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“Everybody’s Looking at Nothing”—the Legal Profession and the Disproportionate Burden of the Proceeds of Crime Act 2002

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This article argues that the failure to exclude minor offences and regulatory breaches from the Proceeds of Crime Act 2002 creates a disproportionate burden on the legal profession. It utilises empirical evidence from 40 interviews with legal professionals at Top 50 UK law firms to support this view.

Introduction

June 2017 saw the transposition of the Fourth Money Laundering Directive (4MLD) into UK law, and with it an array of changes that seek to embed further a risk-based approach to anti-money laundering (AML).[1] During this period of change, the UK has elected to retain an “all crimes” approach to AML in the Proceeds of Crime Act 2002 (POCA 2002). This approach, which is explored below, creates an overly burdensome regime within which the legal profession must operate. This article will draw upon empirical evidence from 40 interviews with transactional and compliance professionals at Top 50 UK law firms. Based upon this evidence, it will argue that the failure to exclude minor offences and regulatory breaches from the ambit of POCA 2002 during the transposition of 4MLD is a wasted opportunity to address that disproportionate burden imposed on the legal profession.

Background

Historically, the UK has elected to “gold plate” its AML regime and transposed the Third EU Money Laundering Directive (3MLD) into UK law in a manner which went further than the strict requirements of the Directive.[2] Hence POCA

[*] My thanks to Dr Jennifer Sigafoos, Dr Robert Stokes and Professor David Whyte.

[1] Council Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation 648/2012 and repealing Directive 2005/60 and Commission Directive 2006/70 [2015] OJ L141/73. 4MLD is transposed into national law by way of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692). See also the Criminal Finances Act 2017 for further AML measures.

[2] Council Directive 2005/60 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [2005] OJ L309/15. This was transposed into UK law by way of the Money Laundering Regulations 2007 (SI 2007/2157) and the Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007 (SI 2007/3398).

2002 criminalises dealings with "criminal property", a definition so widely cast that it encompasses all crimes, and extends to any direct or indirect "benefit" derived from criminal conduct.[3] The concept of "benefit" adds a further layer of complexity to the Act as the term includes any notional saving made pursuant to criminal conduct in addition to the more classical concepts of "property" and "pecuniary advantage".[4] The rationale behind the adoption of an "all crimes" approach is a purely practical one: it does not require any assessment to be made as to the seriousness or otherwise of any underlying criminal offence.[5]

The effect this drafting has in practice is that it imposes a disproportionate burden upon the legal profession. An array of minor offences and regulatory breaches with criminal sanctions attached to them (referred to as "technical" offences throughout this article) may trigger a substantive money laundering offence under POCA 2002.[6] Examples often cited by the profession are the failure to comply with a tree preservation order, or to obtain an asbestos-related environmental licence, both of which will constitute predicate offences under the Act.[7] Such offences may come to light when effecting transactional work on behalf of a client. Any notional saving made by an offender due to their failure to obtain an environmental licence for example will then constitute "criminal property". In respect of such criminal property the law firm must make a Suspicious Activity Report (SAR) to the National Crime Agency (NCA), and/or seek consent to continue with the relevant transaction on the basis that such "authorised disclosure" under the "consent regime" is a complete defence to the substantive money laundering offences.[8]

In terms of reporting levels, solicitors submitted 3,461 SARs in 2014–15, (constituting under 1% of all SARs submitted to the NCA), although concerns have been raised by the NCA and the SRA over declining numbers of SARs from the sector in recent years.[9] The NCA has not published a more detailed breakdown of SARs from the sector, and so it is not possible to identify whether specific sections of the profession predominate in terms of the number of reports they make. The majority of legal sector SARs are "consent" SARs (75.52%) however, and

[3] POCA 2002 s.340 (3) provides that "Property is criminal property if (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit." Only a deposit taking institution may avail itself of a de minimis threshold of £250 (s.339A) pursuant to ss.327(2C), 328(5) and 329(2C).

[4] For the definition of "property" see POCA 2002 s.340(9). Pecuniary advantage is not expressly defined but is referred to in ss.340(6) and (7) of the Act.

[5] This rationale is explained in Secretary of State for the Home Department, Money Laundering and the Financing of Terrorism: the Government Reply to the nineteenth Report from the House of Lords European Union Committee Session 2008–09, HL Paper 132 (TSO, 2009), Cm.7718, pp.11–12. Hence a bank clerk, for example, would not be in a position to distinguish between differing categories of crimes.

[6] Such minor offences and regulatory breaches are typically referred to by participants as "technical" breaches in that they trigger the requirement to make a notification to the NCA, whilst not being perceived by such participants as posing a concrete risk of money laundering.

[7] See provisions under the Town and Country Planning Act 1990 and Town and Country Planning (Tree Preservation) (England) Regulations 2012 (SI 2012/605) in relation to tree preservation orders. See also Davey [2013] EWCA Crim 1662; [2014] 1 Cr. App. R. (S.) 34 (p.205), where a confiscation order under POCA 2002 had been granted in an amount of £50,000. This sum reflected the increased property value resulting from the felling of a tree protected by a tree preservation order. For asbestos related offences see, inter alia, Health and Safety at Work etc Act 1974.

[8] For reporting obligations and authorised disclosure provisions see POCA 2002 ss.330–332, 327(2)(a), 328(2)(a) and 329(2)(a). Since June 2016, consent requests have been referred to as "requests for a defence to a money laundering offence", see NCA, "Requesting a defence from the NCA under POCA and TACT" (NCA, 2016), http://www.nationalcrimeagency.gov.uk/publications/713-requesting-a-defence-under-poca-tact/file [Accessed 30 July 2017].

[9] SRA, Anti-Money Laundering Report (SRA, 2016), p.32, http://www.sra.org.uk/sra/how-we-work/reports.page#aml [Accessed 30 July 2017].

this may suggest that such reports are more likely to be "technical" in nature on the basis that law firms are seeking "consent" to continue with a transaction rather than declining to act.[10]

This issue has received sustained attention from the Law Society over the years. The Society is of the view that the "definition of criminal property lies at the heart of the anomalies and unintended consequences of the UK's anti-money laundering regime".[11] The Society raises concerns that the definition results in "unending tainting" of individuals where criminal property tracks through from one transaction to another such that, "it can make it almost impossible for them to conduct their affairs lawfully again".[12] It is on this basis that the Law Society has repeatedly argued for several amendments to POCA 2002, including the exclusion of minor offences and regulatory breaches.[13] Such exclusions would not have any effect on other sectors obliged to report to the NCA under POCA 2002. For a financial institution, for example, money laundering concerns are typically raised in connection with the movement of funds through a bank account. In contrast to law firms then, such institutions will be unaware of the underlying features of a transaction. This means that, even under the existing regime, banks are unable to assess whether there have been any "technical" breaches on the part of their customers, such as the failure to obtain an environmental licence.

The multiplicity of consultations during the transposition of 4MLD, together with the enactment of the Criminal Finances Act 2017 and the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLR 2017) have failed to address this lack of proportionality within the Act. The retention of the "all crimes" approach following the transposition of 4MLD has been influenced in part by the recommendations made by the Financial Action Task Force (FATF), the global AML standard setting body, of which the UK is a member.[14] One of the measures put forward in the FATF Recommendations 2012 was that countries should criminalise money laundering in relation to "all serious offences, with a view to including the widest range of predicate offences".[15] Nevertheless, whilst 4MLD seeks to align itself with the FATF Recommendations 2012, its provisions oblige member states to criminalise money laundering in

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NCA, Suspicious Activity Reports (SARs) Annual Report 2015 (NCA, 2015), p.11, http://www.nationalcrimeagency.gov.uk/publications/677-sars-annual-report-2015 [Accessed 30 July 2017].

11
Law Society Money Laundering Task Force, "Law Society response to the SARs Regime Review 'Call for Information'" (The Law Society, 2015), p.2, https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/documents/mltf-response-sars-call-information/ [Accessed 28 August 2017].

12 The Law Society, "Financial Action Taskforce Consultation Response Reviewing the standards — preparing for the 4th round of mutual evaluations" (The Law Society, 2011), http://www.lawsociety.org.uk/support-services/risk-compliance/anti-money-laundering/documents/financial-action-taskforce-consultation-response-2011/, pp.19 and 22 [Accessed 28 August 2017].

13
Law Society Money Laundering Task Force, "Law Society response to the SARs Regime Review 'Call for Information'", p.2. The Law Society also argue for: (i) a definition of "criminal property" whereby property constitutes an asset rather than any notional savings; (ii) for consideration of a de minimis threshold in POCA 2002 applicable to the legal profession.

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FATF, "International Standards on Combating Money Laundering and The Financing of Terrorism & Proliferation — The FATF Recommendations" (FATF, 2012, updated June 2017), http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html [Accessed 30 July 2017].

15
FATF, "International Standards on Combating Money Laundering and The Financing of Terrorism & Proliferation — The FATF Recommendations", Recommendation 3 (emphasis added).

respect of "serious crimes", and do not require the "all crimes" approach which the UK has adopted.[16]
The consent regime also remains intact following the transposition of 4MLD, despite proposals to remove it and replace it with an "entity" rather than "transaction" based reporting system. Such a system would require SARs to be made in respect of organisations and individuals, as opposed to each transaction undertaken by them. Nor has the UK acted upon an alternative proposal set forth by the Law Society whereby a "tiered" reporting system could apply to the legal sector. Under this system, lawyers would simply "grade the importance of the SARs they submit".[17]

Empirical research

This article draws upon responses from 40 semi-structured qualitative interviews with money laundering reporting officers (MLROs), deputy MLROs, senior compliance personnel and transactional partners drawn from Top 50 commercial UK headquartered law firms.[18] The interview data was analysed using thematic analysis as a method of "identifying, analysing and reporting patterns (themes) within data".[19] Analysis of the responses from participants highlights the negative effects the expansive scope of POCA 2002 has on the legal profession in practice. Whilst it might be assumed that participants would automatically have a negative view of the SARs regime on the basis that it creates additional work, nevertheless, many participants expressed an active willingness to comply with the AML regime. Participants objected to the way in which minor and serious offences were treated in the same manner. Not only does making numerous "technical" SARs result in an inevitable administrative burden for law firms, it may also result in the interruption of high value commercial transactions while NCA consent is being sought.
Responses also suggest that the "all crimes" approach discredits and weakens the AML regime in a much broader sense, with participants questioning the intelligence value of technical SARs. A focus on technical SARs diverts resources away from areas of real money laundering risk. This focus can even foster a division between what is considered by the legal professional to be "real" money laundering, as separate and distinct from "technical" laundering. Each of these responses from participants is more fully explored below.

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See para. 4 of the preamble to 4MLD which states that, "Union action should continue to take particular account of the FATF Recommendations". Serious crimes are listed within the definition of "criminal activity" at art. 3(4) 4MLD.

17
Home Office and HM Treasury, Action Plan for anti-money laundering and counter-terrorist finance, paras 2.7 and 2.8. See also The Law Society, "Response of the Law Society of England and Wales to the consultation issued by the Home Office and HM Treasury on the Action Plan for anti-money laundering and counter-terrorist finance — legislative proposals" (The Law Society, 2016), p.4. See https://www.lawsociety.org.uk/.../consultation-responses/../aml-ctf-action-plan-legislation [Accessed 28 August 2017].

18
Forty interviews were conducted between 17 November 2015 and 16 June 2016 with participants from 20 Top 50 UK headquartered law firms as determined by reference to turnover. Top 50 firms were selected as they represent a customary grouping within the profession. Twenty participants were drawn from transactional areas of practice at partner level (their interviews referred to as "Transactional Interviews"). Twenty participants were MLROs, deputy MLROs or those fulfilling a senior compliance function (their interviews referred to as "Compliance Interviews"). Ethical approval was obtained prior to conducting the interviews in accordance with Liverpool University's Policy on Research Ethics involving Human Participation.

19
V. Braun and V.Clarke, "Using thematic analysis in psychology" (2006) 3(2) Qualitative Research in Psychology 77, 77 and 79.

The burden of POCA 2002 on the Legal Profession: "Everybody's looking at nothing"[20]

The lack of distinction between minor offences and serious crimes

Participants reported that, owing to its structure, POCA 2002 had far too broad a reach, which had the effect of creating a "cumbersome regime".[21] Participants felt that the Act was disproportionate in its effect in that minor infractions were dealt with in the same way as serious crime, with those minor offences automatically escalated into money laundering scenarios merely by virtue of the definition of "criminal property" under the Act. This inequitable approach was highlighted by, for example, the participant who commented with regard to such minor infractions, "throwing in those offences with very serious criminal offences is the wrong approach … because they're trying to do very different things."[22] This view, that a distinction should be drawn between minor and more serious offences, was echoed by many participants, reflected by the MLRO who added, "if you compare a minor regulatory breach to let's say a very large scale fraud, they are very different in quality, quantity and character".[23]

Whilst participants may have formed their own, differing, views as to what constitutes a serious crime, it should be noted that 3MLD took a broad approach to the definition. In addition to predicate offences such as fraud and corruption, all offences carrying a prison sentence in excess of one year fall within the definition of "serious crimes".[24] The same broad approach to the definition is adopted in 4MLD, with tax offences included as a predicate offence, and both Directives are underpinned by a wide definition of criminal "property". [25]

The majority of participants expressed the clear view that minor offences and regulatory breaches attracting criminal sanctions should be excluded altogether from the ambit of the Act, with virtually all participants performing a compliance role holding this view. These minor offences and breaches of regulations were typically referred to by participants as "technical" breaches in that they trigger the requirement to make a notification to the NCA, whilst not being perceived by such participants as "real" money laundering, a distinction which will be explored further below.

Despite the UK Government explicitly choosing to adopt the "all crimes" approach reflected in the Act, and whilst participants were aware that the legislation was drafted in this manner, its effect is so draconian that several participants still felt that the inclusion of technical offences represented an unintended consequence or by-product of the legislation, encompassing offences which the Act "was never designed to pick up".[26] As one transactional partner summarised in respect of regulatory breaches, "that's not what I would imagine the legislation intended to catch".[27]

[20] Compliance interview 18 dated 8 April 2016.
[21] Compliance Interview 12 dated 26 February 2016.
[22] Compliance Interview 9 dated 15 December 2015.
[23] Compliance Interview 19 dated 24 May 2016.
[24] For the definition of "serious crimes" see art.3(5) 3MLD. The serious crimes which comprise "criminal activity" are listed in art.3(4) 4MLD.
[25] For the definition of "property" see art.3(3) 3MLD and art.3(3) 4MLD.
[26] Compliance Interview 6 dated 8 December 2015.
[27] Transactional Interview 13 dated 1 December 2015.

The administrative burden of technical SARs

Submitting SARs in respect of technical breaches is both time consuming and resource intensive, resulting in an additional administrative burden on law firms. As one participant observed, "the amount of time that is spent dealing with minor regulatory offences, you know, I think clouds everything".[28] In practical terms, the amount of time and resource spent making a technical report as opposed to a more substantive report can be the same, and potentially even greater where the notional saving or benefit is difficult to identify and therefore harder to articulate to the NCA. Participants also spoke of making defensive technical reports "covering our backs", i.e. complying with the technical requirements of the Act to avoid liability under the substantive money laundering offences, an enduring issue which has been a feature of the AML arena for many years now.[29] Such defensive reporting can be seen as an inevitable consequence of combining an "all crimes" AML approach with criminal sanctions of up to 14 years' imprisonment under the substantive money laundering offences.[30] Cumulatively, the submission of multiple technical reports across the sector as a whole can result in what one participant memorably deemed to be nothing more than a large scale "paper pushing" exercise on the part of the profession and the NCA.[31] In short, "everybody's looking at nothing".[32]

Transactional interruption

In addition to the administrative burden created by the Act, making a "technical" report may also have a more serious and disproportionate commercial impact on transactions being effected by law firms. Should a technical breach causing property to become criminal for the purposes of POCA 2002 come to light in the course of a transaction, a SAR must be submitted to the NCA and consent sought to continue with the transaction. As no "prohibited act" in respect of which consent is sought may take place prior to such consent being granted, this may result in the commercial transaction being halted.[33] It was this concern that was voiced by the transactional partner who, whilst fully supporting the aims of POCA 2002, said "the notion that you have to stop a £1 billion deal for a £100 fine … to actually halt that transaction is disproportionate and it can also have quite a serious commercial effect … if you're actually working to a serious commercial deadline."[34]

In summary, some participants felt that the requirement to make SARs in respect of technical breaches serves simply to "generate far more administrative difficulty and transactional interruption than is justified" for law firms.[35]

[28] Compliance Interview 12 dated 26 February 2016.

[29] Compliance Interview 1 dated 17 November 2015. For defensive reporting comments see SRA, Anti-Money Laundering Report, p.32.

[30] The substantive offences are set out in POCA 2002 ss.327–329. Criminal sanctions are set out in POCA 2002 s.334(1).

[31] Compliance Interview 18 dated 8 April 2016.

[32] Compliance Interview 18 dated 8 April 2016.

[33] POCA 2002 s.336(10).

[34] Transactional Interview 7 dated 25 November 2015.

[35] Compliance Interview 9 dated 15 December 2015.

The NCA and technical SARs

For their part, the NCA were perceived by some participants as being "overwhelmed by issues like … listed building consent" or swamped with a "deluge" of technical notifications from law firms.[36] As one participant noted:

"I get the sense that the NCA is drowning under the weight of notifications which are not real in the sense you know they're sort of tax or the environmental or the data protection ones."[37]

This perception was amplified by another participant who said of the NCA that, "pure regulatory breaches isn't something that they're really focusing on".[38] Whether this perception is accurate or not is unclear. Whilst the NCA have expressed concern in recent times over both the decline in quantity and poor quality of legal sector SARs, the NCA have made no public comment suggesting any chagrin over the potential multitude of technical SARs submitted to them by law firms.[39]

POCA 2002 detracts from the aim of the legislation

The detrimental effect of POCA 2002 on the legal profession extends further than purely administrative inconvenience or transactional interruption. It has a corrosive effect on the confidence that the profession have in the AML regime more broadly, with many participants forming the view that the inclusion of technical offences actually detracted from or did not fulfil the purpose of the Act. Following the transposition of 3MLD into national law, the UK has embraced a "risk-based" approach to AML, the central tenet of which is that resources should be appropriately targeted to the areas of greatest money laundering risk. This approach is reiterated in the Government's AML Action Plan published in 2016 (Action Plan 2016) which expressly states:

"We expect the banks and other firms subject to the Money Laundering Regulations to take a proportionate approach, focusing their efforts on the highest risks, without troubling low risk clients with unnecessary red-tape."[40]

The inclusion of technical offences within the regime however militates against a risk-based approach in practice. Some participants noted that resources were being channelled into making technical reports which could be better utilised in addressing more serious money laundering concerns. One participant observed

[36] Compliance Interview 3 dated 25 November 2015, Compliance Interview 1 dated 17 November 2015, Transactional Interview 2 dated 18 November 2015.

[37] Compliance Interview 8 dated 14 December 2015.

[38] Compliance Interview 14 dated 10 March 2016, Compliance Interview 18 dated 8 April 2016.

[39] The concern over the decline in SARs is raised in the National Risk Assessment, see HM Treasury and Home Office, UK national risk assessment of money laundering and terrorist financing (HM Treasury and Home Office, 2015), paras 6.91–6.93. See NCA, Suspicious Activity Reports Annual Report 2014 (NCA, 2015) pp.13, 27 and 28, http://www.nationalcrimeagency.gov.uk/publications/suspicious-activity-reports-sars/464-2014-sars-annual-report/file [Accessed 10 July 2017], whereby the NCA liaised with the SRA and the Law Society with regard to poor quality SARs.

[40] Home Office and HM Treasury, Action Plan for anti-money laundering and counter-terrorist finance, p.3.

"it's just muddying the waters so that people stop concentrating on what we should really be looking at and what actually are the issues as opposed to … reporting on somebody not having carried out an asbestos survey."[41]
This concern was echoed by the participant who regretfully noted that: "We're spending all this time reporting—well, you know, then you're going to miss or there is a much greater chance that you will miss the bigger stuff because you know you're not being able to target your resources to … the real areas of risk."[42]

This diversion of resources is an issue that was acknowledged by the Government in its Action Plan 2016 by stating "too much resource at present is focused on dealing with regulatory compliance, and too little is focused on tackling financial crime risk".[43] Nevertheless, the 4MLD transposition will do nothing to improve the position, and resources will still be channelled into dealing with technical SARs.

The questionable intelligence value of "technical" SARs

Concerns were also raised that the more technical SARs submitted to the NCA do not have any intelligence value. This was an issue raised by several participants. As with many aspects of the AML regime, which remain shrouded in guesswork and estimates, it is difficult to establish a clear link between legal sector technical SARs in isolation and the prevention of money laundering or the facilitation of the confiscation of criminal property. The participants' views on the questionable utility of technical SARs supports the view expressed by the Law Society that the "all crimes" approach under POCA 2002 spawns a multitude of SARs, the "vast majority being of limited intelligence value".[44] It also reflects the complaints of their membership as to "receiving minimal feedback from the SARs they make".[45]
This is an issue that has been considered recently in the Government's Action Plan 2016, where the Home Office conceded that, "we need radically more information to be shared between law enforcement agencies, supervisors, and the private sector".[46] There has been some concrete action in this area, and improved information sharing procedures amongst the regulated sector and NCA are enacted within the Criminal Finances Act 2017.[47]
Several participants went further and expressed doubts as to whether making technical reports actually achieved their AML purpose in a wider sense, such as the MLRO whose view of the Act was that, "I think it's lost proportionality … is it helping identify and/or stop crime ? - I don't see any evidence of that from my perspective".[48] The cumulative effect of the blanket inclusion of all criminal offences within the ambit of the Act has been to diminish the regard for the AML

41 Compliance Interview 1 dated 17 November 2015.
42 Compliance Interview 12 dated 26 February 2016 (emphasis added).
43 Home Office and HM Treasury, Action Plan for anti-money laundering and counter-terrorist finance, p.12.
44 The Law Society Money Laundering Task Force, "Law Society response to the SARs Regime Review 'Call for Information'", p.4.
45 The Law Society Money Laundering Task Force, "Law Society response to the SARs Regime Review 'Call for Information'", p.6.
46 Home Office and HM Treasury, Action Plan for anti-money laundering and counter-terrorist finance, p.3.
47 Criminal Finances Act 2017 s.11.
48 Compliance Interview 8 dated 14 December 2015.

regime held by some members of the profession. Ultimately it has led to POCA 2002 becoming, in the view of one MLRO, "so discredited in the minds of most people that it's actually damaging the regime".[49]

"Real" versus "technical" laundering

One further effect of the "all crimes" approach in the Act is that many participants drew a clear distinction between what they considered to be "technical" money laundering as opposed to "real" laundering. This is reflected by the participant who referred to the Act as a "crazy piece of legislation which captures things that you would not ordinarily think of as money laundering".[50] The breaches of these regulatory types of offence trigger notification requirements under the Act for both law firms and their clients. Participants framed "real" money laundering, in contrast, as having a genuine link to serious organised crime in some manner and posing an actual risk to the integrity of the law firm in question or economy at large. This split between "technical" and "real" laundering is best illustrated by the participant who categorised risks into "actual and significant and real, to the wasting my time".[51] The concern that this binary categorisation may engender in practice is that the practitioner may not perceive a particular issue as being subject to a reporting obligation under the Act due to its technical nature, or that it may be dismissed as too inconsequential to report. This may give rise to the risk of law firms not reporting technical breaches at all. This issue of non-reporting was raised by one participant whose concern was that firms may well take the view that "it's just ludicrous" and went on to say

"so then you've got a, you know, regime that is even more broken because some people are just saying 'well that's stupid why would I report a lack of an asbestos survey?'"[52]

Non-compliance with POCA 2002 as an AML firm level risk

The reach of POCA 2002 is so great that breaches of its "technical" reporting and consent provisions may also trigger money laundering offences within law firms themselves. Law firms subject to the MLR 2017 will be required to undertake a risk assessment in respect of the money laundering threats to their business.[53] Ironically, given the whole purpose of the Act, non-compliance with the technical reporting and consent aspects of the Act was identified by some participants as a money laundering risk to their firms in its own right, separate and distinct from the more traditional external categories of jurisdictional or funding risks. Minor breaches by a law firm of customer due diligence procedures provided for under the MLR 2017 attract criminal sanctions, thus constituting a predicate offence under POCA 2002. As one participant commented in relation to POCA 2002, "it

[49] Compliance Interview 13 dated 10 March 2016.
[50] Compliance Interview 14 dated 10 March 2016.
[51] Compliance Interview 6 dated 8 December 2015.
[52] Compliance Interview 12 dated 26 February 2016.
[53] MLR 2017 reg.18(1) "A relevant person must take appropriate steps to identify and assess the risks of money laundering … to which its business is subject".

is so wide-ranging that … it is … difficult to ensure that the firm as a whole is adhering all of the time … to the letter of that … legislation."[54]

POCA 2002 "remainers"

Despite the groundswell of support, particularly amongst compliance respondents, for creating exclusions from POCA 2002, a number of participants still welcomed the "all crimes" approach adopted in the UK. In part this was attributable to the perceived practical difficulties which would be involved in drawing a distinction between minor and more serious offences or, as one MLRO put it, distinguishing between "big, bad crime and regulatory offences".[55]

In a purely practical context, several participants also felt that a clear cut rigour around small compliance matters fostered a broader ethos of good professional conduct within a firm.[56] The vast majority of participants who supported the "all crimes" approach of POCA 2002 were transactional participants. This predominance may be attributable to the fact that their role in the SARs regime is limited to making an internal SAR to their firm's MLRO. It is therefore only the compliance participants who are responsible for the submission of external SARs to the NCA in connection with technical breaches. Those SARs submitted in respect of technical matters may well be challenging to report, particularly where they require the identification of notional savings or benefits.

Some participants also felt that minor offences should not be allowed to "slip through the net" but that there should be some room for discretion in the way offences are handled thereafter.[57] As one transactional partner commented:

"I think it's better to have a wider net and then perhaps more discretion within that net as opposed to having a smaller net and then just hoping that those minor offences are indeed just minor offences or just regulatory trips."[58]

This instinctive desire to retain an "all crimes" approach was articulated best by the transactional partner who observed

"my sense is that the direction of travel in legislation in this space isn't to make it easier, and I think people would rather just leave it as quite tough."[59]

How might exclusions from POCA 2002 be achieved in practice?

Given the level of support from the legal profession for exclusions from POCA 2002, some consideration should be given as to how this could be effected in practice. Participants themselves suggested various methods by which exclusions could be achieved, any of which could fulfil the aim of removing minor offences and regulatory breaches from the ambit of the Act.

54 Compliance Interview 1 dated 17 November 2015.

55 Compliance Interview 15 dated 10 March 2016, Transactional Interview 12 dated 1 December 2015 and Transactional Interview 14 dated 1 December 2015.

56 Transactional Interview 10 dated 26 November 2015, Transactional Interview 12 dated 1 December 2015 and Transactional Interview 14 dated 1 December 2015.

57 Transactional Interview 20 dated 11 March 2016, Compliance Interview 15 dated 10 March 2016.

58 Transactional Interview 16 dated 8 December 2015.

59 Transactional interview 2 dated 18 November 2015.

Several MLROs and transactional partners suggested inserting a de minimis threshold into POCA 2002, a proposal touched upon in the Action Plan 2016, and which could be achieved by recasting the interpretation section of the Act (s.340).[60] A de minimis threshold is already a familiar concept within the confines of POCA 2002. Deposit taking bodies, for example, can avail themselves of a de minimis defence to the substantive money laundering offences set out in ss.327–329 when operating accounts below a specified threshold amount.[61] The same principles could be expanded upon to cater for the legal profession.

Several compliance participants proposed excluding specified offences by reference to the length of sentence they attract, which is the approach taken in both 3MLD and 4MLD.[62] This could be achieved by recasting the interpretation section of the Act (s.340).[63] Despite the drafting challenges surrounding which offences should be included or excluded, expressly carving out specified offences from the Act was also proposed as a workable way forward.[64] In the alternative, and whilst acknowledging "it would be a huge task to do it", another MLRO suggested reclassifying minor criminal offences as civil offences.[65] This is an approach that would be effective in curtailing the notionally criminal predicate offences which trigger offences under POCA 2002.

Whilst attempts to formulate exclusions from POCA 2002 may involve administrative or legislative challenges, they are not insurmountable. As one MLRO put it, "I'm sure it would not be beyond the wit of man to produce something".[66] Regardless of the mechanical route by which such exclusions could be achieved, and in contrast to many other jurisdictions, the UK has not availed itself of the opportunity to recast POCA 2002 or use other means to address its disproportionate burden upon the legal profession.

Conclusion

This article has drawn out the many practical challenges faced by legal professionals when operating within the broad regime created by POCA 2002, a number of which were also raised in the Government's Action Plan 2016.[67] The regime creates a needless administrative burden for law firms in relation to "technical" SARs, with minor infractions also capable of forcing disproportionate transactional interruption.

Practical consequences aside, the breadth of POCA 2002 has led to a number of participants perceiving the regime to be either discredited or broken, on the basis that it treats serious crime and nominally criminal offences in the same way. More troubling still is the fact that making technical SARs serves to divert law

[60] Compliance Interview 13 dated 10 March 2016, Compliance Interview 8 dated 14 December 2015, Transactional Interview 11 dated 26 November 2015 and Transactional Interview 7 dated 25 November 2015. Home Office and HM Treasury, Action Plan for anti-money laundering and counter-terrorist finance, p.42.

[61] POCA 2002 ss.327(2C), 328(5) and 329(2C). The current threshold is £250.

[62] Excluding offences by reference to length of sentence is the approach taken in both 3MLD and 4MLD. See the definition of "serious crimes" at art.3(5) 3MLD and the list of serious crimes within the definition of "criminal activity" at art.3(4) 4MLD.

[63] Compliance Interview 14 dated 10 March 2016 and Compliance Interview 6 dated 8 December 2015.

[64] Compliance Interview 6 dated 8 December 2015.

[65] Compliance Interview 3 dated 25 November 2015.

[66] Compliance Interview 8 dated 14 December 2015.

[67] Home Office and HM Treasury, Action Plan for anti-money laundering and counter-terrorist finance.

firm resources away from those areas that present a "real" risk of money laundering, thus detracting from the effectiveness of the regime still further.

The operation of the UK AML regime has led to the compartmentalisation of "real" and "technical" laundering in the minds of many participants. This may have a negative impact on compliance with the regime in that technical offences may remain unreported simply because they are not identified as reportable by the legal professional in question or considered too inconsequential to report. The failure to identify and report matters which are technically reportable under the Act has a further negative effect on the regime overall.

The desire of participants to remove minor offences and technical breaches from the scope of the Act is a desire to address and redress the disproportionate burden imposed upon the profession by virtue of the "all crimes" approach adopted by the Act and the attendant potential liability imposed on lawyers for inadvertent laundering under ss.327–329. Exclusions from POCA 2002 could be achieved using any of the pathways put forward by participants.

The inclusive approach adopted may not be too surprising however, given the UK's previous history of "gold-plating" previous EU AML directives transposed into UK law, or as one participant colourfully put it, "we do extra jam on top and lashings of extra sort of 'to be sure, to be sure' type stuff".[68] The retention of an "all crimes" approach may have much to do with what can be expressed as the AML "zeitgeist". Recent years have seen an increased spotlight on money laundering in preparation for the FATF evaluation of the UK in 2018, coupled with numerous pledges to tackle money laundering on the part of a panoply of high profile figures.[69] In the midst of such scrutiny the UK published its first National Risk Assessment (NRA) in 2015, which identified the legal sector as a "high" risk in terms of money laundering, a rating vehemently contested by the profession.[70] This combination of factors alone may well have extinguished any political will to be seen to relax the AML regime in relation to the legal profession, particularly in light of the sector's rating in the NRA.

The UK's unwavering devotion to an "all crimes" approach may also be influenced by political considerations at a supra-national level. The effect of Brexit is that the UK will stand alone in many respects from 2019 onwards, requiring it to seek out strong partnerships and forge new alliances wherever possible. It enters this new arena tainted somewhat by a widely held perception that has gained traction in recent years: that the UK is, despite its ornate and elaborate regulatory regime, the money laundering capital of the world.[71] If the NRA was the flesh

[68] Transactional Interview 4 dated 20 November 2015.

[69] See for example, P. Wintour and H. Stewart, "David Cameron to introduce new corporate money-laundering offence", The Guardian, 12 May 2016, https://www.theguardian.com/politics/2016/may/11/david-cameron-corporate-money-laundering-offence-anti-corruption-summit [Accessed 30 July 2017].

[70] HM Treasury and Home Office, UK national risk assessment of money laundering and terrorist financing, p.12. For the Law Society response see, the Law Society, "Intelligence shortcomings render anti-money laundering report findings misleading, warns legal sector", The Law Society, 15 October 2015, http://www.lawsociety.org.uk/news/press-releases/intelligence-shortcomings-render-anti-money-laundering-report-findings-misleading-warns-legal-sector/ [Accessed 30 July 2017].

[71] The Government recognises that the UK is "unusually exposed to international money laundering risks", see Home Office and HM Treasury, Action Plan for anti-money laundering and counter-terrorist finance, p.7. Press reports abound to the effect that the UK, and London in particular, is the money laundering capital of the world. See J. Hanning and D. Connet, "London is now the global money laundering centre for the drugs trade, says crime expert", The Independent, 4 July 2015, http://www.independent.co.uk/news/uk/crime/london-is-now-the-global-money-laundering-centre-for-the-drug-trade-says-crime-expert-10366262.html [Accessed 30 July 2017]. Transparency International UK has also raised concerns with regard to money laundering via the UK. See for example, Transparency

wound, Brexit may prove to be the fatal blow in terms of any political will to remove technical offences from the ambit of POCA 2002, notwithstanding the suggestion by some commentators that the UK may elect to move away from its AML "gold standard" in an attempt to attract business to its shores post-Brexit.[72] For the time being at least, the legal profession looks set to remain overburdened by an AML regime which is entirely disproportionate in terms of the money laundering risks it is trying to address.

International UK, "Corruption in the UK: Overview and Policy Recommendations" (Transparency International UK, 2011), http://www.transparency.org.uk/publications/corruption-in-the-uk-overview-policy-recommendations/ [Accessed 30 July 2017].

[72] For comments on the UK's position with regard to Brexit, see B. Tupman, "Editorial" (2017) 20(2) Journal of Money Laundering Control 102.