Anti-Money Laundering: the SARs regime

Consultation from the Law Commission

Response by the Council for Licensed Conveyancers

October 2018

Summary

1. There has been a lot of change with regards to anti-money laundering in the last few years, mainly due to the introduction of the fourth money laundering directive, the Money Laundering Regulations 2017 and the Criminal Finances Act 2017. The SARs regime has been one area that has provided some much needed consistency throughout these changes.
2. The consent regime provides the private sector with a valuable tool to help combat money laundering whilst allowing business to continue without excessive delays. This is especially important in the conveyancing market where delays can cause major issues for innocent buyers and sellers. Delays within a chain of transactions can result in a breach of contract due to late payment and in some cases, innocent individuals may be left temporarily homeless if completion cannot take place on time. This may result in financial loss such as removal costs, temporary accommodation and interest on the late payment.
3. Overall, we do not think that the SARs regime itself is problematic but improvements are needed to make the regime more efficient and effective. As stated in the 2015 National Risk Assessment, the IT system used by the National Crime Agency (NCA) and other law enforcement agencies is a potential weakness of the regime.
4. To improve the reporting regime, substantial investment must be made to the IT system to help improve the handling of the increasing volume of SARs and make it fit for purpose for reporters from all different sectors. The NCA also needs more resources and funding to deal with the increasing number and complexity of SARs.
5. Developments in technology and artificial intelligence could be used to better categorise the information provided in the growing number of SARs. The data could be analysed and used to feedback new typologies and case studies to supervisors and reporters to help target resources where they are most needed by better understanding the risks specific to each sector. The data could also be used to help educate reporters to help produce better quality SARs.
6. We are hearing unhelpful mixed messages about the SARs regime. For example, this consultation states that there is a problem with the large volume of disclosures to the UKFIU but the 2017 National Risk Assessment states that there is not enough reporting in the legal sector[1]. It should be made clear what is expected of the legal sector with regards to reporting.
7. Tailored forms for different sectors would significantly improve the quality of SARs. Currently, the forms are not designed to help reporters in the non-financial sectors easily capture the required

[1] Para 7.13, page 52, National Risk Assessment 2017, Oct 2017, HM Treasury & Home Office

information. In addition to this, more feedback from law enforcement agencies is needed. It is important that information and intelligence continues to be shared amongst supervisors and law enforcement agencies to make the regime more effective by understanding the changing risks to the legal sector. This can only be done by improving the relationships and trust between public and private sectors.

8. The criminal sanctions for non-compliance with the law are so severe that it is essential that all those with reporting obligations have clarity and certainty as to their obligations. Government should provide more guidance to ensure regulated persons have the necessary and appropriate education and resources to improve understanding and ensure there is a level of consistency across all of the regulated sectors.

9. It is helpful to remember that reporters in the legal sector are not regular reporters and only make occasional SARs. Therefore it is important that clear and concise guidance is available where possible to increase the quality of SARs from the legal sector.

About the Council for Licensed Conveyancers

10. The CLC is named as a professional body supervisor in Schedule 1 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

11. The CLC was established by the Administration of Justice Act 1985 and is an Approved Regulator under the Legal Services Act 2007, subject to the oversight regulation of the Legal Services Board.

12. It licenses and regulates licensed conveyancers and practices in England and Wales in the provision of reserved legal activities, currently conveyancing and probate services, and other non-reserved legal activities, including will writing. It is also a Licensing Authority authorised to license and regulate Alternative Business Structures (ABS). It has no representative function having always been an independent regulator.

13. The CLC's role is to safeguard the public interest and consumers by regulating providers to deliver high quality and accessible legal services.

14. The CLC welcomes the opportunity to respond to this consultation.

Response to consultation

Question 1: Do consultees agree that we should maintain the "all crimes" approach to money laundering by retaining the existing definition of "criminal conduct" in section 340 of the Proceeds of Crime Act 2002? [Paragraph 5.19]

15. Yes we agree. Moving away from the all crimes approach may create unnecessary complexity and complicate an increasingly burdensome regime. It may also be challenging for some reporters to identify the underlying criminality.

Question 2: We would value consultees' views on whether suspicion should be defined for the purposes of Part 7 of the Proceeds of Crime Act 2002? If so, how could it be defined? [Paragraph 9.8]

16. Paragraph 6.3.2 of the Legal Sector Affinity Group (LSAG) Guidance[2] refers to the definition of 'suspicion' found in the case of *R v Da Silva [2007] 1 WLR 303*. The definition of suspicion in this case is set low so that it captures circumstances which are possible and more than merely fanciful.

[2] Anti-Money Laundering Guidance for the Legal Sector, March 2018, Legal Sector Affinity Group

Question 3: We provisionally propose that POCA should contain a statutory requirement that Government produce guidance on the suspicion threshold. Do consultees agree? [Paragraph 9.18]

17. Yes we agree. Guidance could help reporters to better identify and record the circumstances that have raised their suspicion and may help to promote greater consistency in reporting. It may also help to prevent SARs being made where there is no suspicion of money laundering but there are unusual circumstances.

18. If there were to be non-exhaustive lists of factors capable of founding suspicion, the guidance would need to consider the variation between sectors as professionals in different sectors will encounter different types of information that may raise suspicion. Consulting with stakeholders when drafting the guidance would be very important.

Question 4: We provisionally propose that the Secretary of State should introduce a prescribed form pursuant to section 339 of the Proceeds of Crime Act 2002 for Suspicious Activity Reports which directs the reporter to provide grounds for their suspicion. Do consultees agree? [Paragraph 9.21]

19. Yes we agree. The current reporting form is not user-friendly, especially for those outside of the financial sector. A prescribed form could help to capture more relevant information without being overly burdensome for those submitting the applications. It may also give greater direction to the reporter as to what is required when determining their suspicion.

Question 5: We would welcome consultees' views on whether there should be a single prescribed form, or separate forms for each reporting sector. [Paragraph 9.22]

20. We think that there should be separate forms for each reporting sector. The form should be redesigned to clearly identify the areas which the reporter needs to include (if known), for example, details and whereabouts of the suspect, location of criminal property and the reason for suspicion.

21. Different sectors are likely to receive different information at various times of the relationship or transaction and a single form for all sectors may not provide enough flexibility to allow the relevant information to be captured appropriately.

22. Input from the different reporting sectors in designing the forms would be required with an oversight group at the NCA to ensure a level of consistency across the sectors.

Question 6: We provisionally propose that the threshold for required disclosures under sections 330, 331 and 332 of the Proceeds of Crime Act 2002 should be amended to require reasonable grounds to suspect that a person is engaged in money laundering. Do consultees agree? [Paragraph 9.63]

23. No we do not agree. It is unlikely that changing the threshold for required disclosures would make a significant impact in practice.

24. This is also likely to add unnecessary complexities and burden conveyancers who should not be held to the same investigative standards as law enforcement as they do not have the obligation or expertise to do so.

25. Whilst MLROs do have greater expertise to deal with these issues than other employees, the MLRO's role is usually part of their day-to-day role within a legal practice and they do not necessarily have the time or resources to carry out lengthy investigations.

Question 8: We provisionally propose that the suspicion threshold for the money laundering offences in sections 327, 328, 329 and 340 of the Proceeds of Crime Act 2002 should be retained. Do consultees agree? [Paragraph 9.65]

26. Yes we agree.

Question 9: We provisionally propose that it should be a defence to the money laundering offences in sections 327, 328 and 329 if an individual in the regulated sector has no reasonable grounds to suspect that property is criminal property within the meaning of section 340 of the Proceeds of Crime Act 2002. Do consultees agree? [Paragraph 9.66]

27. If the aim is to retain a relatively low level of suspicion whilst promoting fewer and more focused SARs, the application form should be developed to assist reporters in focusing their thinking about their suspicion as opposed to changing the threshold which in practice is unlikely to have much of an impact.

Question 12: We provisionally propose that statutory guidance should be issued to provide examples of circumstances which may amount to a reasonable excuse not to make a required and/or an authorised disclosure under Part 7 of the Proceeds of Crime Act 2002. Do consultees agree? [Paragraph 11.7]

28. Yes we agree. 'Reasonable excuse' has not been defined by the courts and so statutory guidance would help reporters better understand the reasonable excuse defence, especially if the guidance is monitored and regularly updated.
29. The scope of the defence is important for the legal sector due to legal professional privilege.
30. The LSAG's guidance, which is HM Treasury approved, states that you will have a reasonable excuse for not making an authorised disclosure if your knowledge or suspicion is based on privileged information and legal professional privilege is not excluded by the crime/fraud exception.
31. Reporters in the legal sector would strongly welcome further clarification on the complex issue of legal professional privilege.

Question 13: It is our provisional view that introducing a minimum financial threshold for required and authorised disclosures would be undesirable. Do consultees agree? [Paragraph 11.20]

32. Yes we agree. It is likely that funds will be mixed meaning that additional administration would be required to determine which monies are illicit. This would further complicate the regime for reporters. Additionally, low value transactions could hold useful intelligence relevant to other investigations.

Question 16: Do consultees agree that there is insufficient value in required or authorised disclosures to justify duplicate reporting where a report has already been made to another law enforcement agency (in accordance with the proposed guidance)? [Paragraph 11.28]

33. We would welcome guidance to clarify the confusion around which circumstances should be reported to which enforcement bodies. This should help to minimise duplication and reduce the burden on reporters however there must be firm assurances that the information and intelligence would be efficiently and effectively shared amongst law enforcement agencies.

Question 17. We provisionally propose that statutory guidance be issued indicating that a failure to make a required disclosure where a report has been made directly to a law enforcement agency on the same facts (in accordance with proposed guidance on reporting routes) may provide the reporter with a reasonable excuse within the meaning of sections 330(6)(a), 331(6) and 332(6) of the Proceeds of Crime Act 2002. Do consultees agree? [Paragraph 11.30]

34. Yes we agree, subject to firm assurances that the information and intelligence would be efficiently and effectively shared amongst law enforcement agencies.

Question 18: We provisionally propose that a short-form report should be prescribed, in accordance with section 339 of the Proceeds of Crime Act 2002, for disclosures where information is already in the public domain. Do consultees agree? [Paragraph 11.37]

35. Yes we agree. This is unlikely to occur in many circumstances but would hopefully reduce the burden on the reporter when it does.
36. Despite this, merely because information is in the public domain does not mean that it is correct or accurate, therefore there could potentially be an additional burden on the reporter to verify the information.

Question 19: We provisionally propose that statutory guidance should be issued indicating that it may amount to a reasonable excuse to a money laundering offence not to make an authorised disclosure under sections 327(2), 328(2) and 329(2) of the Proceeds of Crime Act 2002 where funds are used to purchase a property or make mortgage payments on a property within the UK. Do consultees agree? [Paragraph 11.41]

37. Yes we agree. This proposal would also help to prevent delays in property chains as conveyancers would no longer need to wait seven days, and potentially longer, for consent thereby protecting innocent sellers and purchasers.
38. Real estate is irremovable and is therefore easy to identify and freeze at a later date, if required. As the owner of the property must be recorded with the Land Registry it would be easy to identify them.
39. Conveyancers' files also include details of any financial transactions, including payments by third parties thereby helping to trace funds.

Question 20: We provisionally propose that the obligation to make a required disclosure in accordance with sections 330, 331 and 332 of the Proceeds of Crime Act 2002 in these circumstances should remain? Do consultees agree? [Paragraph 11.42]

40. Yes we agree. The report should be made to provide law enforcement agencies with information about the suspicious activity.

Question 23: Do consultees believe that there is value in disclosing historical crime? [Paragraph 11.52]

41. We believe that there is little value in disclosing historical crimes, depending on the definition of 'historical'. This is due to the potential difficulty in identifying the criminal property and being able to fully ascertain the facts at a later date.
42. Due to recently enhanced data protection legislation, it may also be difficult to evidence some of the information relevant to historical crimes which may have been destroyed.

Question 27: We provisionally propose that there should be a requirement in POCA that Government produces guidance on the concept of "appropriate consent" under Part 7 of the Act. Do consultees agree? [Paragraph 12.28]

43. Yes we agree. Statutory guidance may help to dispel any confusion around the term 'appropriate consent' and may help reporters to better understand the process of making an authorised disclosure. Statutory guidance would also help to ensure a level of consistency across the different reporting sectors.

Question 34: Do consultees believe that the consent regime should be retained? If not, can consultees conceive of an alternative regime that would balance the interests of reporters, law enforcement agencies and those who are the subject of disclosures? [Paragraph 14.20]

44. Yes, we believe that the consent regime should be retained. The 'all crimes approach' and the low threshold of 'suspicion' which is unique among AML regimes in the world necessitates protection for reporters. The protection offered by the consent regime also avoids over-criminalisation.

45. The regime itself is not problematic however some changes could be made to ensure it is more effective without being overly burdensome.

46. Rather than an alternative regime, it would be helpful for more resources to be made available to law enforcement agencies to allow them to deal with the increasing volume and complexity of SARs.

47. As mentioned several times throughout this response, improved reporting software and a redesigned form which is fit for purpose to produce clear and useful SARs would also significantly assist the effectiveness and efficiency of the regime.

Question 35: Do consultees believe that a power to require additional reporting and record keeping requirements targeted at specific transactions would be beneficial? [Paragraph 14.40]

48. No we do not agree. This would place a greater burden on the reporter and may put more pressure on law enforcement at a time when more resources are required and the IT system is not currently fit for purpose.