

**Money Laundering Offence,
Suspicious Transaction Reporting:
Legal Obligations
&
Legal Professional Privilege**

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Solicitors' AML/CTF requirements	Source of Law	Sanctions for breach
1. Not to commit "money laundering" 2. Suspicious transactions reporting (" STR ") 3. Not to commit "tipping off"	Organized and Serious Crimes Ordinance, Cap.455 (" OSCO ") Drug Trafficking (Recovery of Proceeds) Ordinance, Cap.405 (" DTROP ") United Nations (Anti-Terrorism Measures) Ordinance, Cap.575 (" UNATMO ")	Disciplinary actions + Criminal sanctions
4. Customer due diligence 5. Record-keeping	Anti-Money Laundering and Counter-terrorist Financing Ordinance, Cap.615 (" AMLO ")	Disciplinary actions

Objectives?

- Solicitors' Guide to Professional Conduct, Practice Direction P
- Para. 19:
 - *“It is important for solicitors to raise their awareness of these provisions and to comply with them to minimise the risk of being involved inadvertently in **criminal offences** such as:- ...”*

Objectives?

- Solicitors' Guide to Professional Conduct, Practice Direction P
- Para. 19:
 - *“It is important for solicitors to raise their awareness of these provisions and to comply with them to minimise the risk of being involved inadvertently in **criminal offences** such as:- ...”*
 - *19.1 assisting persons known or suspected to be launders **money** ... or providing or collecting funds used to commit terrorist acts ...”*

1. money laundering

Objectives?

- Solicitors' Guide to Professional Conduct, Practice Direction P
- Para. 19:
 - *“It is important for solicitors to raise their awareness of these provisions and to comply with them to minimise the risk of being involved inadvertently in **criminal offences** such as:- ...”*
 - *“19.2 **failing to report** a suspicious case of money laundering or terrorist financing ...”*

2. Failing STR duty

Objectives?

- Solicitors' Guide to Professional Conduct, Practice Direction P
- Para. 19:
 - *“It is important for solicitors to raise their awareness of these provisions and to comply with them to minimise the risk of being involved inadvertently in **criminal offences** such as:- ...”*
 - *“19.3 **tipping off** clients who were subject to investigations for an offence of money laundering or terrorist financing...”*

3. Commit “tipping off” offence

Topics today

1. Money laundering
 2. STR
 3. Tipping off
 4. Legal professional privilege
- 

Topics today

1. Money laundering
2. STR
3. Tipping off
4. Legal professional privilege

1. Money laundering

- What is money laundering?

Case law

HKSAR v Yeung Ka Sing, Carson

(2016) 19 HKCFAR 279, [149]:-

‘Money laundering has been described as “the process of disguising the origins of property which has been acquired through criminal conduct.” Concealment and disguise are of its essence.’

1. Money laundering

- Offence creating provisions

Statutes	Offence provision	Statutory defence	Penalty
OSCO	s.25(1)	s.25(2)	s.25(3) Liable to a fine of \$5M and 14 yrs' imprisonment
DTROP	s.25(1)	s.25(2)	s.25(3) Liable to a fine of \$5M and 14 yrs' imprisonment
UN(ATM)O	s.8A	--	s.14(1A) Liable to a fine and to 14 yrs' imprisonment

1. Money laundering

- Elements of offence

- s.25(1), OSCO:-

“... a person commits an offence if,

– knowing or having reasonable grounds to believe that

- any property*

- in whole or in part*

- directly or indirectly*

- represents any person's proceeds of an indictable offence,*

– he deals with that property.”

Mens Rea

Actus reus

1. Money laundering

- **Actus reus** - “Deal”
- s.2, OSCO:-
 - *receiving or acquiring*
 - *concealing or disguising*
 - *disposing or converting property*
 - *bringing into or removing from Hong Kong the property*
 - *using the property to borrow money or as security*

1. Money laundering

- ***Actus reus*** - “Deal”
- Jurisdiction?
 - The act of dealing must occur in Hong Kong
 - The predicate offence may occurred elsewhere

1. Money laundering

- Elements of money laundering

- s.25(1), OSCO:-

“... a person commits an offence if,

– knowing or having reasonable grounds to believe that

- *any property*

- *in whole or in part*

- *directly or indirectly*

- *represents any person's proceeds of an indictable offence,*

– he deals with that property.”

Mens Rea

Actus reus

1. Money laundering

- *Mens rea* – property
- Nature / quality of property → *mens rea*, not *actus reus*
- Wordings of s.25:-
 - Not dealing with what in fact is crime proceeds
 - But dealing with what you know is proceeds, or what you have reasonable grounds to believe to be proceeds

***HKSAR v Wong Ping Shui* (2001) 4 HKCFAR 29**

1. Money laundering

- *Mens rea* – property
- Nature / quality of property → *mens rea*, not *actus reus*
- Prosecutions need not prove that property dealt with were in fact crime proceeds

HKSAR v Yeung Ka Sing, Carson (2016) 19 HKCFAR 279

Oei Hengky Wiryo v HKSAR (No.2) (2007) 10 HKCFAR 98)

1. Money laundering

- Elements of money laundering

- s.25(1), OSCO:-

“... a person commits an offence if,

– knowing or having reasonable grounds to believe that

- *any property*

- *in whole or in part*

- *directly or indirectly*

- *represents any person's proceeds of an indictable offence,*

– he deals with that property.”

Mens Rea

Actus reus

1. Money laundering

- *Mens rea* – proceeds
- s.2(6), OSCO:-
 - Payments or rewards received / pecuniary advantage obtained in connection with commission of offence
 - Property derived or realised from such payments or rewards

1. Money laundering

- *Mens rea* – proceeds
- Money used in furtherance of an indictable offence does not amount to ‘proceeds’

HKSAR v Li Kwok Cheung George (2014) 17 HKCFAR 319

- STR duty to report

1. Money laundering

- Elements of money laundering

- s.25(1), OSCO:-

“... a person commits an offence if,

– knowing or having reasonable grounds to believe that

- *any property*
- *in whole or in part*
- *directly or indirectly*
- *represents any person's proceeds of an indictable offence,*

Mens Rea

– he deals with that property.”

Actus reus

1. Money laundering

- **Mens rea** – having reasonable grounds to believe
- Reformulated test:
 1. (Subjective) What facts or circumstances, including those personal to the defendant, were known to him that may have affected his belief as to whether the money was tainted?
 2. (Objective) Would any reasonable person who shared the defendant's knowledge be bound to believe that the money was tainted?
- If the answer to (2) is “yes”, the defendant is guilty. If “no”, the defendant is not guilty.

1. Money laundering

- Conclusion : what you should do?
- Engaged to provide legal service
 - customer due diligence
- Transferred with clients' moneys
 - consider, based on facts and circumstances, whether a reasonable person would believe the monies are tainted
- If “yes”
 - do not deal with the monies
 - suspicious transaction report (“**STR**”)

Topics today

1. Money laundering
2. STR
3. Tipping off
4. Legal professional privilege

2. STR

- Statutory requirements?
- Disclosure of knowledge / suspicion that property represents proceeds of indictable offence / terrorist property

2. STR

- Provisions?

Statutes	Relevant provision	Penalty for non-disclosure
OSCO	s.25A(1)	s.25A(7) Liable to a fine of \$50K and 3 mths' imprisonment
DTROP	s.25A(1)	s.25A(7) Liable to a fine of \$50K and 3 mths' imprisonment
UN(ATM)O	s.12(1)	s.14(5) Liable to a fine of \$50K and 3 mths' imprisonment

2. STR

- Provisions?

- S.25A(1), OSCO:-

“Where a person *knows or suspects* that any property-

(a) in whole or in part directly or indirectly represents *any person's proceeds of*;

(b) *was used in connection with*; or

(c) *is intended to be used in connection with*,

an indictable offence,

he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer.”

2. STR

- Effect of disclosure?
- May be a defence to “money laundering” offence

2. STR

- Effect of disclosure?
- s.25A(2), OSCO:-

“If a person who has made a disclosure ... does any act in contravention of the offence of money laundering ... and the disclosure relates to that act, he does not commit an offence under s. 25(1) if –

- (a) that disclosure is made **before** he does that act, and he does that act with the consent of an authorized officer; or*
- (b) that disclosure is made –*
 - (i) **after** he does that act;*
 - (ii) on his initiative; and*
 - (iii) as soon as it is reasonable for him to make it.”*

2. STR

- Conclusion : What should you do?
- Property
- Know / suspect
 - Used in crime
 - Intended to be used in crime
 - Proceeds of crime
- Report ASAP
 - Knowledge / suspicion
 - Basis
- Do not tell anybody to prejudice investigations (tipping off)

Topics today

1. Money laundering
2. STR
3. Tipping off
4. Legal professional privilege

3. Tipping off

- Prohibition against tipping off?
- S.25A(5), OSCO:-

“A person commits an offence if, knowing or suspecting that a disclosure has been made under subsection (1) or (4), he discloses to any other person any matter which is likely to prejudice any investigation which might be conducted following that first-mentioned disclosure.”

Topics today

1. Money laundering
2. STR
3. Tipping off
4. Legal professional privilege

4. Legal Professional Privilege

- Do solicitors need to disclose items subject to LPP? No.
 - FATF Recommendation 23
 - Case law
 - Statutes
 - Practice Direction P

4. Legal Professional Privilege

- Do solicitors need to disclose items subject to LPP? No.

- ***Pang Yiu Hung v Commissioner of Police & Anor***
[2003] 2 HKLRD 125:-

“... on a plain reading, it is patent that the legislature intended all persons, including legal practitioners, to be subject to the obligations imposed by s.25A of OSCO ...” [119]

“... they ... are exempted from the obligations ... if, in order to fulfil those obligations, a breach of LPP would be required.” [120]

“... What is required, however, is that information which is not protected by that fundamental right must be reported.” [120]

4. Legal Professional Privilege

- Do solicitors need to disclose items subject to LPP? No.
- S.2(18), OSCO
- S.2(14), DTROP
- S.2(5), UN(ATM)O

“... nothing in this Ordinance shall require the disclosure of any items subject to legal privilege ...”

4. Legal Professional Privilege

- What **are** “items subject to LPP”?
- “Legal advice privilege”
- S.2(1), OSCO:-

“(a) communications between a professional legal adviser and his client or his client’s representative made in connection with the giving of legal advice to the client”

4. Legal Professional Privilege

- What **are** “items subject to LPP”?
- “Litigation privilege”
- S.2(1), OSCO:-

“(b) communications between a professional legal adviser and his client or his client’s representative or between such persons and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings”

4. Legal Professional Privilege

- What **are** “items subject to LPP”?

- S.2(1), OSCO:-

“(c) items enclosed with or referred to in such communications.”

4. Legal Professional Privilege

- What are NOT “items subject to LPP”?
- Crime / fraud exception
- S.2(1), OSCO:-

“Communications or items held with the intention of furthering a criminal purpose”

4. Legal Professional Privilege

- What are NOT “items subject to LPP”?
- Crime / fraud exception
- S.2(1), OSCO:-
- “Communications or items held with the intention of furthering a criminal purpose”
 - s.2(1), OSCO
 - Para. 43, Practice Direction P

4. Legal Professional Privilege

- Protection on Disclosure?
- S.25A(3), OSCO:-

“A disclosure made under s.25A(1) –

(a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;

(b) shall not render the person who made it liable in damages for any loss arising out of –

- *the disclosure;*
- *(ii) any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.”*

Conclusions

Solicitors' AML / CTF requirements	Statutes	Sanctions for breach
1. Not to commit "money laundering"	OSCO	Disciplinary actions + Criminal sanctions
2. STR for items <u>not</u> subject to LPP	DTROP	
3. Not to commit "tipping off"	UNATMO	