Reporting Obligation of Lawyers under the AML/ATF Law in Malaysia

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Abstract

Within the money laundering process, lawyers could become the potential vehicle for the launderers to conduct their illegal activities. In dealing with this problem, the Anti-Money Laundering and Terrorism Financing Act 2001 (AML/ATF) imposes a duty on the Malaysian lawyers to report any suspicious transactions to the authority. Employing a content analysis method, this conceptual paper examines such obligation and the impediments to reporting in many jurisdictions, including Malaysia. The lawyers’ reluctance to comply with their duties to report could be attributed to the culture of confidentiality and the fear of erosion of the principle of client-lawyer privilege.

Keywords: Money laundering; reporting obligation; legal professionals; compliance; client-lawyer privilege

1. Introduction

As a global phenomenon, money laundering is perpetually a serious crime as it could generate considerable incentives for other crimes, while at the same threatening the financial system and institutions locally and internationally. The strengthening of regulations within the financial industry seems to have displaced the crime to the non-financial business sector, including the legal professional industry, as a vehicle for their laundering activities (Levi, 2008). Indeed, the FATF Report in 2013...
indicates that legal practitioners have wittingly or unwittingly been involved in money laundering activities due to the varied services they provide to their clients. Such activities and the vulnerabilities of lawyers to intricate money laundering conspiracies have led to their inclusion as one of the reporting entities under the AML/ATF regime in many jurisdictions, including Malaysia. The independence of the legal profession, the lawyer-client privilege and the duty of confidentiality have been the primary justifications for the legal profession to challenge the imposition of the statutory duty to report suspicious transactions under the AML/ATF laws across the globe. Such issues and the obstacles faced by lawyers in fulfilling their obligations under the AML/ATF law are under-researched in Malaysia. As such, this paper attempts to examine the reporting obligation of lawyers in Malaysia and other jurisdictions. Whilst the literature review explains the concept of money laundering, the vulnerabilities of lawyers to money launderers and the role of FATF in establishing the reporting requirement, the methodology section explains the procedures and the sources of the literature that led to the findings that was obtained via the content analysis method. The findings part examines the legal position in reporting obligation in various jurisdictions including Malaysia. The discussion part explores the impediments to reporting obligations and the last part conclude the paper.

2. Literature Review

2.1. What is money laundering?

Money laundering is a process through which criminals legitimize proceeds derived from illegal activities to give it a legitimate appearance. Over the years, money laundering had been defined differently by different writers and international bodies. For instance, the Financial Action Task Force (FATF) defines money laundering as the processing of a large number of criminal acts to generate profit for individual or group that carries out the act with the intention to disguise their illegal origin, in order to legitimize the ill-gotten gains of crime. Any crime that generates significant profit through extortion, drug trafficking, arms smuggling and some white collar crime may create a “need” for money laundering (FATF, 2001). The Central Bank of Malaysia defines money laundering as all activities and procedures to change the identity of illegally obtained money so that it appears to have originated from a legitimate source (BNM, 2002). Similarly, recent writers have conceptualized money laundering either as a process (Rahman, 2013; Graycar and Grabosky, 1996; Unger, 2013) or a technique (Simser, 2013) to clean ‘dirty money” derived from criminal activities to disguise the origin of such money and to make them appear to have come from a legitimate source.

From the legal perspective, in Public Prosecutor v Hazlan bin Abdul Hamid [2012] the court held that the definition of money laundering in section 3 of AMLATFA goes on to provide that a person's knowledge that property is the proceeds of unlawful activity may be inferred from the objective factual circumstances of the case. Also, the mental element for the offence is satisfied where a person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is the proceeds from any unlawful activity.

2.2. Vulnerabilities of lawyers to money laundering

FATF Report 2013 observes that legal practitioners are vulnerable to money launderers not only because such professional is required to complete certain transactions but also because access to specialized legal skills could facilitate the laundering process. Besides, the use of lawyers would provide a veneer of respectability and legitimacy to the launderer’s activity and having access to the lawyer’s client account seems attractive to such criminals (FATF, 2002; FATF, 2013). Furthermore, the perception
amongst the launderers is that legal professional privilege or professional secrecy will delay, hamper or effectively prevent investigation or prosecution against them, if lawyers’ services are being used by them (FATF, 2013).

2.3. FATF and reporting obligation of lawyers

The vulnerabilities of legal professionals and the tightened regulations over financial institutions from being used by money launderer have shifted the focus of such criminals to professionals such as lawyers and accountants as the new sites of vehicles for money laundering (Reuter & Truman 2004; Mugarura 2011; Turner 2011). In response, FATF 2003 extended the “gatekeepers initiatives” to designated non-financial institutions, business and professions (DNFBPs) including casino, real estate agents, dealers in precious metals and stones, lawyers, notaries, accountants, trust and company service providers as reporting institutions (FATF, 2003; Zagaris, 2008). The inclusion of lawyers as gatekeepers seems to be based on the practical consideration that lawyers have the capacity to monitor and control or influence the conduct of their clients and prospective clients to deter wrongdoings (IBA, 2013).

The FATF Recommendation 12 (FATF 2001) which is now known as Recommendation 16 (FATF 2003) is concerned with the reporting obligation by the DNFBPs. As a result of this Recommendation, legal professionals, accountants and notaries have the duty to comply with record keeping and customer due diligence and submit suspicious transaction reports on clients, when they carry out transactions of buying and selling immovable properties or estates; managing of client money, security and assets; managing bank savings or securities accounts; creation, operation or management of companies or buying and selling business entities (FATF, 2003; Lim, 2003). In the FATF Lawyer Guidance Report in 2008, similar and other activities have been identified as the methods in which criminals have employed the services of a legal professional, including misuse of clients’ account; purchase of real property; creation of trusts and companies; management of trusts and companies; managing client affairs and making introductions; undertaking certain litigation; and setting up and managing charities.

3. Methodology

This conceptual paper employs a content analysis method to analyze lawyers’ obligations to report on their clients of any suspicious transactions and the obstructions they encounter in Malaysia and in other Commonwealth countries. As such, secondary data and sources from decided cases, academic journals, official documents from the Malaysian Bar Council and the Malaysian Central Bank and online databases including Science Direct/Procedia have been gathered and analyzed in the findings below.

4. Findings

4.1. Reporting obligation of lawyers in other jurisdictions

In the UK, the legal imposition of the obligation to report suspicious transactions by lawyers commences in 2002, with the adoption of international instruments into the national law, the Proceeds of Crime Act (POCA) 2002, which is supplemented by the Money Laundering Regulations 2003 and now replaced by the Money Laundering Regulations 2007. These regulations are directly based on the EU Directives 91/308/EEC, 2001/97/EC and 2005/60/EC (Home Office, 2008; Winch 2006). Under POCA 2002 solicitors, accountants, tax advisers and insolvency practitioners who suspect (as a consequence of information received in the course of their work) that their clients (or others) have engaged in tax evasion or other criminal conduct, from which a benefit has been obtained, are now required to report their
suspicions to the authorities, since these will entail suspicions of money laundering (Home Office 2008; Winch 2006). In most cases, it would be an offence of ‘tipping-off’ for the reporter to inform the subject of his report that a report has been made to the relevant authorities (Sproat 2007; Winch 2006).

In Australia, subject only to a client's legal professional privilege, lawyers will be obliged to report suspicious matters to AUSTRAC without being permitted to advise their clients that such a report is made or is even contemplated (AUSTRACT, 2011; Galvin, 2007). In August 2008, AUSTRAC’s AML/CFT rule effectively exempts legal practitioners from obligations in relation to designated remittance services provided in the ordinary course of legal practice. In 2009, AUSTRAC made a further rule that exempts legal practitioners from obligations in relation to custodial, depository or deposit box services provided in the ordinary course of legal practice. The Law Society in Australia has issued guidelines in 2009, which highlighted that the major issue for the legal profession to comply with the AML/CTF reporting obligations is that the duties show a collision on their attorney-client confidentiality and legal professional privilege.

In contrast in Canada, the requirement to report has been challenged by the Law Society on the grounds that such obligation would curtail the independence of the Bar and erode the lawyer-client privilege. The Court held that the anti-money laundering law violated section 7 of the Charter of Rights and Freedoms and cannot be saved by section 1. Hence, the relevant aspect of the AML law undermined the lawyer-client relationship and eroded solicitor-client privilege (McDonald, 2010). Recently in 2013, the Law Society of British Columbia was given judgment by the Court of Appeal that affirmed the earlier decision. In Federation of Law Society of Canada v Canada Attorney General [2013] BCCA 147, the Court of Appeal held that the legislation for reporting threatened fundamental Canadian constitutional principles, where lawyers are required to be loyal to their clients to ensure consistent independence of the Bar and the integrity of the administration of justice.

In Hong Kong, the Law Society of Hong Kong issued Guidelines for legal professionals and the courts upheld that legal professional privilege as a ground for not disclosing suspicious transactions (Seah, 2011). The Mutual Evaluation Report conducted by the FATF showed that Hong Kong was not compliant with the FATF 40+9 Recommendation because of the weak and non-existence of regulations with regard to designated non-financial businesses and professions which includes lawyers (Seah, 2011). The 2009 AML/CFT legislation in New Zealand exempts law firms from carrying on some of the activities in the ordinary course of their business from the requirements of a “reporting entity” under the Act.

4.2. Reporting obligation by Malaysian lawyers

Since September 2004, Malaysian lawyers became one of the reporting institutions and as such are bound by Part 4 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA). They now have an obligation to report any suspicious transactions (STR), which fall under section 14 of the AMLATFA. They are obliged to file the STR to the financial intelligence unit (FIU), which is the Bank Negara Malaysia that was established under section 8 of the AMLATFA (Hamin, 2013). All the other provisions in AMLATFA affect all lawyers as well (Lim, 2003; Mohd Yasin, 2004). Now it has become mandatory for Malaysian lawyers to promptly report any suspicious transactions encountered in the course of preparing for or carrying out, transactions involving them acting as formation agents of legal entities and acting as directors or secretaries of companies (Lim, 2003; Shanmugam and Thanasegaran, 2008). Failure to report such transactions may result in a maximum fine of RM250, 000 or a term of imprisonment or both (section s 4(1) (b) AMLATFA). The specific checklists and guidelines have been issued to the lawyers by the Malaysian Bar Council and that earlier general guidelines by the Bank Negara on AML/ATF equally apply to them (BNM/GP, 2006). The Bar Council Guidelines also states that as an effort to curb money laundering activities in the country, lawyers will have to report any suspicious
transactions such as large and frequent currency exchange, use of multiple deposit accounts and activity inconsistent with customer profile.

5. Discussion

5.1. Impediments to reporting

The imposition of the reporting obligation on lawyers in the AML/ATF regime by the FATF raises the question on the compliance of lawyers with such obligation. The above-mentioned FATF Report 2008 established the inclusion of Recommendation 16, in which lawyers were subjected to disclose confidential information on clients as part of their STR obligations (Shepherd, 2012; O’Doherty, 2005; Kirby, 2008). This new standard was met with a strong response and outcries from the international bar associations, including the American Bar Association (ABA) and the Council of Bars and Law Societies of Europe (CCBE). The ABA opposed the duty to report because ultimately it would falter the independence of the Bar as it turns into an agent of the government (Lim, 2003). Similarly, the CCBE’s objection is based on the ground that such duty would lead to the “breach of the independence of a lawyer and the irrevocable violation of the principle of client confidentiality” (Kirby, 2008).

Importantly, the imposition of the obligation to report on their client or the “gatekeeper initiative” would destroy the fiduciary duty of attorney-client relationship as such relationship also entails confidentiality between them (Kirby, 2008). The legal requirement to report suspicious activity to the government authority will further erode this tenuous relationship (Lim, 2003). Such initiatives would also impair the lawyer-client privilege, as the right for consulting clients in confidence would no longer exist (Lim, 2003; Kirby, 2008). It follows that the duty to report would oblige lawyers to view each client with suspicion, which in the long run would ultimately reduce the client’s willingness to confide in the lawyer in confidence, and which will adversely affect the efficacy of lawyers to represent their client (Kirby, 2008). That a possible conflict between the duty to the client and the duty to disclose to the authorities would occur is also anticipated (Samuels, 2004).

In post-reporting situation, the ethical obligation upon filing the suspicious transaction report against the client is problematic. If the lawyers continue to advise the client, they could be exposing themselves to possible criminal prosecution (Lim, 2003), or breach of contract or malpractice proceedings should the transaction reported collapse (Kirby, 2008). The ultimate consequence is that lawyers will be less accessible to their clients and legal services cost will escalate (Lim, 2003).

Chamberlain and Travers (2004) highlights a number of the difficulties including tipping off, client confidentiality and the inability for firms to develop clear guidelines for staff. In addition, at a practical level, firms face on a daily basis, the challenge of assessing information revealed on due diligence exercises and determining whether it gives rise to a money-laundering reporting obligation (Chamberlain and Travers, 2004). The outcome of this reporting duty will place lawyers in a conflicting position and as a result, full and frank disclosure could not be done, thereby undermining the confidence in legal representation and the legal system (Galvin, 2007).

6. Conclusion

Since 2002, as the “gatekeepers”, lawyers across the world were imposed with a legal duty to report suspicious transactions committed by their clients. However, it is apparent that such obligation is replete with the tensions across many jurisdictions. At one end of the continuum, lawyers in Malaysia the UK and Australia, to a certain extent, are under such obligation. At the other end, lawyers in Canada, Hong Kong and New Zealand who have objected to the duty are exempted from similar obligations, which
consequently led them to being non-compliant with the FATF Recommendations. Despite the imposition of the reporting obligation, legal and practical impediments exist, leading to the lack of compliance with such duty. The APG Mutual Evaluation Report 2007 observed that there was a remarkable lack of reporting by the Malaysian legal professionals of suspicious transactions made by their clients. The notably scarce evidence of the effectiveness of Suspicious Transaction Report system in Malaysia in accordance with FATF Recommendation 16 compounded the problem, which consequently led to a rating as partially compliant for Malaysia. In view of the forthcoming Mutual Evaluation Report at the end of 2014, it is imperative that behavioral changes and attitude towards complying with their obligations under the law by the reporting institutions, including legal practitioners, be urgently addressed by the relevant authorities.

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References


FATF 2013, Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals.


