COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON THE FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL (B33-2015)

The Law Society of South Africa (LSSA) considered the Financial Intelligence Centre Amendment Bill and herewith submits its comments. In view of the extremely short deadline for comment (the request was published on 2 November 2015 for comment by 9 November 2015), we deem it prudent to make some observations on an interim basis and reserve our position to amplify same under more appropriate circumstances, given the present time constraints.

1. GENERAL COMMENT

1.1 As a matter of principle, the LSSA will jealously protect legal professional privilege.

1.2 The LSSA is of the firm view that the additional due diligence measures incorporated in Section 21B (clause 10) will be onerous to implement. It is submitted that the Financial Intelligence Centre (FIC) should provide guidance notes, as well as make reference resources available to all accountable institutions.

1.3 Risk management process and programmes for small practices will require the FIC to engage with the legal profession so that basic processes are available to ensure minimum considerations are put into place, as the administrative sanctions now incorporated into the Amendment Bill can be imposed for, what is now defined as "an act of non-compliance". These sanctions are severe and the consequences thereof may be of such a nature that the firm may not be able to continue to operate. Sanctions, especially administrative, therefore have to be proportional to the seriousness of oversight and the size and nature of the firm. We have addressed this issue further in section 2 of our comments.

1.4 The LSSA accepts that by and large, the amendments appear to be in line with the Financial Action Task Force (FATF) standards and what is expected of

attorneys. The challenge is on their practicability and application in the attorneys' profession.

2. SPECIFIC COMMENT

2.1 Clause 1: Amendment of Section 1 of the Act - Definitions

2.1.1 *"1(e) 'client', in relation to an accountable institution, means a person who has entered into a business relationship or a single transaction with an accountable institution;'*

The LSSA does not believe that "client" should be defined and suggests that the Act should remain silent in this regard. The definition of "client" will differ, depending on the nature of the accountable institution. The possibility exists, for example, that the term "client" in the context of the attorneys' profession will include the purchaser in respect of a transaction for the sale and purchase of immovable property, whereas, ordinarily conveyancers take their mandate from the seller of immovable property.

2.1.2 *"1(g) "'domestic prominent influential person' means an individual who holds … (a) a prominent public function including that of – (v) an executive mayor of a municipality elected in terms of the Local Government: municipal Structures Act … (vi) a leader of a political party registered in terms of the Electoral Commission Act …"*

At local government (municipal) this information is sometimes not readily available. As far as political parties are concerned, there are often disputes as to who their leaders are. The LSSA does not have any principle objection to this amendment clause, but the concern is based on the implementation thereof.

"… (b) the position of … (iii) executive officer; or … of a company … if the company provides goods or services to an organ of state and the annual transactional value of the goods or services or both exceed an amount determined by the Minister by notice in the Gazette; or (c) the position of head, or other executive directly accountable to that head, of an international organisation based in the Republic."

It will be difficult for an attorney to know or obtain the information required in terms of the above provisions. This concern applies to subsection (b) in relation to executive officer and to subsection (c) in relation to the head or executive accountable to the head of an international organisation.

2.1.3 *"1(h) 'executive officer' … means a person who (a) exercises general exclusive control over and management of the whole, or a significant portion, of the business and activities of the company, irrespective of any particular title given by the company to an office held by the person in the company or a function performed by the person of the company;"*

At times a person might not have the designation of executive officer, although such a person controls the organisation, e.g. in respect of "beneficial ownership". It is necessary to ascertain how far one would be expected to go to establish who the person is to be cited under some other designation, but effectively controls the organisation. The challenge can be huge where one is dealing with a large organisation or foreign entity.

The LSSA believes that it is important to identify the level of obligation to discharge a person's responsibility in terms of the Act.

To address the above, it is suggested that the FIC must have a reference resource and guidance note, as even in respect of Companies and Intellectual

Property Commission registrations, "beneficial ownership" is not necessarily identified, whilst in foreign owned instances, the relationship may be obscure.

The LSSA is of the view that attorneys' firms should be deemed to have discharged their responsibility once they have attempted to discern the relationship.

2.2 Clause 2: Amendment of Section 3 of the Act - Objectives

"3(1) The principal objective of the Centre is to assist in the – (c) implementation of financial sanctions pursuant to resolutions adopted by the Security Council of the United Nations …"

It may be a challenge to obtain the list by the Security Council. It is expected that, with the coming into operation of the Amendment Act, the list will become readily available and be regularly updated by the FIC.

2.3 Clause 4: Amendment of Section 6 – Appointment of Director

The previous position in terms whereof the Minister had to consult with the Council, is being dispensed with. In terms of the proposed amendment, the Minister is empowered to appoint a "fit and proper" person as Director.

Although the Act states the term of office of the Director, which is renewable, the LSSA is of the view that there is a need to restrict the number of renewal terms of office of the Director in the public interest, to avoid persons occupying positions *ad infinitum*.

2.4 Clause 10: Insertion of Section 21B – Additional due diligence measures relating to legal persons, trusts and partnerships

Firms listed on the stock exchange have already met strict requirements. Therefore, the LSSA is of the view that certain exemptions should apply in terms of the extent of enquiries and determinations to be made. A firm should be regarded as having discharged its obligation if the accountable institution has verified that the person giving the instruction has been mandated to do so, i.e. in the form of a resolution or minute.

The LSSA is not in favour of a blanket requirement to interrogate the identity of beneficial owners or clients that are corporate vehicles.

The scope of mandate between an attorney and his or her client will to a large extent determine the information required by the attorneys' firm. The attorneys' firm will have to maintain the due diligence processes required by the circumstances, for example, to ensure that transactions are not measures to siphon monies or funds out of the country.

Please further refer to comments under paragraph 1.

2.5 Clause 10: Insertion of Section 21B(7)(c) – Trusts

"21B(7) If a natural person … is acting or purporting to act in pursuance of the provisions of a trust agreement or similar agreement … an accountable institution must …. (c) establish the identity of the founder …"

There are specific challenges in dealing with a trust where the founder is deceased.

2.6 Clause 10: Insertion of Section 21B(8) – Overseas legal persons, trusts and partnerships

"21B(8) This section applies … whether it is incorporated or originated in the Republic or elsewhere."

The challenges in dealing with a trust where the founder is deceased are far greater if the trust is based overseas.

2.7 Clause 10: Insertion of Section 21C – On-going due diligence

"21C An accountable institution must … conduct on-going due diligence … which includes – (a) monitoring of transactions undertaken throughout the course of the relationship, including … (i) the source of funds …"

Implementation is problematic and if the attorneys' firms are expected to verify the source of funding, there is a need to clarify how far they are expected to go in verifying that information provided by the client on the source of funds is correct.

The previous position by the FIC in dealing with this has been that the accountable institution was only to ask questions on the source of funds and record the answer. It will be important for the FIC to commit to that position in a guidance note so that there will not be a shifting of positions in the future.

Further, in practice clients are increasingly making payments via electronic fund transfers (EFTs). Accountable institutions must be given some guidance as to how far they are to make enquiries. Whilst many of the issues can be addressed in internal risk or risk management processes, there is need for some guidance alongside the Amendment Act.

2.8 Clause 17: Insertion of Section 26A – Notification of persons and entities identified by Security Council of the United Nations

"26A(1) Upon the adoption of a resolution by the Security Council of the United Nations .. providing for financial sanctions which entail the identification of persons or entities against whom member states of the United Nations must take the actions …

the Minister must announce the adoption of the resolution by notice in the Gazette and other appropriate means of publication."

The difficulties of obtaining the list of names that the Security Council forwarded to government has already been raised above. Publication in the Gazette may be suitable, although not all accountable institutions may have access to Gazettes. It is suggested that a circular from time to time be forwarded to accountable institutions containing the list of names.

2.9 Clause 20: Amendment of Section 28A – Property associated with terrorist and related activities and financial sanctions pursuant to resolutions of United Nations Security Council

"28A(c)(3) An accountable institution must upon – … (b) notice being given by the Director … scrutinise its information …"

The LSSA believes that the notice referred to in this section should include the notice by the President in terms of Section 25 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004.

2.10 Clause 26: Insertion of Section 41A – Protection of personal information
Clause 27: Substitution of Section 42 – Risk management and compliance
Clause 28: Insertion of Section 42A – Governance of compliance
Clause 29: Substitution of Section 43 – Training

The current assistance by the FIC in terms of guidance and typography is supported. As regards risk mitigation measures and training, this is supported on the basis that the FIC continues with the existing practice of support, guidance and examples (typography).

2.11 Clause 27: Substitution of Section 42 – Risk management and compliance

"42(1) An accountable institution must develop, document, maintain and implement an anti-money laundering and counter-terrorist financing risk management and compliance programme."

A number of concerns on the practical implications of this section exist, which must be addressed by the FIC in terms of a guidance note. As an example, in instances where the attorney is well acquainted with the client, there may not be need to go beyond an identity document. A note can be made on file of the client's contact number or record, without requesting a copy of their utility bill.

2.12 Clause 41: Substitution of Section 51 – Failure to report cash transactions
Clause 43: Substitution of Section 56 – Failure to report electronic transfers
Clause 44: Substitution of Section 58 – Failure to comply with direction of Centre

The LSSA supports the decriminalization of certain contraventions and is happy with the inclusion of Sections 51(2), 56(2) and 58(2), which provide for administrative sanctions.

However, the Act should be absolute and clear, in the interest of decriminalizing of offences, whether the Centre would have a choice as to whether to charge an accountable or reportable institution criminally or administratively and how that choice will be exercised.

The LSSA does not support a position where there is an option of either administrative or criminal sanctions and believes that administrative sanctions should be the only option. It is suggested that the relevant sections be amended accordingly.

2.13 Clause 42: Substitution of Section 51A(3) – Failure to report property

"51A(3) An accountable institution that fails to scrutinise the information as contemplated in section 28A(3), is guilty of an offence."

The LSSA does not support this clause in terms of the current wording and views it as too broad and the empowering provision subjective. We submit that there needs to be further delineation of "lack of scrutiny".