

# **Anti-money laundering guidance for solicitors conducting private client work**

Thursday 23 February 2006

## **Introduction**

1. This work draws heavily on work already published by the Law Society to help solicitors comply with the UK's anti money laundering regime, which is available from [www.lawsociety.org.uk](http://www.lawsociety.org.uk), or from Professional Ethics: 0870 606 2577. Family lawyers will have a particular interest in the guidance on *Bowman v Fels* (2005) EWCA Civ 225, which is referred to below.
2. Private client work which involves learning about, or dealing with, a client's assets can lead a solicitor to form knowledge or suspicion, or gives rise to reasonable grounds for suspicion, of money laundering. However, whether a money laundering report is required in any individual situation will require a detailed examination of the relevant criminal offences within Part 7 of POCA as most recently interpreted by the case of *Bowman v Fels*. Full guidance on *Bowman v Fels* (2005) EWCA Civ 226 is available, and solicitors conducting private client work should carefully consider their approach in the light of this judgment.
3. Solicitors could be at risk of money laundering if their work involves assisting with the management or distribution of assets which include suspected "criminal property", whether they take a principal role themselves or act for others, e.g. trust work, administration of estates, Powers of Attorney, Court of Protection work, or wealth management. Such work can risk commission of a principal money laundering offence under sections 327-329 of POCA, see paragraphs 2.13-2.18 of the Law Society's Money Laundering Guidance- pilot January 2004 - ("the Guidance") available from [www.lawsociety.org.uk](http://www.lawsociety.org.uk). However, a defence may be available if a report is made to the National Criminal Intelligence Service ("NCIS"), or after 1 April to the Serious and Organised Crime Agency ("SOCA"), and if relevant, "appropriate consent" is obtained or can be deemed through lapse of time, see paragraph 2.23-2.27 of the Guidance. However, because of the judgment in *Bowman v Fels*, before a solicitor reports to NCIS/ SOCA a key consideration will be whether their knowledge or suspicion of money laundering is based on information received in legally professionally privileged circumstances.
4. If a solicitor takes a principal role in a matter, for example by acting as an executor or trustee, it may mean that there are fewer alternative ways to deal with a money laundering situation than when acting for others, e.g. termination of the retainer may not be possible.

5. Solicitors undertaking private client work should remain alert to the warning signs outlined in chapter 6 of the Guidance. For example, private client instructions which fall outside a solicitor's expertise need careful consideration, see paragraph 6.16-6.19 of the Guidance. Solicitors may benefit from discussing the issues with Professional Ethics before accepting instructions, or at a later stage if reasons for suspicion emerge: Tel 0870 606 2577.

## **Money Laundering Regulations 2003**

6. Whenever a solicitor is conducting any "relevant business" for a client, they will need to comply with the Money Laundering Regulations 2003, see paragraph 3.6-3.15 of the Guidance. Suggested identification methods for individuals, estates, and trusts are also covered in chapter 3 of the Guidance.

7. Although will writing is not "relevant business" for the purposes of the Money Laundering Regulations 2003 as no trust exists until death, ancillary services provided by solicitors when drafting wills may be "relevant business". For example, tax advice is covered by the definition of relevant business in Regulation 2(2)(i). Similarly trust services are covered in Regulation 2(2)(m), see paragraph 3.12 of the Guidance, and administration of estates is likely to fall within the meaning of "financial transaction" within Regulation 2(2)(l), see paragraph 3.9 of the Guidance. However, obtaining a Grant of Probate may fall outside the definitions.

### **NOTE:**

Whether or not work being undertaken is covered by the Money Laundering Regulations 2003 solicitors should take a risk based approach when considering what anti money laundering procedures they wish to implement, bearing in mind the level of money laundering risk posed by the nature of the work they are being asked to undertake. When taking clients' instructions it may already be necessary, or at least helpful, to obtain information about the purpose of those instructions, e.g. the reason for forming or winding up a trust, or for the execution of a Power of Attorney. Aside from providing clients with the best possible service, assessing the information provided, and if appropriate asking more questions, may help resolve any money laundering concerns. Making careful notes of questions posed and answers received may assist if a solicitor's conduct is questioned later.

## **Risk areas**

### **Administration of estates**

8. Administration of estates is likely to fall within the definition of "financial transaction" within Regulation 2(2)(l), (see paragraph 3.9-3.12 of the Guidance). Therefore, as

well as being aware of the principal offences, see paragraphs 2.13-2.31 of the Guidance, solicitors need to be aware of the section 330 failure to report (regulated sector) offence; see paragraphs 2.40-2.43 of the Guidance.

9. When a solicitor is either acting as executor, or for executors, there is no blanket requirement that a solicitor should be satisfied as to the provenance of all of the funds which form a part of the estate they are administering. However, solicitors should be alive to factors which can increase the money laundering risk of the work they are undertaking and act accordingly, see chapter 6 of the Guidance. For example, where estate assets have been earned in a foreign jurisdiction, solicitors should be aware of the wide definition of “criminal conduct” in section 340 (2) (b), namely the provision in POCA relating to overseas criminal conduct, see paragraph 2.7 (Also, see footnote). Suspect territories in particular should prompt solicitors to make more checks, see paragraphs 6.31-6.34 of the Guidance.

**NOTE:**

It does not matter when the underlying criminal offence occurred as the definition of “criminal conduct” in s.340(2) has unlimited retrospective effect.

10. The wide nature of the offence of “acquisition, use and possession” in section 329 offence of POCA may lead to a money laundering offence being committed at an early point in the administration. The section 328 arrangements offence may also be relevant. This is one reason why solicitors need to be alert from the outset, and throughout, so that any reporting can be considered as soon as knowledge or suspicion is formed to avoid problems with delayed appropriate consent, see paragraph 2.26 of the Guidance. However, a key advantage achieved by the *Bowman v Fels* judgment is that a solicitor who makes a report is able to continue work on the matter short of transferring funds or taking some other irrevocable step.

11. An extreme example of when administration of an estate may constitute a money laundering offence would be where a solicitor dealing with administration knows or suspects that the deceased was accused or convicted of acquisitive criminal conduct during their lifetime, perhaps because their firm acted in the relevant criminal litigation.

12. Where a solicitor forms knowledge or suspicion that the deceased improperly claimed welfare benefits during their lifetime, for example because the capital of the deceased took them over the financial threshold for the relevant benefit they claimed, there will be “criminal property” included in the estate, and so usually a money laundering report may be required. More information on the financial thresholds for benefits can be obtained from [www.dwp.gov.uk](http://www.dwp.gov.uk), However, a practical solution to consider in these circumstances is whether any outstanding liability to the Department of Work and Pensions can be repaid prior to collation of the assets or

administration, as this may rid the estate of any “criminal property” and so avoid the risk of committing a money laundering offence by administering the estate. The extent of the liability should be established from the Department of Work and Pensions.

#### **NOTE:**

The definition of “criminal property” in section 340(3)(a) does not have a financial minimum which applies to solicitors. Any proceeds of criminal conduct, including deemed proceeds from obtaining a pecuniary advantage, maybe defined as criminal property, however small the amount.

14. It may be helpful to consider the general warning signs for money laundering in chapter 6 of the Guidance if there is concern about beneficiaries. In high risk circumstances, such as terrorism, solicitors may wish to refer to the Bank of England consolidated sanctions list, see paragraph 2.36 of the Guidance and [www.bankofengland.co.uk](http://www.bankofengland.co.uk).

15. Whilst administering an estate a solicitor may form knowledge or suspicion that beneficiaries are not intending to pay the correct amount of tax, or are avoiding some other financial penalty, e.g. creditors, or the Assets Recovery Agency. For example, beneficiaries may be reluctant to disclose gifts they have received from the deceased less than seven years before death. Dependant on the circumstances these types of matters may not in fact constitute money laundering because no criminal conduct has yet occurred, and therefore there is no “criminal property”, but a solicitor should carefully consider their position in conduct terms under Principle 12.02 because they may be in breach of the law or Professional Conduct rules. Further help can be obtained from Professional Ethics: 0870 606 2577.

### **Grant of Probate**

16. Simply obtaining a grant of probate may not fall within the definition of “financial transaction” in Regulation 2(2)(l), see paragraph 3.9-3.12.

#### **Deceased non-UK domiciled persons**

17. A UK grant of probate may be required before UK assets can be released, whilst for overseas assets the relevant local laws will apply. Solicitors should remain alert to money laundering warning signs, e.g. where the deceased or their business interests are based in a suspect territory. Information about non cooperative territories is available from [www.fatf-gafi.org](http://www.fatf-gafi.org), and information about countries where corruption/bribery is a problem is available from [www.transparency.org](http://www.transparency.org). In appropriate circumstances it may be helpful to ask the lawyer dealing with the matter

in the home country for information about the deceased to gain some reasonable assurances that there are no suspicious circumstances surrounding the provenance of their estate. The issue of the tax payable on the estate may depend upon the relevant jurisdiction, see paragraph 14 above regarding the future potential tax evasion.

## **Trusts**

18. Trust work is covered by Regulations 2(2)(m). Guidance on possible methods of identification is given at paragraphs 3.104- 3.107 of the Guidance.

19. Although trusts are most commonly used for legitimate reasons, they can also be used as money laundering vehicles. Discretionary trusts and complex offshore trusts are most vulnerable to money laundering. When setting up trusts, solicitors should remain alive to the warning signs of money laundering, and consider whether the purpose of the trust could be money laundering. Information about the purpose of the trust, including why any unusual structure or jurisdiction has been used, can help allay concerns. Similarly information about the provider of the funds, and those who have control over the funds, may also assist, see *Re: the Esteem settlement, Grupo Torras SA v AI – Sabah* (2004) WTLR 1.

20. Whether solicitors act as trustees themselves, or for trustees, the nature of work may already require information which will assist in assessing money laundering risk, e.g. location of assets, identity of trustees, see paragraph 3.105 of the Guidance. Again, any involvement of suspect jurisdictions, especially those with strict bank secrecy and confidentiality rules, or in jurisdictions without equivalent money laundering procedures, may mean that further enquiries are helpful, see paragraphs 6.31-6.34 of the Guidance.

21. Solicitors may form knowledge or suspicion of money laundering in relation to money or property which either already forms a part of trust property, or is intended to do so. Such knowledge or suspicion may arise from information about the circumstances of historic events, e.g. where there has been a sale of a property overseas and tax was not paid on that sale. In these circumstances solicitors should consider whether their instructions may involve them in a section 328 arrangement offence, and if so what options are open to them in accordance with the *Bowman v Fels* guidance.

## **Charities**

22. Whether the Money Laundering Regulations 2003 apply to work undertaken for charities depends upon whether “relevant business” is being undertaken, see chapter 3. Where the work will constitute “relevant business” the charity will need to be identified, see paragraphs 3.9 – 3.15. Identification will need to be to an objective and subjective standard, see paragraph 3.28 of the Guidance. In cases where a

charity is not the solicitor's client, but is involved in some way in the solicitor's instructions, the solicitor may still wish to make some checks.

#### **NOTE:**

The Charity Commission provides some information about registered charities in England and Wales, [www.charity-commission.gov.uk](http://www.charity-commission.gov.uk) or tel: 0870 333 0123, The information available includes the charities' objects, contact details, the names of its trustees, its broad areas of activity as well as overall financial information including when annual returns have been filed and accounts. Charities which are household names may pose a lower risk. However, not all charities in England and Wales are required to register, or the charity may be based in a country which does not have a registration system. Solicitors may make enquiries about the level of regulation in the host country, or seek advice from Professional Ethics.

23. In common with trusts, whilst the majority of charities are used for legitimate reasons, they can also be used as money laundering/terrorist financing vehicles. Solicitors who act for charities may need to consider the purpose of the charity itself. Remaining alert to the warning signs of money laundering may assist with this, see Chapter 6. An extreme example of the misuse of charities may be terrorist purposes, and where there is concern, reference should be made to the Bank of England terrorist lists see paragraph 14 above.

24. Where a solicitor is acting for a charity and is due to receive money on their behalf from an individual or company donor, the solicitor needs to be alert to unusual circumstances including significant sums. Where the charity is due to receive a bequest from an estate similar considerations apply.

#### **Powers of Attorney/Receivership**

25. Execution of a Power of Attorney for clients does not itself constitute a "financial transaction" for the purposes of Regulations 2(2) (I), see paragraph 3.9 of the Guidance. However, a solicitor acting for an attorney, or as an attorney themselves, is likely to be undertaking "relevant business". Similarly solicitors acting for receivers appointed by the Court of Protection, or who are appointed as receivers themselves, are likely to be undertaking "relevant business".

26. All these areas of work can give rise to money laundering issues. For example, where a solicitor acts as an attorney they may learn financial information about the donor, such as their non payment of tax, or wrongful receipt of welfare benefits. Whether this is a matter which is reportable to NCIS/SOCA as money laundering will depend upon a detailed analysis of the *Bowman v Fels* guidance, especially whether knowledge or suspicion has been formed from information received in legally

professionally privileged circumstances. Where the Court of Protection has an interest because of a receivership or registered enduring power of attorney, consideration will need to be given as to whether the Master needs to be informed. Informing the Master is unlikely to be tipping off because it is unlikely to prejudice an investigation, which is a necessary criterion for either of the tipping off offences, see paragraph 2.57-2.61 of the Guidance.

27. Principle 24.03 of the Guide to the Professional Conduct of Solicitors contains information for solicitors regarding Powers of Attorney, e.g. if a solicitor forms knowledge or suspicion that a donee is acting improperly, for example not dealing with the donor's assets in the donor's best interests, the solicitor should seek confirmation of instructions from the donor.

28. If a solicitor forms knowledge or suspicion that a donee has already completed an improper financial transaction, that may amount to a money laundering suspicion, and a money laundering report to NCIS/SOCA may be required, dependant on whether legal professional privilege applies. However, solicitors may find it hard to decide whether they have a suspicion if the background is a family dispute, and it can help to discuss matters with Professional Ethics: 0870 606 2577.

## **Reporting Issues**

29. The case of *Bowman v Fels* has drastically altered how private client solicitors undertaking private client work should approach their reporting obligations because of the increased importance of legal professional privilege. Administration of estates or other types of private client work should lead solicitors to consider in detail the *Bowman v Fels* guidance referred to above.

30. Legal professional privilege is a key consideration and recent case law has defined privilege in transactional work widely, see paragraph 5.6 onwards in the *Bowman v Fels* guidance. For example instructions to prepare wills are likely to be covered by legal professional privilege (unless there is a criminal intention behind the instructions), and after death but before publication of wills, rights to legal professional privilege vest in the Personal Representatives.