

SUPPLEMENTARY 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 under severe pressure of time due to the extremely short deadline for comment and the specific timing of the publication of the Bill close to year-end. We request that these supplementary comments be read in conjunction with the LSSA's previous submissions, which are attached for ease of reference.

1. GENERAL COMMENT

- 1.1 The LSSA is strongly opposed to the tendency of giving a very short period for comments on draft legislation, as the profession needs to consult with its stakeholders to obtain input. Secondly, the timing of the publication in which submissions are requested, is putting unnecessary pressure on already stretched reserves, as year-end always has its own pressures for stakeholders to finalise matters before closure for December holidays, when human resources are minimal.
- 1.2 The LSSA has submitted comments on the White Paper to the Financial Intelligence Centre (FIC). Not all comments have been accepted and no consultation took place concerning the reason for such decision.
- 1.3 The LSSA has also considered the submissions by the Association for Savings and Investment South Africa (ASISA) and the Banking Association of South Africa (BASA). We believe that the issues raised by these organisations are valid and need urgent further consideration by the legislature, the FIC and the National Treasury (NT), particularly in view of the Financial Action Task Force (FATF) Recommendations and global trends to ensure that the South African economy is not put under further pressure.

- 1.4 In view of these general remarks, the LSSA does not intend to comment in detail on issues that were already put forward by the LSSA, ASISA and BASA, but will only expand on issues we consider important, or where it appears that comments already made have not been accepted. The LSSA again refers to its previous submissions attached hereto.
- 1.5 The summary of the comments received by NT and FIC and their responses thereto was brought to the attention of the LSSA after it has considered the Bill. Reference is made to these responses, but insufficient time to consult with its stakeholders restricted the LSSA's position to fully debate these responses.

2. SPECIFIC COMMENTS

2.1 Definition of 'beneficial owner'

- 2.1.1 The issues raised by ASISA and BASA are very real in the commercial world and also in the attorneys' profession. There are approximately 25 000 practising attorneys in South Africa. Of these, in excess of 75% are sole practitioners or from small firms. They simply do not have the resources to comply with the cumbersome proposed requirements.
- 2.1.2 Separate regulation of attorneys can address this issue, for example by prescribing a certain monetary limit above which further due diligence of a beneficial owner must be done where an attorney's practice turnover is under a certain monetary limit, or where specific types of business transactions are involved.
- 2.1.3 The Bill is premised on a financial environment and we believe that it does not take into account the specific requirements of the legal profession. To deal with the attorneys' profession in separate regulation will create certainty in this sector and will be practical and effective in regulating this sector to

reach the objectives of the FIC Act. This might also be applicable to other sectors that are regulated by the FIC Act.

- 2.1.4 Furthermore, should separate regulation of attorneys be implemented, guidance and training of practitioners will be easier and create certainty, for example as to how to identify the beneficial owner of a potential client, how to do due diligence and appropriate risk management and compliance programmes for a specific practitioner.
- 2.1.5 We disagree that separate regulation of the attorneys' profession will lead to arbitrage or an uneven commercial playing field. Attorneys mainly deal with litigation, legal advice and commercial transactions. Where they deal with money, it is through their trust account, which is operated through a financial institution and subject to an annual audit.
- 2.1.6 The recommendation of ASISA with regard to this definition is supported, subject to the qualifications mentioned above. The duties imposed on attorneys with the suggested wording are too onerous, especially for the single practitioner.

2.2 Definition of 'client' and 'single transactions'

- 2.2.1 It is submitted that 'client' should not be defined. The definition of 'client' will differ, depending on the nature of the accountable institution. Alternatively, if 'client' is to be defined, it is suggested that the FATF Recommendations be followed that a certain monetary limit be placed on single transactions and that the definition of 'client' therefore be coupled to such exempted amount.
- 2.2.2 The word 'transaction' is not defined. In the context of attorneys' work, in conveyancing matters instructions are received from the seller of a property, who is the client. Payment of the purchase price is received from the purchaser. The question is whether the receipt of this payment is regarded

as a 'transaction'. Further, is receipt of a payment from a debtor in debt collecting matters a 'transaction'?

2.3 Definition of 'domestic prominent influential person'

The LSSA agrees with ASISA and BASA that the definition should conform to the international compliance terminology and, in such definition, certain particular South African concerns can be addressed.

2.4 Anonymous clients

Section 20A of the Bill is problematic. Attorneys may at times receive deposits into their trust accounts and they may not be able to identify the person who made the deposit. This begs the question as to whether an unidentified person will be regarded as an 'anonymous client'.

2.5 Risk based approach

2.5.1 The LSSA submits that FIC must have the duty to supply risk management and compliance programmes for the different sectors. ASISA and BASA clearly demonstrated the difficulties around the approval of these programmes.

2.5.2 The requirement in Section 42(2)(2B) that programmes must be reviewed 'at regular intervals' is unduly prescriptive. If the proposal is accepted that FIC will have a duty to supply these programmes for the different sectors, it will ensure that the objectives of the Act are met and that uniformity is applicable across all sectors.

2.5.3 As previously stated, the attorneys' profession consists mainly of sole practitioners with limited resources (and a large number of new entrants from

previously disadvantaged backgrounds) and are set on being service providers of legal issues. Compliance issues to run an attorney's practice impacts on the sustainability of such practice.

2.5.4 As sole practitioners need to run their whole practice alone, they are under great pressure to manage their time to attend to all issue of compliance, whilst also doing their own administration, research and trying to make a profit.

2.5.5 These issues again tie in with our proposals to have separate regulation for the attorneys' profession and to have certain monetary limits with regard to clients or transaction.

2.6 'Know your client'

2.6.1 It is common course that many clients obtain proof of residence by getting a letter from their local councillor. These letters are obtained without the councillor knowing or trying to establish whether the 'client' is indeed staying in his area. It is suggested that co-operation with the Department of Home Affairs be improved to ensure that accountable institutions can vet the identity and residential address of a potential client. Alternatively, proof of residence should not be required.

2.6.2 Attorneys act on a mandate. The representative's identity is established, as well as the authority to act on behalf of his / her principal. If the principal is a trust or a legal person, the founding document is requested. The requirement that the identity of all directors should also be obtained is cumbersome, time consuming and superfluous.

2.6.3 The LSSA agrees with ASISA and BASA that "domestic prominent influential person" or "foreign prominent public official" is not easily established from the

public domain. It is submitted that FIC provides registers of these persons to allow easy identification.

2.6.4 The LSSA welcomes the assurance and responses from NT and FIC that ‘processes are under way to develop a national risk assessment’.

2.6.5 The LSSA supports the views expressed by ASISA in paragraph 5.2 of their submission.

2.7 Elective provisions of Sections 51, 56 and 58

The LSSA submits that the elective nature of these provisions will create uncertainty and might be misused by relevant officials. These provisions have a double barrel approach which is substantially unreasonable towards accountable institutions.

2.8 Section 26C(2)(a) – ‘at least’

The reason for the inclusion of the words ‘at least’ in this paragraph is unclear. It implies that the Minister can permit much more. This might lead to undue favours and create unacceptable precedents.

3. RESPONSES FROM NATIONAL TREASURY AND THE FINANCIAL INTELLIGENCE CENTRE REGARDING COMMENTS RECEIVED

As far as the responses from NT and FIC regarding comments received are concerned, we wish to submit the following:

3.1 Several of the responses reflect that “guidance will have to provide examples”. The mere fact that guidance will have to be given, indicates that the specific provisions in the Bill are insufficiently described or provided for. Such provisions will create uncertainty in the commercial environment and will put an unbearable burden on the

training institution of attorneys. The training institutions of other sectors will be in a similar position.

- 3.2 The training of personnel of accountable institutions poses a serious threat to such training organisations, as such organisations might be cited as co-defendants should a trained person be sued for damages flowing from incorrect assessment or compliance. It is therefore of great importance that all provisions of the Bill are clear and unambiguous.
- 3.3 The LSSA welcomes the assurance and responses that regulations and exemptions will be amended or removed.
- 3.4 The LSSA also welcomes the assurance and responses that a transitional phase will be introduced and submits that such time period for attorneys should be set in consultation with the attorneys' profession.