

- “(1) Subject to subsection (4), a person commits an offence if that person-
 - engages in a transaction that involves criminal property;
 - conceals, disguises, disposes of or brings into Jamaica any such property; or
 - converts, transfers or removes any such property from Jamaica,
- and the person knows or has reasonable grounds to believe, at the time he does any act referred to in paragraph (a),(b) or (c), that the property is criminal property.
- (2) Subject to subsection (4), a person commits an offence if that person enters into or becomes concerned in an arrangement that the person knows or has reasonable grounds to believe facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

Defences -Section 92(4) so far as relevant are:

- if before embarking or engaging in the any act, the person makes an authorised disclosure and receives appropriate consent to act from a nominated officer, a constable, customs officer or officer of the FID pursuant to ss 91 (2) and 99 of the Act, or
- the person intended to make disclosure before doing the act and has a reasonable excuse for not doing so and makes the disclosure on his own initiative as soon as is reasonably practical after doing the act.
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- **NB** S 92 (4) does not state that LPP is a defence to the concealment offences under s 92 (1) or (2).

Offence of Non – Disclosure

Section 94, 95 – Non Disclosure Offences

- S 94 deals with non-disclosure offences by a business falling within the regulated sector. With the extension of the POCA obligations this will include attorneys who engage in activity listed in FATF Recommendations 12 (d) and (e).
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- Points of note are:
- S 94 (2) creates an offence where a person in the regulated sector:
 - a. fails to make disclosure where he has reasonable grounds for knowing or believing, that another person has engaged in transaction that could constitute or be related to money laundering, and
 - b. the information on which such knowledge or belief is based came in the course of a business and the person fails to make the required disclosure as soon as is reasonably practicable, and in any event within fifteen days after the information or matter comes to him.
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- S 94 (3) places a statutory obligation on the person in the regulated sector to pay special attention to all complex or unusual or large business transactions or unusual patterns of transaction that appear to be inconsistent with the customer’s normal transactions.
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- S 94 (3) stipulates that the required disclosure must be made either to the nominated officer, that is to say the officer within the business who is responsible for handling disclosure matters or to the designated authorities which is defined as the Chief Technical Director of the Financial Services Investigation Division in the Ministry of Finance or such other person as the Minister may designate by Regulations.
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- S 94 (5) (b) recognizes LPP as a defense to offences under s 94 (1) or (2) . S 94(8) enumerates a definition of what information will be the subject of LPP with the important overriding proviso that privilege will not apply where the intention is to further a criminal purpose. The intention referred to must be taken to be that of the customer or client. S 94 (8) is as follows:
 - a. “Information or other matter comes to an Attorney-at-Law in privileged circumstances if it is communicated or given to him-
 - (a) by, or by a representative of, a client of his in connection with the giving by the Attorney-at-Law of legal advice to the client;
 - (b) by, or by a representative of, a person seeking legal advice from the Attorney-at-Law; or
 - (c) by a person in connection with legal proceedings or contemplated legal proceedings:
- Provided that this subsection does not apply to information or other matter that is communicated or given with the intention of furthering a criminal purpose.”

Offence of Tipping Off

Under s 97(1) an offence is committed -

- if having reasonable grounds to believe that a protected disclosure has been made, the person makes any disclosure which is likely to prejudice any investigation likely to be conducted as a consequence of the first disclosure, or
- if knowing or having reasonable grounds to believe that the enforcing authority is enacting or proposing to enact in connection with a money laundering investigation, a disclosure is made of any information or other matter to any other person.
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- It is to be noted with respect to the offence of tipping off under s97 that
- The Tipping Off offence is committed even where the disclosure is made to some one other than the client.
- (2) S 97 (2) (c) recognizes the defense of LPP where the disclosure by the person is made to an attorney for the purpose of obtaining legal advice.
- (3) S 97 (2) (d) also permits disclosure by an attorney in circumstances that coming within s 97 (3), namely:
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 - “... if it is a disclosure-
 - (a) to, or to a representative of a client of the attorney-at-law in connection with the giving by the attorney-at-law of legal advice to the client; or
 - (b) to any person in connection with legal proceedings or contemplated legal proceedings:
- Provided that a disclosure does not fall within this subsection if the disclosure is made with the intention of furthering a criminal purpose.”

Other Offences

- **The Regulations** - In addition to the foregoing provisions of the Act, the Regulations will impose on Attorneys on pain of criminal sanction the obligations to carry out customer due diligence, record keeping, development of internal policies and training of staff to monitor for and report on possible money-laundering transactions. These requirements are prescribed by FATF and covered by the existing Proceeds of Crime (Money Laundering Prevention) Regulations 2007 that now apply to financial institutions.
- **The Terrorism Prevention Act**
- S 15 of this Act is applicable to prescribed business entities that are obligated to make reports. Pursuant to s 15 (2) (c) the Minister can add to this list by order.
- S 16 (3) - Designated entities have an obligation to report all complex, unusual or large transactions and unusual patterns of transactions which have no apparent economic or obviously lawful purpose.
- S 17 – Tipping off is an offence but LPP is recognized as a defense and S17(4) exempts disclosures by an attorney to his client in connection with the giving of legal advice or to any person in connection with legal proceedings.

Importance of Regulatory Guidance

- S 94 (7) of the Proceeds of Crime Act requires the Court in determining whether any non-disclosure offence has been committed under ss 94 or 95 to consider any guidance issued by the supervisory authority or body that regulates the business or profession in the regulated sector.
- This designation is done by the Minister pursuant to s 91 (1) (g).
- It is envisaged that with the extension of POCA obligations to encompass Attorneys-at-law, the General Legal Council will be designated to be the authority to monitor compliance by Attorneys and to issue Guidance as to the effective measures to be adopted in comply with the Act and Regulations.

To what extent will the Attorney's duties to a client be modified by POCA

Canon IV (t) of the Legal Profession (Canons of Professional Ethics) Rules (1978) which states:

“An Attorney shall not knowingly-

- i. reveal a confidence or secret of his client, or
- ii. use a confidence or secret of his client-
 - 1. to the client's disadvantage; or
 - 2. to his own advantage; or
 - 3. To the advantage of any other person

unless in any case it is done with the consent of the client after full disclosure.

Provided however, that an Attorney may reveal confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.”

The Attorney's duty of confidence - LPP

Case Law

1. Three Rivers DC v Bank of England (Disclosure No. 4) [2005] 1 AC 610
2. Balbel v Air India [1988] Ch 317 (CA)
3. Jamaican Bar Association v The Attorney General et al Civil Appeal 96/2003 decision 14th December 2007

Conclusions

- The Court presumes that the legislature does not intend to interfere with fundamental rights and freedoms;
- LPP is a substantive legal right;
- Unless a contrary intent was evident, legislation must be construed to preserve LPP;
- LPP can be modified by proper legal authority and can not in any event be a shelter or mask for criminal conduct.

What is the substantive right to which LPP is part

1. Charter of Fundamental Rights And Freedoms (Constitutional Amendment) Act 12 of 2011 s13 J (3) - right to privacy
- Regina (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2003] 1 AC 563
2. Charter of Fundamental Rights And Freedoms (Constitutional Amendment) Act 12 of 2011 s 16 - right to a fair trial

Will fundamental freedoms be infringed by the extension of POCA Obligations to Attorneys

Ordre des Barreaux Francophones et Germanophone Case C-3-05/05, 26th June 2007

- **Decision on point of the European Court Of Justice in Ordre des Barreaux Francophones et Germanophone Case C-3-05/05, 26th June 2007 held that –**
 1. legislation bringing lawyers within the regulated sector had to be construed as being of limited application in order to conform to the fundamental rights and freedoms with the result that POCA obligations were only applicable to lawyers who participated in the listed transactions and did not apply to lawyers engaged to represent clients in connection with legal proceedings;
 2. legislation extending POCA obligations applied only to lawyers engaged in the specific types of transactions identified by the Directive, but further even where the lawyer did engage in such transactions, once the lawyer was called on to represent the client before a court, the lawyer became exempt from the POCA Obligations.

Bowman v Fels (Bar Council and others intervening) [2005] 1 WLR 3083

- **NB -Similarity of JA and UK Legislation**
- **Decision of the English Court of Appeal in Bowman v Fels (Bar Council and others intervening) [2005] 1 WLR 3083 as to requirement of disclosure under s328 of UK ACT – S92 of JA ACT holding that –**
 1. s 328 was not intended to apply to the ordinary conduct of litigation by legal professionals which included any steps taken by them in litigation from the issue of proceedings up to the final disposal by judgment and that Parliament could not have intended that proceedings or steps taken by lawyers in order to determine or secure their client’s legal rights should at all bring them within the scope of those provisions;
 2. Even if s.328 (s92 Ja) did apply to the ordinary conduct of legal proceedings, it did not override LPP or a solicitor's implied duty to the court not to disclose information gained from documents disclosed by another party to adversarial litigation and not read in open court.

Conclusion:

1. it must therefore follow from that reasoning that although LPP is not expressly mentioned in s 92 of the Act, its language is not sufficient to override LPP where Attorneys engage in transactions to which POCA obligations are applicable, and
2. LPP must continue to attach to communications passing for the purpose of obtaining legal advice where there is no intent discernible to the Attorney that the client seeks that advice to assist in the commission of a criminal offence.

UK REGULATORY GUIDANCE

- **NB- Ready availability of UK Regulatory Guidance to lawyers see [www.barcouncil.org.uk/guidance/moneylaundering regulation](http://www.barcouncil.org.uk/guidance/moneylaundering%20regulation)**

The effect of the cases is summarized by UK Bar Guidance 12 -14

Guidance 12

- Most barristers in independent practice potentially fall within the category of independent legal professionals. However, this category is defined further in Regulation 3(9) as follows:
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- “Independent legal professional’ means a firm or sole practitioner who by way of business provides legal or notarial services to other persons, when participating in financial or real property transactions concerning –
- **the buying and selling of real property or business entities;**
- the managing of client money, securities or other assets;
- the opening or management of bank, savings or securities accounts;
- the organisation of contributions necessary for the creation, operation or management of companies; or
- **the creation, operation or management of trusts, companies or similar structures,**
- and, for this purpose, a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction.”

UK GUIDANCE 13 and 14

- 13. The European Court of Justice has now confirmed that this list is intended to be exhaustive: see *Ordre des barreaux francophones et germanophone v Conseil des Ministres* Case C-305/05, 26th June 2007.
- 14. It follows from this that many barristers will NOT find themselves falling within the definition of 'relevant persons' for the purpose of the Regulations. In particular:
 - (1) Members of the employed bar are not "relevant persons", since they are neither "independent"; nor do they offer their legal services "by way of business".
 - (2) Since barristers in independent practice are not permitted to undertake the management or conduct of their clients' affairs, or handle client money (see the Bar Council's Code of Conduct, Rules 401(b)(i) and 307(f)), they will not fall within the definition of "independent legal professional" pursuant to Regulation 3(9)(b), (c) or (d).
 - (3) It follows that it is only barristers in independent practice who "assist in the planning or execution" of the types of transaction listed in Regulation 3(9)(a) and (e) who will be caught: i.e. those barristers who are asked to advise (at the planning or execution stage) in transactions which involve either:
 - the buying or selling of real property / business entities;
 - the creation, operation, or management of trusts, companies or similar structures.
 - (4) Moreover, given the emphasis in Regulation 3(9) on professionals "assisting in the planning or execution" of these transactions, barristers in independent practice who provide advice to clients AFTER a transaction has taken place, will not be 'relevant persons' for the purposes of the Regulations.
 - (5) In particular, barristers conducting litigation on behalf of clients arising out of the transactions referred to in Regulation 3(9)(a) and (e) will therefore fall outside the ambit of the Regulations. This is expressly confirmed (in the case of customer due diligence) by Regulation 11(2); and also (more generally) by the decision of the European Court of Justice in the *Ordre des barreaux francophones et germanophone* case referred to above.

Guidance where contentious matter is concluded by a financial transaction

Guidance 15

- It follows that, in practice, the members of the bar most likely to find themselves falling within the ambit of the Regulations are members of the Chancery bar involved in non-contentious advisory work: and in particular, those barristers in independent practice who are instructed to advise clients at the planning / execution stage of real property / business transactions; or in relation to setting up companies, trusts or similar structures. Whilst many contentious matters will conclude with a negotiated settlement that could arguably be considered to be transaction, the Bar Council considers that having regard to the reasoning of the courts in *Bowman v Fels* and *Ordre des barreaux francophones et germanophone*, advising or otherwise acting in connection with an agreement that is intended to compromise a genuine dispute will not fall within regulation 3(9)

Guidance as to attorneys in chambers or who work as a team but are not partners

- Bar Guidance 34 Staff Training - as to staff training and the adoption of internal procedures to forestall money laundering, the Guidance is that each independent legal professional coming within the regulated sector must ensure that policies and procedures are adopted as part of their personal practice and in particular staff should be told that if they know or suspect or have reasonable grounds to individual attorney instructed in the case who must then take action as is appropriate.
- Bar Guidance 35 Working in a team - it is also recommended that where independent legal professionals work together as part of a team, they should try to reach agreement as to the relevant anti-money laundering policies and procedures that they will adopt in relation to a particular transaction.
- Bar Guidance 37 Attorneys in Chambers are responsible for their individual practices

Although barristers (through Chambers) employ clerks, and may work alongside other barristers as part of a team, nonetheless the Bar Council takes the view that barristers do not have an organisation within the terms envisaged by this part of the Regulations: and are instead individually responsible for their own professional practice. In those circumstances, although the wording of the exemption in Regulation 20(3) is not particularly felicitous when applied in the context of a barristers' set of Chambers, it is not thought to be necessary for barristers within a Chambers to appoint a nominated officer, to whom other barristers must report any money laundering suspicions. Rather each barrister within a set of Chambers should consider for himself or herself whether or not to make any report directly to the state authorities.

Concluding Observations

- Two Scenarios of conflict for the Attorney who is brought within the Regulated Sector will inevitably undermine trust and confidence in the integrity of the legal system of which Attorneys are an integral part.
 1. Were the Attorney operates in the litigation department of a firm and the client gives work to another department which triggers POCA reporting obligations.
 2. Alternatively a sole practitioner may be representing a client in legal proceedings and the client approaches the attorney to act in an unrelated transaction which triggers POCA reporting obligations. In either of the scenarios it is doubtful that LLP could assist the attorney.

One Suggested Solution

- Immediately amend the tipping off provisions of The Proceeds of Crime Act and The Terrorism Prevention Act to conform with the note to FATF Recommendation 14 (tipping off). The note states:

“Where lawyers, notaries other independent legal professionals and accountants acting as independent legal professionals seek to dissuade a client from engaging in illegal activity, this does not amount to tipping off.

- This was legislated in the UK by Amendments to the Proceeds of Crime Act passed in 2007 as follows:
 - S333D(2) UK
 - “A professional legal adviser...does not commit an offence under section
 - 333A if the disclosure -
 - (a) is to the adviser’s client, and
 - (b) is made for the purpose of dissuading the client from engaging in conduct amounting to an offence.