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Money Laundering, Anti-Money Laundering and the Legal Profession

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Introduction

One of the most notable features of the global anti-money laundering regime, which has evolved over the last three decades into an extensive range of legislative, regulatory and policy frameworks, guidelines, standards and institutions, is the conscription of private, non-state actors into the fight against 'dirty' money. This has involved a number of obligations being imposed on those believed to be in a position to prevent the movement of illicit funds into the legitimate financial system and has been described as a clear example of Garland's 'responsibilisation strategy',[1] whereby responsibility for the prevention and control of money laundering is passed to private entities.[2] Banks and other financial institutions were the first to be assigned a role in the prevention of money laundering, with expectations of improved customer due diligence, identification procedures and record keeping forming a key objective of the Financial Action Task Force's (FATF) original Recommendations. The introduction of the first EU Money Laundering Directive in 1991[3]—which brought the FATF's standards to the European sphere—introduced a series of obligations for financial and credit institutions to implement adequate money laundering procedures, policies and training programmes; to carry out appropriate customer due diligence measures; to refrain from transactions they

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knew or suspected to be associated with money laundering; and to report suspicious transactions to the relevant national authorities. The obligations imposed by the Directive constituted 'unprecedented changes' in the commercial relationship of financial institutions and their clients.[4] Subsequent Money Laundering Directives[5] have extended these preventative obligations beyond the financial sector to encompass a wide range of actors including art dealers, estate agents, auditors, accountants and tax advisers, and legal professionals, due to a growing concern that institutions and professionals outside of the financial sector were increasingly being exploited by individuals wishing to launder criminal proceeds. The extension of the preventative obligations to the legal profession has been particularly controversial, with the potential implications for the lawyer-client relationship and duty of confidentiality causing considerable concern within the profession. In the UK, the focus on legal (and other regulated) professionals' role in the facilitation or prevention of money laundering has resulted in an anti-money laundering legislative framework that enables the criminal prosecution of such professionals for failing to fulfil their preventative obligations. Money laundering legislation in the UK, therefore, has significant implications for those working in the legal profession.

This chapter considers the relationship between money laundering, the anti-money laundering framework and the legal profession, focusing on three main areas. First, it examines the growing concern about the role that professionals, such as lawyers and accountants, play in the facilitation of money laundering. Recent years have seen an emerging narrative from bodies such as the FATF, policymakers and law enforcement organisations, which suggests that criminals have become increasingly reliant on the services of professionals to manage their criminal proceeds. However, there remains little understanding of the empirical scale and nature of professional facilitation of money laundering. The second part of the chapter considers the designation of legal and other regulated professionals as 'gatekeepers' in the fight against money laundering—a position that has emerged from the view that they are increasingly involved in laundering schemes. The chapter discusses the preventative obligations imposed on professionals, tracking the development of these obligations through international and national frameworks, and highlights the antagonism of including legal professionals in the anti-money laundering regime. Finally, the chapter addresses the implications for lawyers of their designation as 'gatekeepers' in anti-money laundering, and the resultant legislative frameworks, focusing specifically on the UK. This section provides an overview of the offences in UK legislation for which lawyers who are believed to have

facilitated money laundering on behalf of a client, or in the process of assisting or providing services to a client, can be prosecuted. Drawing on recent empirical research which analysed cases of solicitors convicted of money laundering offences,[6] the final part of the chapter highlights the far-reaching nature of anti-money laundering legislation in the UK, which allows for the conviction of legal professionals for money laundering offences without criminal intent or actual knowledge or suspicion that money laundering was taking place.

The Facilitation of Money Laundering by Professionals: A Significant Concern?

The Official Narrative

Recent years have seen a growing concern with the role that legal and financial professionals play in the facilitation of money laundering and an emerging official narrative that suggests that this is a significant—and increasing—problem. Intergovernmental bodies, policymakers and law enforcement organisations have highlighted the vulnerability of legal and financial professions to exploitation by those needing to launder criminal proceeds, suggesting that criminals have become increasingly reliant on the services and skills provided by professionals in these sectors to manage the proceeds of their crimes. This increasing reliance, it is suggested, is due to the stringent anti-money laundering controls imposed on financial institutions, making it more difficult to launder criminal proceeds and heightening the risk of detection, and the use of increasingly complex laundering methods. The FATF has been a prominent voice in this argument; for a number of years, its annual *Typologies* reports have drawn attention to the involvement of legal and financial professionals in money laundering, suggesting that this is a growing problem, for example:

> As anti-money laundering regulations have increased in many countries the criminals place increasing reliance on professional money laundering facilitators.[7]

> Accountants, solicitors and company formation agents turn up even more frequently in anti-money laundering investigations. In establishing and administering the foreign legal entities which conceal money laundering schemes, it is these professionals that increasingly provide the apparent sophistication and extra layer of respectability to some laundering operations.[8]

> Increasingly, money launderers seek out the advice or services of specialised professionals to help facilitate their financial operations. This trend toward the involvement of various legal and financial experts, or gatekeepers, in money laundering schemes has been documented previously by the FATF and appears to continue today.[9]

In its 2010 *Global Money Laundering and Terrorist Financing Threat Assessment*, the FATF classes 'the abuse of gatekeepers'—defined as professionals who can provide financial expertise or access to functions that could help criminals move or conceal illicit funds—as a significant threat.[10] The *Threat Assessment* suggests that, as a result of the services they provide, members of legal and financial professions have become an increasingly common feature of complex money laundering schemes, particularly those involving organised crime or significant financial frauds.[11] In addition to the risks to the legitimate financial sector associated with its infiltration by criminal funds, the involvement of professionals in laundering activity could cause reputational damage to the individual professionals and businesses involved, and harm the integrity and reputation of these professional sectors as a whole. It may also lead to increased criminal influence in businesses or groups of businesses, affecting decision-making, leading to further exploitation, and distorting the market for the services these professionals provide.[12]

The view that witting or unwitting professionals play a key role in the facilitation of money laundering is shared by others. For example, a report by the *Global Agenda Council on Organized Crime*, published by the World Economic Forum, suggests that professionals can play a critical role in helping criminals manage the proceeds of their crimes, by acting as 'the key doors for facilitating criminal financial transactions and keeping a veil of opacity on criminal assets'.[13] The report admits that the extent to which this, in fact, happens is not known; nonetheless, they argue, it represents a risk that needs to be managed.[14] The increasing engagement of professionals by criminals to 'establish more sophisticated methods to sidestep the financial regulatory environment and law enforcement' has also been noted by the Australian Crime Commission,[15] while Europol has described professional expertise as a key 'crime enabler', suggesting that the skills and services of professionals such as lawyers are sought by organised crime groups for a range of purposes, including the laundering of criminal proceeds.[16]

Within the UK, recent official organised crime threat and strategy documents have highlighted the role of 'professional enablers' in assisting organised criminals, including in the facilitation of money laundering:

> Organised crime cannot function without the legitimate economy. Criminals will seek to launder money through the financial sector, or use the services of lawyers or accountants to invest in property or set up front businesses. A small number of complicit or negligent professional enablers, such as bankers, lawyers and accountants can act as gatekeepers between organised criminals and the legitimate economy.[17]

> The skills and knowledge of a variety of professionals, such as accountancy service providers, the legal profession, estate agents, and trust and company service providers, are used by [organised crime groups] for sometimes complex money laundering activity. They assist, wittingly or unwittingly, in creating complexity through actions such as setting up networks of corporate structures, acquiring assets to store illicit funds and providing anonymity for the criminal.[18]

In 2014, the National Crime Agency's (NCA) *National Strategic Assessment of Serious and Organised Crime* stated unequivocally that '[c]omplicit, negligent or unwitting professionals in financial, legal and accountancy professions in the UK facilitate money laundering', by compromising the money laundering controls that are in place across the regulated professions.[19] The most recent NCA assessment states that legal professionals assist organised crime groups in complex money laundering activity, primarily through the abuse of client accounts, and purchase of property or assets.[20] This issue also features prominently in the UK's national strategy for serious and organised crime produced by the Home Office, which highlights the critical nature of the role played by financial and legal professionals in the UK who 'facilitate money laundering on behalf of organised criminals'.[21] The subsequent governmental *UK National Risk Assessment of Money Laundering and Terrorist Financing* assesses the money laundering risk within the legal services sector as 'high'.[22] The report suggests that many of the services provided by this sector 'are attractive to criminals seeking to conceal the origins of criminal funds', and that some legal professionals act as 'enablers to money laundering by providing access to these services'.[23]

A Lack of Understanding

A number of commentators in the academic literature have echoed the official narrative that legal and financial professionals play a critical role in the facilitation of money laundering, and are becoming increasingly involved in such activity.[24] However, there is usually little evidence given to support this assertion and a notable lack of understanding of the phenomenon. The nature of

professionals' involvement in money laundering has received limited academic attention, and there has been little empirical research in the area. Much of the existing literature considers professionals' involvement in organised crime more generally or in relation to lawyer wrongdoing in various forms. For example, a 2004 special issue of *Crime, Law and Social Change*, based on a study carried out in France, Italy, the Netherlands and the UK, focused on the compromising conduct of legal professionals—including lawyers and, where relevant, notaries—in relation to organised crime.[25] More recently, Soudijn conducted empirical research on what he termed 'financial facilitators', described as 'experts who put criminals in a position to circumvent the anti-money laundering measures'.[26] His research related not just to professionals such as lawyers or accountants but to anyone who assists a criminal in a fundamental way with their money laundering activities, including exchange office cashiers and real estate brokers. In the UK, notable analysis of the role of legal professionals in the facilitation of money laundering has come from Middleton,[27] and Middleton and Levi,[28] who have considered the issue of solicitors involved in various forms of wrongdoing, including fraud, enabling organised crime and involvement in money laundering. In their most recent research, Middleton and Levi concluded that the facilitation of money laundering by lawyers remains under-analysed, its extent and nature is still disputed, and official statements asserting its wide-scale lack of a sound evidential basis.[29]

Published empirical research with a specific focus on professionals' involvement in money laundering is limited in other jurisdictions. In Canada, Schneider used data collected from a sample of Royal Canadian Mounted Police proceeds of crime case files to explore how lawyers may be used to launder criminal proceeds.[30] He found that lawyers 'came into contact with the proceeds of crime' in almost half of the cases examined, and suggested that their involvement in money laundering was primarily due to their role as intermediaries in financial and commercial transactions.[31] Cummings and Stepnowsky analysed a sample of money laundering cases from the US Court of Appeals to examine whether, and to what extent, lawyers are 'involved knowingly or unknowingly in transactions that serve to launder illicit funds'.[32] They found that only a small number of the cases they examined showed evidence of lawyer involvement in laundering transactions and suggested that even in these cases the involvement was primarily unwitting.

Seeking to fill the research gaps, the author's UK study analysed cases of solicitors convicted of money laundering offences alongside interviews with criminal justice practitioners and members of relevant professional and regulatory bodies.[33] This research represents the most in-depth qualitative analysis in this area to date, considering the roles, relationships and decision-making

processes of the actors involved. The research highlighted the complex and diverse nature of professional involvement in money laundering, comprising a variety of actions, purposes, actors and relationships, and confirmed the need for greater understanding in this area and for a more accurate assessment of scale. The involvement of professionals in money laundering, therefore, clearly remains an under-researched and poorly understood area. As a result, the construction of professional facilitation of money laundering in official discourse and much of the academic literature—which sees professionals as playing a critical, and increasing, role in the laundering of criminal proceeds—has weak empirical foundations. Despite this, far-reaching legislative and policy measures aimed at preventing professionals becoming involved in money laundering have been implemented, including their own conscription into anti-money laundering efforts through a variety of rules, responsibilities and obligations.

Lawyers as 'Gatekeepers': The Preventative Obligations of Regulated Professionals

In 1999, a meeting of the G8 interior and justice ministers in Moscow adopted what became known as the 'Moscow Communiqué'.[34] This document brought the term 'gatekeeper' to prominence within anti-money laundering discourse, in reference to individuals in the position to provide or deny access to the legitimate financial system for those wishing to launder criminal proceeds. The Communiqué suggested that such actors were often involved in money laundering arrangements, and declared the intention to consider extending suspicious transaction reporting requirements to those categorised as 'gatekeepers' and making the failure to fulfil such requirements a punishable offence:

> We recognize that many money-laundering schemes involve the corruption of financial intermediaries. We will therefore consider requiring or enhancing suspicious transaction reporting by the 'gatekeepers' to the international financial system, including company formation agents, accountants, auditors and lawyers, as well as making the intentional failure to file the reports a punishable offense, as appropriate.[35]

In response to the Moscow Communiqué, the FATF created a working group to identify those professionals that should be considered as 'gatekeepers' with respect to money laundering.[36] In May 2002, the FATF published a

consultation paper reviewing their original 40 Recommendations and suggesting improvements to be made to the anti-money laundering framework.[37] This paper referred to the growing concern that certain 'gatekeeper professionals', such as lawyers, notaries and accountants, were acting as intermediaries in money laundering schemes or providing advice to criminals to assist them in the laundering of their illicit funds.[38] The following year, the FATF issued a revised set of Recommendations, which incorporated the improvements suggested in the consultation paper.[39] The revised Recommendations extended responsibility for performing customer due diligence, record-keeping and reporting suspicious activity to those that had been identified as 'gatekeepers' and were now categorised as designated nonfinancial businesses and professions (DNFBPs). This group included lawyers, notaries and other independent legal professionals; accountants; trust and company service providers; casinos; real estate agents; and dealers in precious metals and stones.[40] Therefore, the 2003 revised Recommendations represented the first time that legal professionals were specifically included in the requirements to undertake customer due diligence and submit suspicious activity reports.

The inclusion of legal professionals in the preventative measures of the anti-money laundering regime proved contentious, with considerable debate about the appropriateness of such a move and challenge from bodies representing the profession. A number of commentators in the academic literature have expressed concern over the extension of reporting duties and other anti-money laundering prevention measures to legal professionals, because of the implications for privacy and the right of lawyer confidentiality, the right to a legal defence and due process, and the potential risk to professionals who come into contact with 'dirty' money.[41] Because of their integral role in the legal system and duty to their clients, the public and 'the mechanism of law that organizes society', the co-opting of lawyers into money laundering prevention was said to present 'strains that are more pronounced than in the regulation of other professions, industries or sectors'.[42] The primary concerns expressed by the profession related to the independence of lawyers, legal professional privilege and the duty of confidentiality.[43] The potential for conflict between duty to a client and the duty to report suspicious activity, and the possible erosion of the 'tenuous relationship' between lawyer and client caused particular unease.[44]

In response to the revised FATF Recommendations, legal professional associations from the European Union (EU), Canada, United States, Switzerland and Japan signed a 'Joint Statement by the International Legal Profession to the FATF' in 2003. The purpose of this statement was to draw attention to the profession's concerns about the implications of the inclusion of 'gatekeepers' in the Recommendations for the rule of law and access to justice.[45] The

American Bar Association (ABA) expressed considerable concern about the possible threat to attorney-client privilege and independence of the Bar as a result of the obligations for legal practitioners set out in the revised FATF Recommendations.[46] There has been notable resistance to the reporting obligations in Canada, with law societies bringing a series of legal challenges against the 'intrusion upon solicitor-client privilege' in provinces across the country.[47] This objection led to lawyers in Canada being exempted from reporting obligations (and thus Canada being non-compliant with the FATF Recommendations). The Council of Bars and Law Societies of Europe (CCBE) declared that the duty to report would lead to the 'breach of the independence of a lawyer and the irrevocable violation of the principle of client confidentiality'.[48] There were legal challenges against the reporting obligations in both Belgium and France, and by the Law Society of England and Wales.[49]

The extension of the preventative obligations to DNFBPs was incorporated into the EU anti-money laundering framework through the second Money Laundering Directive, introduced in 2001.[50] Provisions introduced by this and later Money Laundering Directives were transposed to the UK through successive Money Laundering Regulations (2003, 2007, 2017) and the Proceeds of Crime Act 2002. The Money Laundering Regulations ('the Regulations') implement the main preventative measures of the EU Directives and apply to those sectors categorised as DNFBPs, including legal professionals.[51] The Regulations require that members of these sectors undertake customer due diligence measures, involving verifying the identity of customers or beneficial owners, and obtaining information on the nature and purpose of the customer's business,[52] and monitoring this relationship on an ongoing basis.[53] They must also keep a record of the information obtained on the customer's identity and business, along with supporting documentation, for a period of five years.[54] Further requirements include the establishment and maintenance of appropriate policies and procedures relating to their money laundering obligations[55] and ensuring that all relevant employees are aware of the law relating to money laundering and terrorist financing and are appropriately trained.[56] Under Regulation 20, organisations within the regulated sector must have a 'nominated officer' responsible for receiving disclosures of suspicious activity from members of the organisation and making disclosures to the relevant authorities (as required by Part 7 of the Proceeds of Crime Act and Part 3 of the Terrorism Act 2000).[57] At the present time, the relevant authority for making disclosures to is the NCA. The Proceeds of Crime Act established the primary money laundering offences in UK legislation. Details of the offences contained in this Act, and their implications for legal professionals, are considered in the remainder of this chapter.

Prosecution of Lawyers Involved in Money Laundering in the UK

Within the UK, legal professionals who are believed to have facilitated money laundering on behalf of a client, or in the process of assisting or providing services to a client, may be prosecuted under various sections of the Proceeds of Crime Act. Sections 327, 328 and 329 of the Act set out the principal money laundering offences, which can be applied to any individual. Section 330 provides for the offence of 'failure to disclose: regulated sector'; this part of the legislation applies only to individuals working in the regulated sector, including legal professionals. This section of the chapter provides an overview of these offences, and discusses their relevance to, and implications for, the legal profession. It does not aim to provide a detailed analysis of the legislation, as this has been done extensively elsewhere.[58]

Proceeds of Crime Act 2002: Sections 327, 328 and 329

The three principal money laundering offences in UK legislation are set out in sections 327, 328 and 329 of Part 7 of the Proceeds of Crime Act. Section 327 covers the offence of concealing, disguising, converting or transferring criminal property, or removing criminal property from England and Wales, Scotland or Northern Ireland.[59] The references to concealing and disguising criminal property also include concealing or disguising its 'nature, source, location, disposition, movement or ownership or any rights with respect to it'.[60] Section 328 focuses on involvement in arrangements known or suspected to facilitate money laundering, stating that a person commits an offence if he

> enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.[61]

Section 329 of the Act provides the third principal money laundering offence and relates to the acquisition, possession or use of criminal property.[62] For all three sections, an offence is not committed if the person makes an 'authorised disclosure'[63] or intended to make such a disclosure but had a reasonable excuse for not doing so,[64] or if the actions involved are related to the enforcement of a provision of the Act or any other enactment relating to criminal conduct or its benefit.[65] A person convicted of an offence under any of these parts of the legislation is liable to imprisonment for 14 years, a fine or both.

An offence of money laundering can be charged on its own or included on an indictment containing the underlying predicate offence. In both of these cases, there are two sub-categories:

1. 'own-proceeds' or 'self-laundering', in which the person charged with money laundering also committed the predicate crime
2. laundering by a person or persons other than that who committed the predicate crime[66]

The section 327 offence would be the most relevant for cases of 'self-laundering', where the person who committed the predicate crime is prosecuted for laundering the proceeds of that crime. The section 328 offence, on the other hand, covers situations where a third party handles funds derived from criminal activity. Section 328 would, therefore, be more appropriate if the individual prosecuted for the laundering offence was not involved in the proceeds-generating predicate offence.[67] The Crown Prosecution Service (CPS) guidance on the money laundering legislation highlights the utility of the section 328 offence for the prosecution of professionals who 'launder on behalf of others', suggesting that it can 'catch' individuals working within professional roles who 'in the course of their work facilitate money laundering by or on behalf of other persons'.[68] Therefore, this part of the legislation is of particular relevance to legal professionals, and it has been suggested that this particular component of the Act should be 'of considerable concern to those who handle or advise third parties in connection with money and other types of property'.[69]

For all three principal money laundering offences, 'criminal property' is defined as property that constitutes or represents a person's benefit from criminal conduct, where the alleged offender *knows or suspects* that it constitutes such benefit.[70] This part of the legislation, therefore, provides the *mens rea* requirement across all three offences, based on 'knowledge' and 'suspicion'. There is a further *mens rea* requirement in the section 328 offence, which specifies that the person 'knows or suspects' that the arrangement they have become concerned with facilitates money laundering.[71] The notion of 'knowledge' is relatively straightforward, and its interpretation in the context of these offences unproblematic.[72] However, actual knowledge is not required for a conviction, and the concept of 'suspicion' is more ambiguous and has proved contentious.[73] Guidance on the meaning of 'suspicion' in money laundering offences is provided for the legal profession by the Law Society of England and Wales' *Anti-Money Laundering Practice Note*, which advises its members that:

> [t]here is no requirement for the suspicion to be clearly or firmly grounded on specific facts, but there must be a degree of satisfaction, not necessarily amounting to belief, but at least extending beyond speculation.
>
> The test for whether you hold a suspicion is a subjective one.
>
> If you think a transaction is suspicious, you are not expected to know the exact nature of the criminal offence or that particular funds were definitely those arising from the crime. You may have noticed something unusual or unexpected and after making enquiries, the facts do not seem normal or make commercial sense. You do not have to have evidence that money laundering is taking place to have suspicion.[74]

Therefore, although suspicion requires a level of satisfaction greater than mere speculation, it does not require a clear factual basis. Lawyers can be prosecuted under the money laundering legislation for acting in a transaction involving the proceeds of crime if they were considered to have had suspicion that money laundering was taking place, even if they did not have specific facts or evidence to support their suspicion, or knowledge of the nature of the criminal offence or that the funds definitely represented the proceeds of crime.

The *mens rea* requirements for these offences differ markedly from the international frameworks from which the Proceeds of Crime Act derived. As such, the UK has exceeded the obligations contained in relevant treaties and successive EU Money Laundering Directives, which had a much greater focus on intent and knowledge, and were directed towards those deliberately laundering criminal proceeds. The use of 'suspicion' as the basis for criminal liability cannot be found in either the 1998 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the 'Vienna Convention'), or the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (the 'Strasbourg Convention'). In addition, both Conventions require states to create criminal offences related to money laundering under domestic law only 'when committed intentionally'.[75] All EU Money Laundering Directives to date have defined money laundering as conduct that is 'committed intentionally'. For example, Article 1 of the Fourth Directive, introduced in May 2015, states that:

1. This Directive aims to prevent the use of the Union's financial system for the purposes of money laundering and terrorist financing.
2. Member States shall ensure that money laundering and terrorist financing are prohibited.

3. For the purposes of this Directive, the following conduct, *when committed intentionally*, shall be regarded as money laundering:

(a) The conversion or transfer of property, *knowing* that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action.
(b) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, *knowing* that such property is derived from criminal activity or from an act of participation in such activity.
(c) The acquisition, possession or use of property, *knowing*, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity.
(d) Participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions referred to in points (a), (b) and (c).[76]

The wording in this Article echoes that of the previous three Directives. It is clear, therefore, that money laundering legislation in the UK goes well beyond what is required by international standards, with no requirement for criminal intent and the mental element being satisfied by suspicion. The legislation is not aimed solely at those deliberately laundering criminal proceeds; its scope is much broader, allowing for the inclusion of a wider range of acts (and omissions) and of those who are less directly—and unintentionally—involved in money laundering.

Section 330: 'Failure to Disclose: Regulated Sector'

Section 330 of the Proceeds of Crime Act contains the offence of 'failure to disclose: regulated sector', which creates the obligation to inform the authorities of suspicions of money laundering. It enforces the disclosure of suspicious transactions to a nominated officer, for example, the designated Money Laundering Reporting Officer (MLRO) within the individual's firm.[77] This offence applies only to members of the regulated sector, when the information relating to the suspicious activity is received 'in the course of a business in the regulated sector'.[78] The Proceeds of Crime Act provided an initial list of activities

that, if engaged in by a business, defined the business as being part of the regulated sector.[79] However, the following year, the definition was expanded by various statutory instruments,[80] which resulted in all parties covered by the Second EU Money Laundering Directive being considered as part of the regulated sector.[81] This offence, therefore, applies to a range of business sectors,[82] including the legal profession when involved in financial or property transactions.

According to section 330 of the Act, if an individual working in the regulated sector knows or suspects, or has reasonable grounds for knowing or suspecting, that another individual is engaged in money laundering, and the information has come to them in the course of their business, they must make a report to the relevant nominated officer.[83] It is a criminal offence under this part of the legislation not to do so as soon as is practicable, unless there is a reasonable excuse for not making the required disclosure, sufficient training has not been provided by the relevant employer in relation to these requirements, or, in the case of professional legal advisers, the information is received in privileged circumstances.[84] This section of the Proceeds of Crime Act thus creates positive obligations for individuals working in the regulated sector, making an *omission* (failing to carry out a duty) rather than an *act* the criminal offence.

The mental element of this part of the legislation differs from that of the section 327, 328 and 329 offences, by introducing the objective test of having 'reasonable grounds' for knowledge or suspicion. Also known as the 'negligence test', the objective test asks whether there were

> …factual circumstances from which an honest and reasonable person, engaged in a business in the regulated sector, should have inferred knowledge or formed the suspicion that another was engaged in money laundering.[85]

This means that those working in the regulated sector can be found guilty of an offence of failing to report, under section 330, if they *should have* known or suspected another person was engaged in money laundering, even if they lacked *actual* knowledge of such conduct. As such, acting negligently in the performance of their obligation to report knowledge or suspicion of money laundering is treated as a criminal offence in the same way as deliberate money laundering, albeit with a lesser sentence attached for conviction (a maximum of five years' imprisonment and/or a fine). Further provisions in the Act relate to the disclosure of suspicious transactions in non-regulated sectors. However, the requirements for those in the regulated sector are more stringent than for those in the non-regulated sector, with *actual* knowledge or suspicion being required for a conviction for failing to disclose offences in the non-regulated sector.[86] The introduction of the 'reasonable grounds' component of the

offence was justified by two key arguments. First, there were concerns about the difficulties of proving actual knowledge or suspicion and the possibility that those who 'turn a blind eye' to money laundering could avoid prosecution, and that individuals in the regulated sector may choose not to report suspicions because they were aware of these difficulties.[87] Second, it was considered that those working in the regulated sector should be expected to bear the extra responsibility because of their role, as shown by the rationale for the inclusion of the test in the explanatory notes for the Proceeds of Crime Act:

> [P]ersons who are carrying out activities in the regulated sector should be expected to exercise a higher level of diligence in handling transactions than those employed in other businesses.[88]

This position reflects the characterisation of professionals in the regulated sector as 'gatekeepers', and their associated obligations in the prevention of money laundering, highlighted in the previous section. The section 330 offence in the Proceeds of Crime Act, therefore, has its origins in the view of professionals as 'gatekeepers' and concern about their involvement in money laundering. However, once again, UK legislation goes further than international requirements, with the Moscow Communiqué referring only to 'making the *intentional* failure to file [suspicious transaction] reports a punishable offence'.[89] The result is a far-reaching anti-money laundering framework, under which legal professionals can face criminal prosecution without criminal intent, and without actual knowledge or even suspicion that criminal activity was taking place, creating significant implications for legal professionals working in the UK.

Implications for Legal Professionals: Considering Cases of Convicted Solicitors

A recent study by the author on the role of legal and financial professionals in the facilitation of money laundering identified 20 cases of solicitors who had been convicted in the UK between 2002 and 2013, for involvement (related to their professional role) in the laundering of criminal proceeds generated by others.[90] Cases were primarily identified by searching transcripts from relevant professional disciplinary tribunals and the Westlaw UK legal database, as well as media reports and an FATF report which identified examples of legal professionals involved in money laundering in Member States.[91] The criteria for inclusion of cases in the final sample were: solicitors or chartered accountants who have been convicted of money laundering

offences (under Proceeds of Crime Act 2002 (POCA), Drug Trafficking Act 1994 (DTA) or Criminal Justice Act 1993 (CJA)) between 2002 and 2013, where the offences committed were related to their professional positions or roles, and involved facilitating the laundering of the proceeds of crimes committed by others. Data is not routinely collected on professionals involved in money laundering in any systematic way by either law enforcement, the criminal justice system, or the professional or regulatory bodies, leading to considerable challenges in the identification of relevant cases. For example, the Solicitors Disciplinary Tribunal in England and Wales provides a full transcript for all tribunal hearings from 2002 on their website. These judgments cannot be searched for cases specifically relating to money laundering, so all 1426 transcripts available at the time were searched individually using the PDF word search function for cases referencing 'money laundering' or 'proceeds of crime'. The 159 cases identified through this process were then read thoroughly to identify those that fit the inclusion criteria. The challenges associated with identifying cases of convicted professionals mean that the 20 cases analysed cannot be considered as an exhaustive sample.[92]

Data collected on the cases from a range of sources[93] demonstrated considerable variation in the actions and behaviours of solicitors that can be considered to facilitate money laundering, and for which professionals can be convicted under the money laundering legislation, as well as in the purpose of the transactions involved, the level of financial benefit gained by the solicitor, and the nature of their relationship with the predicate offender. For example, while acting in the purchase or sale of residential property and moving money through their firm's client account were the most common means by which solicitors in the cases were involved with criminal funds, the cases also included solicitors who had written to a bank to try and have an account unfrozen, paid bail for a client using what was considered to be the proceeds of crime, transferred ownership of hotels belonging to a client, written a series of profit and loss figures on the back of a letter, witnessed an email, allowed the use of headed stationery and provided legal advice for a mortgage fraudster. Although four of the solicitors appeared to directly financially benefit from their involvement in the transactions, the others appeared to acquire no direct financial gain. They may have received the relevant fees for the transaction involved, but this would have represented no more than the normal fee they would have received had the transaction involved non-criminal funds. Notable variation was also seen in the degree of intent involved, and the extent to which the solicitors were aware that they were facilitating money laundering. In four of the cases examined, the data

suggested that the solicitor was knowingly and intentionally involved and could be considered as a complicit, active participant in the laundering activity. However, in the majority of cases identified, there appeared to be no intent or active involvement in the laundering; there was not a deliberate decision to offend or actual dishonesty on the part of the solicitor. The facilitation of money laundering by professionals, therefore, is clearly not a homogenous phenomenon; it is complex and diverse, and involves multilayered relationships. It also cannot be neatly categorised, as the boundaries between levels of awareness and intent, and between categorisations of means of facilitation, are blurred.[94]

The solicitors in the cases analysed had been convicted under a variety of offences. While those whose offence had occurred prior to 2002 were prosecuted under either the Drug Trafficking Act 1994 (n = 1) or the Criminal Justice Act 1998 (n = 5), the majority (n = 14) of the sample were convicted of one of the offences contained in the Proceeds of Crime Act.[95] Perhaps unsurprisingly, the most common offence seen was that set out in section 328 of the Proceeds of Crime Act (entering into or becoming concerned in an arrangement facilitating the acquisition, retention, use or control of criminal property). In eight of the cases, the solicitor was convicted on at least one count under section 328. As was highlighted earlier, this offence is the most appropriate of the three primary money laundering offences if the individual prosecuted was not involved in the predicate offence. In four of the cases, the solicitor was considered to have had *actual knowledge* that the transactions they were involved in facilitated the laundering of criminal proceeds. These solicitors received prison sentences and were usually struck off the roll of solicitors at their subsequent disciplinary hearings. However, in another four cases, convictions were based on the assumption of *suspicion* rather than actual knowledge. In these cases, reference was made during sentencing and disciplinary proceedings to the lower level of *mens rea* and, therefore, culpability of the solicitor, and this was reflected in the sentences and sanctions received. For example, in one such case, the solicitor received a fine of £5000 rather than a custodial sentence, and in another, the solicitor involved was sentenced to 39 weeks imprisonment suspended for 18 months, 200 hours community work and a £5015 fine. Neither of these solicitors were struck off when they subsequently appeared in front of the Solicitors Disciplinary Tribunal.

Seven of the solicitors in the cases were convicted under section 330 of the Proceeds of Crime Act, the offence of failing to report suspicions of money laundering for those working in the regulated sector. Four of these were also convicted of other substantive money laundering offences, but three were

convicted solely of one or more counts of the section 330 offence. The solicitors in these cases received, respectively, a custodial sentence of six months (reduced by the Court of Appeal from 15 months), four-month suspended sentence and a fine of £2515. One of the solicitors was struck off the roll of solicitors, but the others received only a fine or suspension. In one of these cases, it was made clear by the Judge in the criminal trial, and the disciplinary tribunal that heard the case, that it was accepted that the solicitor had not known or suspected his client was engaged in money laundering, but that he had reasonable grounds to suspect he was. The data illustrate, therefore, the range of offences that legal professionals who are believed to have facilitated money laundering on behalf of a client, or in the process of assisting or providing services to a client, can be prosecuted under. It demonstrates the potential for conviction if solicitors are considered to have had suspicions that transactions they progress involved the proceeds of criminal activity, even if they did not have actual knowledge or criminal intent, and were not actively engaged in the laundering. Furthermore, the cases show that, under section 330 of the Proceeds of Crime Act, a criminal conviction can be secured without having to show that there was even suspicion of money laundering, if there were reasonable grounds for such suspicion and this was not reported. The implications of the money laundering offences contained within the Proceeds of Crime Act for legal professionals, therefore, are significant.

Conclusion

This chapter has drawn attention to the complex and contentious relationship between the legal profession and the fight against criminal finance. Concern that legal and other professionals involved in financial transactions are playing an increasing role in the facilitation of money laundering has led to such actors being designated as 'gatekeepers', and subjected to various preventative obligations. This follows a trend seen in anti-money laundering policy (as in other aspects of crime control) towards the enlisting of private, non-state actors into a role in the 'policing' of financial transactions, to prevent the flow of illicit funds into the legitimate financial system. The preventative obligations, focused on requirements to undertake customer due diligence and submit suspicious activity reports, are implemented through national legislation (e.g. the Proceeds of Crime Act 2002 and the Money Laundering Regulations in the UK), but they have their foundations in

international frameworks. The inclusion of legal professionals in the preventative obligations of the anti-money laundering regime has been contentious, with significant concern raised about the implications for principles of confidentiality and the lawyer-client relationship, and fears about the potential risks for legal professionals.

The implications for legal professionals of their characterisation as 'gatekeepers', and the resultant anti-money laundering legislation and policy measures, are significant. Cases of solicitors convicted of money laundering offences in the UK show that legal professionals can be convicted for facilitating money laundering on behalf of a client, or in the process of assisting or providing services to a client, without having actual knowledge or criminal intent, or being actively engaged in the laundering, if they were shown to have had suspicions that money laundering was taking place or, even, if there were reasonable grounds for suspicion, but no actual suspicion. This is due to the far-reaching nature of money laundering legislation in the UK, which goes far beyond what is required by international standards, with no requirement for criminal intent and *mens rea* requirements being satisfied by suspicion or, for those working in the regulated sector, reasonable grounds for suspicion. Unlike international anti-money laundering frameworks, including UN and Council of Europe Conventions and EU Money Laundering Directives, the legislation is not aimed solely at those deliberately laundering criminal proceeds. Its scope is much broader, allowing for the inclusion of a wider range of acts and omissions, and for those who are less directly—and unintentionally—involved in money laundering.

These aspects of the anti-money laundering policy and legislative frameworks in the UK stem from the concern that professionals play a critical role in the facilitation of money laundering, and the resultant designation of such professionals as 'gatekeepers'. However, this concern does not have a solid evidential basis. The role of professionals in money laundering is under-researched and poorly understood, and there remains no clear picture of the scale or nature of professionals' involvement in money laundering activity. This has not stopped the far-reaching legislation and policy measures aimed at preventing professional facilitation of money laundering described in this chapter being implemented. It is clear, therefore, that there is a need for further research into the involvement of professionals in the facilitation of money laundering, and greater consideration of the obligations of professionals in the prevention of money laundering and the legislative framework which underpins these obligations.

Notes

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88. POCA 2002 (n 59) *Explanatory Notes* para 479.
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90. Research conducted as part of an ESRC-funded PhD carried out at the University of Manchester between 2012 and 2016. See Benson (n 6).
91. FATF 2013 (n 12).
92. Full details of the research methodology can be found in Benson (n 6).
93. Including Solicitors Disciplinary Tribunal (SDT) hearing transcripts; Court of Appeal hearing transcripts; media reports; fieldwork notes and observations from attendance at SDT hearing.
94. Benson (n 6).
95. Prior to the enactment of the Proceeds of Crime Act, laundering offences were covered by two different Acts: laundering the proceeds of drug trafficking was an offence under the Drug Trafficking Act 1994, and laundering the proceeds of other crimes was covered by the Criminal Justice Act 1998. The previous Acts were used to prosecute solicitors in this sample, where the offence had occurred prior to the enactment of the Proceeds of Crime Act.

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