“Trust me; I’m your lawyer”: Lawyers’ Reporting Duty under AML/ATF Law in Malaysia

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Abstract

Lawyers have always been vulnerable to be misused by money launderers as one of the potential vehicles for such criminals to conduct their illegal activities. Given such issues, the Anti-Money Laundering and Terrorist Financing Law in Malaysia imposes an obligation on lawyers to report any suspicious transactions to the regulator. Adopting a content analysis method, this paper examines such obligation and the impediments to such reporting. Lawyers’ reluctance to comply with their reporting duties could be attributed to the culture of confidentiality and the fear of erosion of the client-lawyer privilege.

Keywords: Money laundering; Reporting Obligation; Gatekeeper; Client-lawyer Privilege

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1.0 Introduction

Money laundering has been considered as 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 lead to the displacement of money laundering to the non-financial business sector, including the legal professional industry, as a vehicle for their laundering activities (Levi, 2008). The vulnerabilities of lawyers to intricate money laundering conspiracies have led to their inclusion as one of the reporting entities under the AML/CFT regime in many jurisdictions, including Malaysia. The independence of the legal profession, the lawyer-client privilege and the duty of confidentiality are the primary justifications for lawyers to challenge their reporting obligations under the AML/CFT laws across the globe. This paper attempts to examine the reporting obligation of lawyers in Malaysia and other jurisdictions. While the first part explains the concept of money laundering, the second part deals with the vulnerabilities of lawyers to money launderers. The third part examines the role of FATF in establishing the reporting requirement; the fourth part examines the legal position in reporting obligation in various jurisdictions including Malaysia; the fifth part explores the impediments to reporting obligation and the last part conclude the paper.

2.0 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. Money laundering has 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 vast number of criminal acts to generate profit for individual or group that carries out the act with the intention to disguise their illegal origin, 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). Similarly, recent writers have conceptualized money laundering either as a process (Rahman, 2013; Graycar and Grabosky, 1996; Unger, 2013). Simser (2013) suggests that money laundering is 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 lawyers are vulnerable to money launderers not only because such professional is required to complete individual 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 confidentiality 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. They must also submit suspicious transaction reports on clients when they carry out transactions of buying and selling immovable properties or estates. Reporting is mandatory in managing client's 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). The FATF Lawyer Guidance Report in 2008 confirmed the above-mentioned methods in which criminals have been using lawyers for money laundering purposes.

3.0 Methodology

This paper employs a doctrinal legal analysis and secondary data, which analyses the primary source, which is the Anti-Money Laundering and Terrorism Financing Act 2001 (AMLATFA) itself, and secondary sources including case law, articles in academic journals, books, and online databases.

4.0 Results

4.1 Reporting obligation of lawyers in other jurisdictions

In the UK, the legal imposition of the duty to report suspicious transactions by counsel commences in 2002, with the adoption of international instruments into the national law, the Proceeds of Crime Act 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 that their clients have engaged in tax evasion or other criminal conduct, are now required to report their suspicions to the authorities, since these entail suspicions of money laundering (Home Office 2008; Winch 2006). In most circumstances 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 about designated remittance services provided in the ordinary course of legal practice. In 2009, AUSTRAC made a further rule that exempts legal practitioners from obligations about custodial, depository or deposit box services provided in the ordinary course of legal practice. The Law Society of Australia has issued guidelines in 2009, which highlighted that the major issues for the legal profession in complying with the AML/CTF reporting obligations are that the duties show a collision on their attorney-client confidentiality and legal professional privilege.

In Canada, the requirement by lawyers to report has been challenged by the Law Society on the grounds of the curtailing the independence of the bar and erosion of lawyer-client privilege. The Court held that money laundering law violated section 7 of the Charter of Rights and Freedoms and cannot be saved by section1. As such the relevant aspect of the AML law undermined the lawyer-client relationship and eroded solicitor-client privilege (McDonald, 2010). Recently in 2013 in Canada, the Law Society of British Columbia was given judgment by the Court of Appeal that affirmed the earlier decision. In Federation of Law Societies of Canada v Canada Attorney General 2013 BCCA 147, held that the legislation for reporting threatened fundamental Canadian constitutional principles, where lawyers are required to be loyal to their clients to ensure the 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 about designated non-financial businesses and professions which include 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

In Malaysia, since September 2004 lawyers are bound by Part 4 of the AMLATFA. All the reporting institutions including legal practitioners in Malaysia have an obligation to report any suspicious transactions (STR), which fall under section 14 of AMLATFA 2001. They are obliged to file the STR to the financial intelligence unit established under section 8 of the AMLATFA, of which referred to Bank Negara (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 advocates and solicitors to report promptly 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 suspicious transactions may result in a maximum penalty of RM250, 000 or a term of imprisonment or both (section s 4(1) (b) AMLATFA). The specific checklist and guidelines have been issued to the lawyers by the Bar Council and those earlier general guidelines by the Bank Negara on AML/CFT equally apply to them (BNM/GP, 2006). The Bar Council Circular/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 vast and frequent currency exchange, use of multiple deposit accounts and activity inconsistent with the customer profile.

5.0 Discussion

Impediments to reporting

Reporting obligation of lawyers by FATF raises issues on lawyer's compliance with such obligation. The FATF Report 2008 established 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, namely the ABA, the IBA and the Council of Bars and Law Societies of Europe (CCBE). The ABA opposed the duty to report because ultimately it would alter the independence of the Bar as it turns into an agent of the government (Lim, 2003). Similarly, the CCBE's objection is because 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 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 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 the 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 some the difficulties including tipping off, client confidentiality and the inability for firms to develop clear guidelines for staff. Also, 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).

6.0 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 some degree, 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 be 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 following FATF Recommendation 16 compounded the problem, which consequently led to a rating as partially compliant for Malaysia. Given the forthcoming Mutual Evaluation Report in August this year, such issues should be urgently addressed by the relevant authorities.

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References

APG on Money Laundering (2007). APG Mutual Evaluation Report on Malaysia, Against the FATF 40 Recommendations (2003) and 9 Special Recommendations.

Chamberlain, M. & Travers, (2004). The Proceeds of Crime Act 2002 – FMLC Highlights Key Legal Uncertainties, Journal of International Banking and Financial Law, 11, 435.

Dillon, G., Ahmad, R., Rahman, A. & Ng, Y. M., (2013). The Viability of Enforcement Mechanisms under Money Laundering and Anti-Terrorism Offence in Malaysia: An Overview, Journal of Money Laundering Control, 16(2), 171-192.

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

FATF Typology Report 2002.

Hamin, Z & Wan Rosli, W.R., (2013). Money, Money, Money, Must be plenty in the Rich Men's World: Constructing Criminal Property in Money Laundering Offences in the UK, paper presented at 5th International Conference on Financial Criminology, Global Trends in Financial Crimes in the New Economies, 28-29 May, 2013, Holiday Inn Hotel, Glenmarie, Shah Alam, Selangor, Malaysia.

Hamin, Z, Omar, N, Wan Rosli, W. R., & Pengiran, M. A.W., (2013). Regulating Customer Due Diligence within Financial Institutions in Malaysia and the United Kingdom, Procedia - Social and Behavioral Sciences, 101(0), 277-283.

IBA (2011). Anti-Money Laundering Forum: The Lawyers Guide to Legislation and Compliance on Malaysia, available at

IBA (2011). Anti-Money Laundering Forum: The Lawyers Guide to Legislation and Compliance on the UK, available at

Kirby, D. J., (2008). The European Unions Gatekeeper Initiative: The European Union Enlists Lawyers in the Fight against Money Laundering and Terrorist Financing, Hofstra Law Review, 37:261.

Lim, F. E., (2004). Anti-Money Laundering Initiatives: Ramifications On The Legal Profession, ASEAN Law Association Conference 2003.
MacDonald, R. J. QC (2010). Money Laundering Regulation – What Can be Learned from the Canadian Experience, ABA Journal of the Professional Lawyers.

Mohd Yasin, N., (2007). Legal Aspects of Money Laundering in Malaysia from the Common Law Perspective, Lexis-Nexis, Kuala Lumpur.

Nikolosk, S., & Simonovski, I. (2012). The role of Banks as Entity in the System for Prevention of Money Laundering in the Macedonia. Procedia - Social and Behavioral Sciences, 44(0), 453-459.

ODoherty, S., (2005). Solicitors and Money Laundering, Justice of the Peace, 169, 288.

Samuels, A., (2004). Proceeds of Crime: Structure, Principles, Problems, Justice of the Peace, 168, 551.

Shanmugam, B. & Thanasegaran, H. (2008). Combating Money Laundering in Malaysia, Journal of Money Laundering Control. Vol. 11 No. 4.

Shepherd, K.L., (2009). Guardians at the Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers, Real Property, Trust and Estate Law Journal, 43.

Simser, J., (2013). Money Laundering: Emerging Threats and Trends, Journal of Money Laundering Control, 16(1), 41-54.