20 *LAWYERS*

20.1 Definition of *Lawyers* undertaking *Supervised business*

20.1.1 Activities to which the *Money Laundering Order* applies

Overview

1. Paragraph 21 of Part 3 of Schedule 2 to the Proceeds of Crime Law defines the relevant operations and activities of lawyers, notaries, and other independent legal professionals (Lawyers) for the purposes of complying with the requirements of the *Money Laundering Order*. Guidelines provide the interpretation and activities and operations of Lawyers that are in scope.

2. Whilst the *Money Laundering Order*, the *Guidelines* and consequently *this Handbook*, only brings within its scope the business activities of law firms where they are carrying on a *supervised business*, the *Anti-Money Laundering and Counter-Terrorism Legislation* and the general offences and penalties cover all persons and all business activities within Jersey. Consequently, law firms undertaking a significant proportion of *supervised business* may wish to consider applying the *systems and controls* to counter *money laundering,* the *financing of terrorism,* or the *financing of proliferation* across the whole of their business activities.

20.2 *Identification measures*

20.2.1 Urgent undertakings

3. Section 4.7 of *this Handbook* sets out statutory requirements under the *Money Laundering Order* regarding when *identification measures* must be applied, in respect of a *business relationship* or *one-off transaction*.

4. Where the provision of *supervised business* by a *Lawyer* is urgent, this undertaking may be provided prior to obtaining evidence of identity if there is little risk of *money laundering, the financing of terrorism, or proliferation financing* occurring, and evidence of identity is obtained as soon as reasonably practicable. Nevertheless, identity is still required to be **found out**.

5. For clarity the above includes:

- There is little risk of *money laundering*, and the relationship/transaction should not be deemed high risk;
- Timeline for obtaining evidence of identity must be reasonably practicable (i.e. the timeline for obtaining evidence must be justifiable);
- There is a genuine reason for urgency, and the above is used on an exceptional basis for urgent business only and not for business as usual.

20.2.2 Ascertaining legal position

Overview

6. Section 4.8 above sets out the statutory requirements under the *Money Laundering Order* to terminate a *business relationship* or not carry out a *one-off transaction* where a *supervised person* is unable to apply *identification measures* in respect of that relationship or one-off transaction.

7. A concession from terminating a *business relationship* is permitted for *Accountants*, *Lawyers* and other professional advisers who are in the course of ascertaining the legal position for their *customer* or performing the task of defending or representing their *customer* in legal proceedings (including advice on instigating or avoiding proceedings).

8. To qualify for the concession the *Accountant*, *Lawyer* or other professional adviser must be a member of a relevant professional body that undertakes competency testing for its members and imposes and maintains professional and ethical standards.

Statutory requirements (paraphrased wording)

9. *Article 14(9) of the Money Laundering Order provides that the prohibition from continuing a business relationship does not apply where the relevant person is a lawyer or other business falling within paragraphs 21 or 22 of Part 3 of* Schedule 2 *to the Proceeds of Crime Law and is in the course of ascertaining the legal position for that person's client or performing the task of defending or representing the client in, or concerning legal proceedings, including advice on instituting or avoiding proceedings.*

Guidance notes

10. *CDD* information will still need to be collected within a reasonable timescale to comply with Article 13 of the *Money Laundering Order*.

11. *Accountants*, *Lawyers*, and other relevant professional advisers are encouraged to consider their position very carefully before applying the above concession to ensure that the type of work and their professional status falls within the conditions contained in Article 14(9) of the *Money Laundering Order*.

12. For example, the concession applies to litigation but not transactional work, so *Lawyers* should be mindful of the distinction between advice, litigation work and transactional work.

20.3 Risk Assessment

13. A *supervised person's* risk assessment is essential to directly inform and conduct the businesses approach to *AML/CFT/CPF*.

14. There are three levels to a lawyer's risk assessment:

i) Business Risk Assessment (also known as Practice Wide Risk Assessments) to identify ML/TF/PF risks;

ii) Customer Risk Assessments (client risk assessments) to identify the ML/TF/PF at individual *customer*/client level; and

iii) Matter risk assessments on each new matter or a *customer*.

Those risks at ii) and iii) should feed back into the BRA.

15. Every *customer* has to have a risk assessment, and it may be possible to adopt a category-based approach to high/medium/low ratings (e.g. conveyancing matters of a value £3,000,000 or more are high risk). The following sub-sections set out some key legal service area vulnerabilities drawn from *FATF* and law enforcement guidance and case studies, and some key warning signs that have been drawn up by the Law Society for England and Wales, as an indication of service area vulnerabilities. Further factors to consider when evaluating the risks posed by *customers* and service areas are set out in section 3.3.4 of *this Handbook*.

20.3.1.1 Use of client accounts

Guidance notes

16. Lawyers should not provide a banking service for their *customer*s. However, it can be difficult to draw a distinction between holding *customer* money for a legitimate transaction and acting more like a bank. For example, when the proceeds of a sale are left with a *supervised person* to make payments, these payments may be to mainstream lending companies, but may also be to more obscure recipients, including private individuals, whose identity is difficult or impossible to check.

17. Situations which could give rise to cause for concern are detailed at section 6.7.2 of *this Handbook*.

18. *Supervised persons* should think carefully before disclosing client account details as this allows money to be deposited into a client account without the *supervised person's* knowledge. If it is necessary to provide account details, *supervised persons* should ask the *customer* where the funds will be coming from. Will it be an account in their name, from Jersey or another jurisdiction? *Supervised persons* should consider whether they are prepared to accept funds from any source that they are concerned about.

19. Circulation of client account details should be kept to a minimum. *Customers* should be discouraged from passing the details on to third parties and should be asked to use the account details only for previously agreed purposes.

20.3.1.2 Establish a policy on handling cash

Guidance notes

20. It is good practice to establish a policy of not accepting cash payments above a certain limit either at the *supervised person*'s office or into the *supervised person*'s bank account. Customers may attempt to circumvent such a policy by depositing cash directly into a client account at a bank. Supervised persons may consider advising *customer*s in such circumstances that they might encounter a delay in completion of the final transaction. Avoid disclosing client account details as far as possible and make it clear that electronic transfer of funds is expected.

20.3.1.3 *Source of funds*

Guidance notes

21. Accounts staff should monitor whether funds received from *customer*s are from credible sources. For example, it is reasonable for monies to be received from a company if your *customer* is a director of that company and has the authority to use company money for the transaction.

22. In some circumstances, cleared funds will be essential for transactions and *customers* may want to provide cash to meet a completion deadline. *Supervised persons* should assess the risk in these cases and ask more questions if necessary.

20.3.1.4 Private client work – Administration of estates

Guidance notes

23. A deceased person's estate is very unlikely to be actively utilised by criminals as a means for laundering their funds, however there is still a risk of *money laundering*, the *financing of terrorism*, or *proliferation financing* for those working in this area.

24. When winding up an estate, there is no blanket requirement that *supervised persons* should be satisfied about the history of all the funds which make up the estate under administration. However, *supervised persons* should be aware of the factors which can increase *money laundering, the financing of terrorism* or *proliferation financing* risks and consider the following:

- where estate assets have been earned in a foreign jurisdiction, *supervised persons* should be aware of the wide definition of criminal conduct in the *Proceeds of Crime Law*; and
- where estate assets have been earned or are located in a *higher risk country or territory*, *supervised persons* may need to make further checks about the source of those funds.

25. *Supervised persons* should be alert from the outset and monitor throughout so that any disclosure can be considered as soon as knowledge or suspicion is formed, and problems of delayed consent can be avoided (see section 9.4 of *this Handbook*).

26. *Supervised persons* should bear in mind that an estate may include criminal property. An extreme example would be where the *supervised person* knows or suspects that the deceased person was accused or convicted of acquisitive criminal conduct during their lifetime.

27. If *supervised persons* know or suspect that the deceased person improperly claimed welfare benefit/allowances or had evaded the due payment of tax during their lifetime, criminal property will be included in the estate and so a *money laundering* disclosure may be required.

28. Relevant local laws will apply before assets can be released. For example, a grant of probate will normally be required before UK assets can be released. *Supervised persons* should remain alert to warning signs, for example if the deceased or their business interests are based in a *higher risk country or territory*.

29. If the deceased person is from another jurisdiction and a *Lawyer* is dealing with the matter in the home country, *supervised persons* may find it helpful to ask the *Lawyer* for information about the deceased to gain some assurances that there are no suspicious circumstances surrounding the estate. The issue of the tax payable on the estate may depend on the jurisdiction concerned.

20.3.1.5 Property transactions

Guidance notes

30. Criminal conduct generates huge amounts of illicit capital, and these criminal proceeds need to be integrated into personal lifestyles and business operations. Law enforcement agencies have advised that property purchases are one of the most frequently identified methods of *money laundering*. Property can be used either as a vehicle for *money laundering* or as a means of investing laundered funds.

31. Criminals will buy property both for their own use, e.g., as principal residence or second homes, business, or warehouse premises, and as investment vehicles to provide additional income.

32. The purchase of real estate is commonly used as part of the last stage of *money laundering*. Such a purchase offers the criminal an investment which gives the appearance of financial stability. The purchase of a restaurant or hotel, for example, offers advantages as it is often a cash-intensive business, which is the preferred currency of criminals. Cash remains the mainstay of much serious organised criminal activity. It has the obvious advantage that it leaves no audit trail and is the most reliable form of payment, as well as the most flexible. Retail businesses also provide a good front for criminal funds where legitimate earnings can be mixed with the proceeds of crime.

20.3.1.6 Criminal use of conveyancing services

Guidance notes

33. Law enforcement agencies have advised that of all the services offered by Lawyers, conveyancing is the function most utilised by criminal groups. Conveyancing is a comparatively easy and efficient method of laundering money with relatively large amounts of criminal monies 'cleaned' in one transaction. In a stable or rising property market, the money launderer will incur no financial loss except fees. Conveyancing transactions can also be attractive to money launderers who are attempting to disguise the audit trail of the proceeds of their crimes. As the property itself can be 'criminal property' for the purposes of the Proceeds of Crime Law, Lawyers can still be involved in *money laundering* even if no money changes hands.

34. Corrupt *Lawyers* may employ trainees to perform the conveyancing work for criminal groups, thereby distancing themselves from the criminal aspect of the business. Conveyancers should also be alert to instructions which are a deliberate attempt to avoid assets being dealt with in the way intended by the court or through the usual legal process. For example, *Lawyers* may sometimes suspect that instructions are being given to avoid the property forming part of a bankruptcy or forming part of assets subject to confiscation.

20.3.1.7 Ownership issues

Guidance notes

35. Properties owned by nominee companies or multiple owners may be used as *money laundering* vehicles to disguise the true owner and/or confuse the audit trail. Supervised persons should be alert to sudden or unexplained changes in ownership.

36. Unexplained changes in ownership may indicate a form of *money laundering* known as "flipping", which involves a property purchase, often using someone else's identity. The property is then quickly sold for a much higher price to the same buyer using another identity. The proceeds of crime are mixed with mortgage funds for the purchase. This process may be repeated several times.

37. Another potential cause for concern is where a third party is providing the funding for a purchase, but the property is being registered in someone else's name. There may be legitimate reasons for this, such as a family arrangement, but *supervised persons* should be alert to the possibility of being misled about the true ownership of the property. Further *CDD* measures should be undertaken on the person providing the funding.

20.3.1.8 Methods of funding

Guidance notes

38. Many properties are bought with a combination of deposit, mortgage and/or equity from a current property. Usually, the Lawyer acting for the purchaser will have information about how the *customer* intends to fund the transaction. Lawyers should expect to be updated if those details change, for example, if a mortgage falls through and new funding is obtained.

39. *Supervised persons* should remember that payments made through the mainstream banking system are not guaranteed to be clean.

40. Transactions that do not involve a mortgage or are not being financed wholly from the sale of a previous property have a higher risk of being fraudulent. *Supervised persons* should be alert for large payments from such private sources of funds, especially if the *customer* receives payments from several individuals or sources. If concerns arise:

- the *customer* should be asked to explain the *source of funds*. *Supervised persons* should assess whether the explanation appears to be valid – e.g., the money has been received from an inheritance; and
- *supervised persons* should ensure that the *customer* is the *beneficial owner* of the funds being used in the purchase. Documentary evidence should be obtained in support of the same.

41. Settlements which are to be paid in cash – particularly where cash is to be passed directly between sellers and buyers without adequate explanation – may indicate *money laundering,* the *financing of terrorism,* or the *financing of proliferation*.

42. Third parties often assist with purchases and *supervised persons* may be asked to receive funds directly from third parties, for example relatives often assist first time buyers. Consideration will need to be given as to the extent of due diligence that needs to be undertaken on those third parties. *Supervised persons* should consider whether there are any obvious warning signs and what needs to be known about:

- the *customer*;
- the third party;
- their relationship; and
- the proportion of the funding being provided by the third party.

43. *Supervised persons* should consider their obligations to the mortgage lender in these circumstances – *supervised persons* are normally required to advise mortgage lenders if the buyers are not funding the balance of the price from their own resources.

20.3.1.9 Valuations

Guidance notes

44. An unusual sale price can be an indicator of *money laundering*. Whilst Lawyers acting in a property sale are not required to get independent valuations, if a *supervised person* becomes aware of a significant discrepancy between the sale price and what a property would reasonably be asked to sell for, consideration should be given to asking more questions.

45. Properties may also be sold below the market value to an associate, with a view to obscuring the title to the property while the original owner still maintains the *Beneficial ownership.*

20.3.1.10 Mortgage Fraud

Guidance notes

46. A *supervised person* may discover or suspect that a *customer* is attempting to mislead a lender to improperly inflate a mortgage advance – for example, by misrepresenting the borrower's income or because the seller and buyer are conspiring to overstate the sale price. Transactions which are not at arm's length may warrant particular consideration. However, until the improperly obtained mortgage advance is received, there is not any criminal property for the purposes of disclosure obligations to the FIU.

47. If a *supervised person* suspects that a *customer* is making a misrepresentation to a mortgage lender, the *supervised person* must either dissuade them from doing so or consider the ethical implications of continuing with the retainer. Even if a *supervised person* no longer acts for the *customer*, it may still be under a duty to advise the mortgage lender.

48. Large scale mortgage fraud is more sophisticated and will normally involve several properties. It may be committed by criminal groups or by individuals. The buy-to-let market is particularly vulnerable to large scale mortgage fraud, whether through new-build apartment complexes or large-scale renovation properties. Occasionally commercial properties will be involved.

49. Fraudsters may use private sources of funding such as property clubs, especially when credit market conditions tighten. These lenders often have lower safeguards than institutional lenders, leaving them vulnerable to organised fraud. Property clubs can be targeted particularly in relation to overseas properties where the property either does not exist, or is a vacant piece of land, not a developed property.

50. Sometimes fraud is achieved by selling the property between related private companies. The transactions will involve inflated values and will not be at arm's length. Increasingly, offshore companies are used with the property sold several times within the group before approaching a lender for a mortgage at an inflated value.

51. *Supervised persons* that discover or suspect that a mortgage advance has already been improperly obtained should consider advising the mortgage lender.

52. *Supervised persons* acting in connection with a re-mortgage who discover or suspect that a previous mortgage has been improperly obtained may need to advise the lender, especially if the re-mortgage is with the same lender. Consideration should also be given to making a disclosure to the *FIU* as the improperly obtained mortgage advance represents criminal property.

53. If a *customer* has made a deliberate misrepresentation on their mortgage application, it is likely that the crime/fraud exemption to legal professional privilege will apply (see section Legal Professional Privilege (LPP)20.5.1of *this Handbook*). This means that no waiver of confidentiality will be needed before a disclosure is made. However, such matters will need to be dealt with on a case-by-case basis.

20.3.1.11 Company and commercial work

Guidance notes

54. The nature of company structures can make them attractive to money launderers because it is possible to obscure true ownership and protect assets for relatively little expense. For this reason, Lawyers working with companies and in commercial transactions should remain alert throughout their business relationships, with existing as well as new *customer*s.

55. A common operating method amongst serious organised criminals is the use of front companies. These are often used to disguise criminal proceeds as representing the legitimate profits of fictitious business activities. They can also help to make the transportation of suspicious cargoes appear as genuine goods being traded. Often, they are used to mask the identity of the true *beneficial owners* and the source of criminally obtained assets. Corporate vehicles are also frequently used to help commit tax fraud, facilitate bribery/corruption, shield assets from creditors, facilitate fraud generally or circumvent disclosure requirements.

56. The lack of transparency concerning the *Beneficial ownership and control* of corporate vehicles has proved to be a consistent problem for *money laundering* investigations. Corporations acting as directors and nominee directors can be used to conceal the identity of the natural persons who manage and control a corporate vehicle.

57. Several international reports have highlighted the extent to which private limited companies, shell companies, bearer shares, nominees, front companies, and *SPVs* have been used in *money laundering* operations. Case studies submitted to the *FATF* have indicated the following common elements in the misuse of corporate vehicles:

- multi-jurisdictional and/or complex structures of corporate entities and trusts;
- foreign payments without a clear connection to the actual activities of the corporate entity;
- use of offshore bank accounts without clear economic necessity;
- use of nominees;
- use of shell companies;
- tax, financial and legal advisers were generally involved in developing and establishing the structure. In some case studies a *Lawyer* was involved who specialised in providing illicit services for *customers*.

58. The more of the above elements that exist, the greater the likelihood and the risk that the identity of the underlying *beneficial owner* may be able to remain unidentifiable.

20.3.1.12 Shell corporations

Guidance notes

59. The shell corporation is a tool that appears to be widely used by criminals. Often purchased "off-the-shelf", it can be a convenient vehicle for *money laundering* and for concealing the identity of the beneficial owner of the funds. The company records are often more difficult for law enforcement to access because they are held behind a veil of professional privilege or the professionals who run the company act on instructions remotely and anonymously.

60. Shell companies are often used to receive deposits of cash which are then transferred to another jurisdiction, to facilitate false invoicing or to purchase real estate and other assets. They have also been used as the vehicle for the actual predicate offence of bankruptcy fraud on many occasions.

20.3.1.13 Bearer shares

Guidance notes

61. Bearer shares confer rights of ownership to a company upon the physical holder of the share. They are commonly and legitimately used in several countries. However, the high level of anonymity that bearer shares offer provides opportunities for misuse where the identity of the shareholder is not recorded when the share is issued and transferred, ownership of the share is effectively anonymous.

62. Such shares are open to two *money laundering* risks:

- financial assets can be acquired without the purchaser being identified; and
- the company owners and controllers may not be capable of being identified.

63. To guard against misuse, several jurisdictions have dematerialised or immobilised bearer shares when they are registered in an effort to ensure that the identity of the *Beneficial owners* can be verified. Dematerialisation is achieved by requiring registration upon transfer or requiring registration to vote or collect dividends. While physical transfer of bearer shares is possible, it is believed to be rare.

20.3.1.14 Private equity

Guidance notes

64. Lawyers could be involved in any of the following circumstances:

- the start-up phase of a private equity business where individuals or companies seek to establish a private equity firm (and in certain cases, become authorised to conduct investment business);
- the formation of a private equity fund;
- ongoing legal issues relating to a private equity fund;
- execution of transactions on behalf of a member of a private equity firm's group of companies (a private equity sponsor that will normally involve a vehicle company acting on its behalf).

65. Private equity work may be considered to be low risk for *money laundering,* the *financing of terrorism,* or the *financing of proliferation* for the following reasons:

- private equity firms are also covered by the *Money Laundering Order* and similar legislation in equivalent jurisdictions;
- investors are generally large institutions, some of which will also be regulated for *money laundering* purposes;
- there are generally detailed due diligence processes followed prior to investors being accepted;
- the investment is generally illiquid, and the return of capital is unpredictable;
- the terms of the investment in the fund generally strictly control the transfer of interests and the return of funds to investors.

66. Factors which may alter this risk assessment include:

- where the private equity firm, fund manager or an investor is located in a jurisdiction which is not regulated for *money laundering* to a standard which is equivalent to the *FATF Recommendations;*
- where the investor is either an individual or an investment vehicle itself (a private equity fund of funds);
- where the private equity firm is seeking to raise funds for the first time or is approaching a large investor base.

20.3.1.15 Conveyancing transactions

Guidance notes

67. A *supervised person* may demonstrate that the basis upon which it has determined the value of a conveyancing transaction for the purposes of Article 4 of the *Money Laundering Order* is appropriate where it applies the value of the property that is the subject of the transaction.

20.4 Exemptions from *CDD* measures

Overview

68. This section is supplemental to and should be read in conjunction with section 8 of *this Handbook*.

69. Any relevant exemption as noted in (Section 8) may be applied. But also, Lawyer specific exemptions can be utilised if applicable:

Customer/Activity	Exemption	Article of MLO	Section of *this Handbook*	Conditions to be fulfilled before use?	Ongoing requirements?
Trust Customer	Third parties	17C(1) (c)(ii) and 17C(2)	8.2	Yes	Yes
Registered Property contracts passed before court	Customer	18(6)	8.3.7	Yes	Yes

20.4.1 Exemption from applying *third party identification requirements* in relation to certain *relevant customer*s involved in *Trust Company Business*

70. This section is supplemental to and should be read in conjunction with section 8.2 of *this Handbook*.

71. Article 17C(1)(c)(ii) of the *Money Laundering Order* provides that a *supervised person* that is a Lawyer is exempt from applying third party identification requirements in relation to a third party for which a relevant *customer* is acting if the relevant *customer* carries on Trust Company Business and is registered to carry on such business under the FS(J) Law, or equivalent business.

72. Article 17C(2) of the *Money Laundering Order* requires that a *supervised person* who does not apply *third party identification requirements* must be satisfied, by reason of the nature of the relationship with the *relevant customer*, that there is little risk of *money laundering, terrorism financing,* or *proliferation financing* occurring.

Guidance notes

73. In relation to the exemption set out at Article 17C(1)(c)(ii) of the *Money Laundering Order*, a *supervised person* may be satisfied that there is little risk of *money laundering,* the *financing of terrorism,* or the *financing of proliferation* occurring where:

- The service provided to a *Trust Company Business relevant customer* is drafting (including incidental reviewing and advising (insofar as the *Money Laundering Order* is applicable)) of one or more of the following and
- It considers the extent of the service provided.

In respect of trusts (except employee benefit schemes) administered by a *relevant customer* carrying on *Trust Company Business*, the service provided by the *supervised person* is drafting:

- a trust deed;
- a supplemental trust deed of:
    - appointment;
    - advancement;
    - disclaimer;
    - indemnity or release;
    - appointment, retirement and indemnity;
    - addition;
    - exclusion;

- amendment;
- change of proper law;
- revocation or termination.

› a loan agreement or loan assignment or novation;

› factual confirmations covering matters such as the existence and status of a trust and its trustee's capacity to enter into transactional documentation.

In respect of companies or partnerships administered by a *relevant customer* carrying on *Trust Company Business*, the service provided by the *supervised person* is drafting:

› incorporation documents;

› a loan agreement or loan assignment or novation;

› minutes and other corporate authorisations;

› stock transfer forms and share certificates;

› memoranda and articles of association;

› factual confirmations covering matters such as the existence and status of a company or partnership and its capacity to enter into transactional documentation.

In respect of employee benefit schemes (including pension schemes) controlled or administered by a *relevant customer* carrying on *Trust Company Business*, the service provided by the *supervised person* is drafting:

› a trust deed;

› a supplemental trust deed of:

- appointment;
- advancement;
- disclaimer;
- indemnity or release;
- appointment, retirement and indemnity;
- addition;
- exclusion;
- amendment;
- change of proper law;
- revocation or termination.

› a loan agreement or loan assignment or novation;

› factual confirmations covering matters such as the existence and status of a trust (or other vehicle by which the scheme is structured) and its capacity to enter into transactional documentation.

In respect of a foundation administered by a *relevant customer* carrying on *Trust Company Business*, the service provided by the *supervised person* is drafting:

› statutory forms;

› charters and regulations;

- supplemental deeds of:
    - initial and further endowments;
    - transfers of assets;
    - indemnities and releases;
    - distributions;
    - amendments and variations;
    - changes of proper law;
    - continuance and mergers, revocation, termination, winding up or dissolution;
    - appointment/removal of guardian or any other person appointed under the regulations of the foundation to carry out a function in respect of the foundation;
    - guardian sanctioning of council actions;
    - addition and removal of beneficiaries and changes of purposes;
    - addition, amendment, removal, exercise, assignment of founders' rights;
    - appointment and removal of council members;
    - releases of powers;
    - delegation of council powers.
- factual confirmations covering matters such as the existence and status of a foundation and its capacity to enter into transactional documentation.

74. The above is not intended to be an exhaustive list of documents for which drafting services are provided and a *supervised person* may be able to demonstrate that other drafting services present little risk of *money laundering*, *terrorist financing,* or *proliferation financing*.

75. A *supervised person* may demonstrate that it has considered the extent of the service provided to the *relevant customer* when it considers:

- whether the service provided is "off the shelf" or bespoke;
- the need for and extent to which an "off the shelf" service is to be modified; and
- the fee that is to be charged.

76. For example, the provision of a standard trust deed that requires very little modification, may be described as "off the shelf" and attracts only a nominal fee, may be illustrative of a relationship presenting little risk of *money laundering*. By contrast, the provision of a bespoke trust deed that requires detailed information on the trust to be collected and which attracts more than a nominal fee, may not.

20.4.2 Jersey property transfers

77. This section is supplemental to and should be read in conjunction with section 8.3.7 *of this Handbook*.

78. This section relates to the exemption available under Article 18(6) of the *Money Laundering Order*, which provides that a *supervised person* that is a *Lawyer* or a real estate agent, which enters into a *business relationship* or carries out a *one-off transaction* for the purpose of enabling a *customer*, directly or indirectly, to enter into a registered contract within the meaning of the Control of Housing and Work (Jersey) Law 2012 (i.e. where it is to be passed before the Royal Court and registered in the Public Registry of Contracts), need not obtain **evidence of identity** of its *customer*.

AML/CFT/CPF Codes of Practice

[COP178] For each case described in Article 18 of the *Money Laundering Order*, a *supervised person* must obtain information on the purpose and intended nature of the business relationship or one-off transaction.

[COP179] A *supervised person* that is a *lawyer* must obtain and retain documentation establishing that its *customer* is entitled to benefit from the exemption set out in Article 18(6) of the *Money Laundering Order*.

20.5 Reporting *money laundering* and *terrorist financing* activity

Overview

79. This section is supplemental to and should be read in conjunction with the *AML/CFT/CPF Codes of Practice* and *Guidance notes* set out at section 8 of *this Handbook*.

20.5.1 Legal Professional Privilege (LPP)

Overview

80. *Lawyers* are under a duty to keep the affairs of their *customers* confidential, and the circumstances in which they can disclose *customer* communications are strictly limited.

81. However, the *Proceeds of Crime Law* and *Terrorism Law* contain provisions requiring the disclosure of confidential information in certain circumstances to the police (or a *MLRO/Deputy MLRO*) by persons working in *supervised businesses*. These laws also provide individuals working for law firms which conduct *supervised business* with certain defences against proceedings for breaching any duty of confidentiality, or for an offence such as *money laundering*, if they make a disclosure to the police or to a *MLRO/Deputy MLRO* in accordance with the procedures set down by their employer.

82. This section examines some of the tensions which may arise between a *Lawyer*'s duty of confidentiality to their *customer* and the disclosure requirements set out in the *Proceeds of Crime Law* and *Terrorism Law*.

Statutory requirements (paraphrased wording)

83. *Article 34D of the Proceeds of Crime Law and Article 21 of the Terrorism Law contain comparable provisions. Those provisions provide that a person employed in a supervised business commits an offence if they come into possession of information in the course of that business which leads them to know or suspect, or have reasonable grounds to know or suspect, that another person is engaged in money laundering (e.g. the offences set out at Articles 30 and 31 of the Proceeds of Crime Law) or is committing an offence under Articles 15 and 16 of the Terrorism Law, or conduct outside Jersey which if occurring in Jersey would constitute one of the above offences. The offence is committed, unless the person reports their knowledge, suspicion or reasonable grounds to the FIU or to the MLRO (or Deputy MLRO) in accordance with their employer's procedures.*

84. *The Money Laundering Order requires that any person who conducts a financial services business in Jersey must have procedures in place for reporting such knowledge or suspicion to the FIU.*

85. *However, the Proceeds of Crime Law and Terrorism Law also include exemptions from the requirement to make such disclosures for professional legal advisers acting in privileged circumstances (see Article 34D(5) of the Proceeds of Crime Law, for example). Legal privilege is defined in the three laws referenced above. The exemptions do not apply to information or other matters communicated or given with a view to furthering a criminal purpose.*

86. *Article 35 of the Proceeds of Crime Law and Article 35 of the Terrorism Law prohibit disclosure of information in circumstances where a suspicious activity report has been made and/or where it would prejudice an existing or proposed investigation. However, an exception is also provided in respect of these offences where a professional legal adviser discloses any information or other matter:*

- *to a customer or to a representative of a customer of the legal adviser in connection with the giving of legal advice by the adviser to the customer; or*
- *to any person for the purpose of actual or contemplated legal proceedings.*
- *Again, this exemption does not apply in relation to any information or other matter that is disclosed with a view to furthering a criminal purpose.*

20.5.1.1 Duty of confidentiality

Overview

87. *Lawyers* are professionally and legally obliged to keep the affairs of their *customers* confidential. This obligation extends to all matters revealed to a *Lawyer*, from whatever source, by a *customer* or someone acting on the *customer's* behalf.

88. In exceptional circumstances, this obligation may be overridden. The most relevant instances are where a court orders disclosure or disclosure is required by statute.

20.5.1.2 Application of *LPP*

89. Certain confidential communications between a *Lawyer* and their *customer* will fall into a category known as *LPP*. *LPP* is a privilege against disclosure, ensuring *customers* know that certain documents and information provided to *Lawyers* cannot be disclosed without the *customer's* consent. It recognises a *customer's* right to be open with their legal adviser, without fear of later disclosure to their prejudice. *LPP* cannot be overridden by any other public interest but can be waived or overridden by statute.

90. *LPP* only covers those confidential communications falling under either **advice privilege** or **litigation privilege**. It does not cover all information/matters which *Lawyers* have a duty to keep confidential.

91. For the purposes of *LPP*, the term "*Lawyers*" includes Advocates, Écrivains, barristers, solicitors, in-house *Lawyers*, and their employees.

20.5.1.3 Advice Privilege

Guidance notes

92. Communications between a Lawyer and a *customer* are subject to **advice privilege** if:

- the *Lawyer* is communicating with the *customer* in their capacity as a *Lawyer*;
- the communications are confidential; and
- the communications are being made for the purpose of seeking advice from a lawyer or providing it to a *customer*.

93. Communications are not privileged simply because a *customer* is speaking or writing to their *Lawyer*. The protection applies only to those communications which directly seek or provide advice, or which are given in a legal context, that involve the *Lawyer* using their legal skills and which are directly related to the performance of the *Lawyer*'s professional duties.

94. Some examples of what is/is not covered by advice privilege, as established through case law, are set out below:

- communications **subject** to advice privilege:
    - a *Lawyer*'s bill of costs and statement of account;
    - information imparted by prospective *customers* in advance of a retainer, if the communications were made for the purpose of indicating the advice required.
- communications **not subject** to advice privilege:
    - notes of open court proceedings are not privileged as the content of the communication is not confidential;
    - a client account ledger maintained in relation to the *customer's* money;
    - an appointments diary or time record on an attendance note, time sheet or fee record relating to a *customer*;
    - conveyancing documents (these documents are not communicated and therefore are not subject to advice privilege).

20.5.1.4 Advice within a transaction

95. All communications between a *Lawyer* and their *customer* relating to a **transaction** in which the *Lawyer* has been instructed for the purpose of obtaining legal advice are covered by advice privilege, provided that they are directly related to the performance by the *Lawyer* of their professional duty as legal adviser of their *customer*.

96. This means that where a *Lawyer* is providing legal advice in a transactional matter (such as conveyancing) the advice privilege will cover all:

- communications with;
- instructions from; and
- advice given to;

The *customer*, including any working papers and drafts prepared, as long as they are directly related to the *Lawyer*'s performance of their professional duties as a legal adviser.

20.5.1.5 *Litigation Privilege*

Guidance notes

97. **Litigation privilege** is wider than advice privilege and protects confidential communications made in pursuance or contemplation of litigation, between either:

- a Lawyer and a *customer*;
- a Lawyer and an agent, whether or not that agent is a Lawyer; or
- a Lawyer and a third party.

98. Such communications must be for the sole or dominant purpose of litigation, namely:

- for seeking or giving advice in relation to it;
- for obtaining evidence to be used in it; or
- for obtaining information leading to obtaining such evidence.

20.5.1.6 What is covered by *LPP* – Further points to consider

99. An original document not brought into existence for privileged purposes, and thus not already privileged, does not become privileged simply by being given to a *Lawyer* for advice or another privileged purpose.

100. Furthermore, where a *Lawyer* has a *customer* which is a body corporate, communication between the *Lawyer* and the employees of the corporate *customer* may not be protected by *LPP* if those employees are not considered to be the *customer* for the purpose of the retainer. As such, some employees will be *customers*, while others will not.

101. It is not a breach of *LPP* to discuss a matter with your *MLRO* (or *Deputy MLRO*) for the purpose of receiving guidance on whether to make a disclosure. Privilege will continue to apply whilst such a determination is being made.

20.5.1.7 Crime/Fraud Exception

Guidance notes

102. LPP protects advice a Lawyer gives to a *customer* on avoiding committing a crime or warning them that proposed actions could attract prosecution. LPP **does not extend** to documents which themselves form part of a criminal or fraudulent act, or communications which take place in order to obtain advice with the intention of carrying out an offence. It is irrelevant whether or not the Lawyer is aware that they are being used for that purpose.

103. Article 32 of the *Proceeds of Crime Law* and Article 22 of the *Terrorism Law* provide that, if a *Lawyer* discloses information under those laws, the disclosure will not be treated as a breach of any restriction on disclosure contained in any statute, contract or otherwise.

104. It is not just a ***customer's*** intention which is relevant for ascertaining whether information was communicated for the furtherance of a criminal purpose. In addition to the circumstances described above, *LPP* **also does not extend** to a situation where a **third party** intends the *Lawyer-customer* communication to be made for the furtherance of a criminal purpose (e.g., the innocent *customer* is being used by a criminal third party).

20.5.1.8 Determining when to submit a *SAR*

105. The reporting obligations and offences contained in Article 34D of the Proceeds of Crime Law and Article 21 of the *Terrorism Law* do not apply to a *Lawyer's* knowledge or suspicion, or reasonable grounds for knowledge or suspicion, arising from information obtained in "privileged circumstances" (as defined by the above laws). The *Money Laundering Order* also makes a provision in respect of privileged circumstances at Article 21(5). A *Lawyer* may, however, wish to consider making a joint report with their *customer*. The agreement of the *Lawyer*'s *customer* to waive *LPP* is necessary for this to be possible.

106. If information leading to knowledge, suspicion or reasonable grounds for knowledge or suspicion is obtained in circumstances that are not covered by *LPP*, a disclosure should be made to avoid the commission of an offence of failing to disclose. *Lawyers* will not be in breach of their professional duty of confidentiality if they make a report in these circumstances.

107. If a *Lawyer* commits an offence under Article 30 of the *Proceeds of Crime Law* or Article 16 of the *Terrorism Law* they should make a disclosure to the FIU or their *MLRO*/*Deputy MLRO*, otherwise they will not be able to avail themselves to the defences which operate under those Articles.

108. As the application of *LPP* is complex, *supervised persons* carrying on legal business may wish to consider maintaining procedures which require reports to be made to the *MLRO* (or *Deputy MLRO*) **on each occasion** that there is knowledge, suspicion, or reasonable grounds to suspect *money laundering* or the *financing of terrorism*. The *MLRO* (or *Deputy MLRO*) can then discuss the situation with the employee concerned and, as necessary, take advice from an appropriate partner.

20.5.1.9 *CDD* measures and *LPP*

Guidance notes

109. To assist in complying with the requirements of the Proceeds of Crime Law, *supervised person*s carrying on legal business may wish to consider separating all material on *customer* files so that it is clear what material is non-privileged and what material is covered by LPP.

110. *CDD* and risk assessment documents should be completed, where possible, in a way which distinguishes privileged and non-privileged information. *Supervised persons* carrying on legal business may wish to consider including guidance to this effect in their procedures. This will assist in ensuring that the *JFSC* can request information from and conduct examinations of *supervised persons* with the minimum disruption to business, thus aiding in the *supervised person's* compliance with their obligations to the *JFSC*.