

## 8 REPORTING MONEY LAUNDERING AND FINANCING OF TERRORISM

### Please Note:

- › Regulatory requirements are set within this section as *AML/CFT Codes of Practice*.
- › This section contains references to Jersey legislation which may be accessed through the [JFSC website](#).
- › Where terms appear in the Glossary this is highlighted through the use of italic text. The Glossary is available from the [JFSC website](#).

### 8.1 Overview of Section

1. Under the *Proceeds of Crime Law* and *Terrorism Law*, where any person conducting *financial services business* in or from within Jersey forms a knowledge, suspicion, or has reasonable grounds to suspect *money laundering* or the *financing of terrorism* activity relating to business that is conducted in Jersey, then it must report its knowledge or suspicion to the JFCU.
2. Under the *Money Laundering Order*, a law firm undertaking Schedule 2 business must have procedures in place for reporting knowledge or suspicion of *money laundering* or financing terrorism activity to the JFCU.
3. This Section outlines the statutory provisions concerning reporting that apply to: (i) an employee of a *relevant person*; and (ii) a *relevant person*, in the course of carrying on any trade profession or business (including Schedule 2 business). It also sets *AML/CFT Codes of Practice* for and provides guidance to:
  - › employees making a report to their *MLRO* (or *deputy MLRO*) (referred to as **internal SAR**); and
  - › *MLROs* (and *deputy MLROs*) making a report to the JFCU (referred to as an **external SAR**).
4. This section also considers the consent that must be sought from the JFCU before proceeding with a transaction or continuing a business relationship, and application of tipping off provisions.
5. An important precondition for making a report is to know enough about a business relationship or one-off transaction to be able to recognise what is “unusual”. Such knowledge is dependent upon the application of *identification measures* and on-going monitoring.
6. A report may also be based on information from other sources, including law enforcement agencies, other government bodies, the media, or the client.
7. Whilst this Section describes reports made to the JFCU under the *Proceeds of Crime Law* and *Terrorism Law* as SARs, depending on the circumstances such reports may involve knowledge of *money laundering* or the *financing of terrorism*, rather than suspicion (or reasonable grounds for knowledge or suspicion).
8. Additional information on reporting is contained within Part 2 of the *AML/CFT Handbook*.

### 8.2 Reporting Knowledge or Suspicion

#### Overview

9. Legislation deals with reporting by a firm and employee in the course of carrying on a *financial services business* (distinct from other business) in two ways:

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- › There is a **reporting requirement** under Article 34D of the *Proceeds of Crime Law* and Article 21 of the *Terrorism Law* – when a *SAR* must be made when there is knowledge, suspicion or reasonable grounds for suspecting that another person is engaged in *money laundering* or the *financing of terrorism*, or any property constitutes or represents proceeds of criminal conduct, or is or may be terrorist property.
  - › There is **protection for reporting** under Article 32 of the *Proceeds of Crime Law* and under Article 18 of the *Terrorism Law* – when there is suspicion or belief that any property constitutes or represents the proceeds of criminal conduct, or that property is terrorist property. Where the person making the report does any act or deals with the property in any way which would otherwise amount to the commission of a *money laundering* or the *financing of terrorism* offence, the person shall not be guilty of that offence (where certain conditions are fulfilled) where it makes a **protective report**.
10. In practice, a report made in accordance with the **reporting requirement** will also provide **protection**. Take the situation of a firm that knows or suspects, or has reasonable grounds for knowing or suspecting, that property constitutes or represents the proceeds of criminal conduct, and which has possession of that property. It must report its knowledge or suspicion under Article 34D of the *Proceeds of Crime Law*. Where it makes such a report this will also address its suspicion or belief that property constitutes or represents the proceeds of criminal conduct under Article 32 of the *Proceeds of Crime Law* – the effect being that it does not commit a *money laundering* offence under Article 30 (and perhaps also Article 31) of that law.
11. There is also a reporting requirement (Article 34A) and protection for reporting (Article 32) in a case where information or a matter comes to a firm's attention other than in the course of carrying on a *financial services business* (i.e. **any trade, profession, business or employment**). A similar reporting requirement (and protection) may also be found in Articles 19 and 18 of the *Terrorism Law*.
12. Whilst the *Proceeds of Crime Law* and *Terrorism Law* anticipate that a report may be made by an employee directly to the *JFCU*, Article 21 of the *Money Laundering Order* requires that such reporting is made in line with reporting procedures. Such procedures must provide for securing that a report by an employee is made to the *MLRO* (or *deputy MLRO*).
13. Where the *MLRO* (or *deputy MLRO*) resolves to make an external *SAR* as a result of an internal *SAR* made under the *Proceeds of Crime Law* or *Terrorism Law*, Article 21 of the *Money Laundering Order* requires that *SAR* to be made using **the approved** form.
14. A *SAR* made in respect of a business relationship or one-off transaction does not remove the need to make further reports in respect of knowledge or suspicion that subsequently arises in respect of that relationship or one-off transaction (a series of linked transactions).

### 8.2.1 Requirement to Report Knowledge or Suspicion

#### Overview

15. In the course of carrying on a *financial services business*, employees of a firm must raise an internal *SAR* as soon as practicable where they have knowledge or suspicion, or where there are reasonable grounds for having knowledge or suspicion, that:
- › Another person is engaged in *money laundering* or the *financing of terrorism*; or
  - › Property constitutes or represents the proceeds of criminal conduct; or
  - › Property is, or may be, terrorist property.

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16. What may constitute reasonable grounds for knowledge or suspicion will be determined from facts or circumstances from which an honest and reasonable person working in a firm would have inferred knowledge or formed a suspicion (the so called “objective test”<sup>1</sup>).
17. Something which appears unusual is not necessarily suspicious and will likely form the basis for examination. This may, in turn, require judgement to be exercised as to whether something is suspicious.
18. A firm’s *MLRO* (or *deputy MLRO*) must consider all internal *SARs* as soon as practicable.
19. A firm’s *MLRO* (or *deputy MLRO*) must make an external *SAR* as soon as is practicable if he or she knows, suspects or has reasonable grounds for knowing or suspecting, that:
  - › Another person is engaged in *money laundering* or the *financing of terrorism*; or
  - › Property constitutes or represents the proceeds of criminal conduct; or
  - › Property is, or may be, terrorist property.
20. Once an employee has made an internal *SAR*, and provided any additional information that may be requested by the *MLRO* (or *deputy MLRO*), they will have fully satisfied their statutory obligation in respect of the particular information or matter reported.
21. Under the *Proceeds of Crime Law*, the requirement to report applies in relation to the proceeds of criminal conduct which constitutes an offence specified in Schedule 1 of the *Proceeds of Crime Law*, or, if it occurs or has occurred outside Jersey, would have constituted such an offence if occurring in Jersey.
22. Under the *Terrorism Law*, the requirement to report applies in relation to property which is intended to be used or likely to be used for the purposes of terrorism in Jersey or elsewhere or for the support of a terrorist entity in Jersey or elsewhere.
23. Other than in the course of carrying on a *financial services business* (i.e. any other trade, profession or business carried on by a firm), employees of a firm must also raise an internal *SAR* where they have knowledge or suspicion that another person is engaged in *money laundering* or the *financing of terrorism* - where information or other matter on which knowledge or suspicion is based comes to them in the course of their employment. This will be so irrespective of the underlying nature of the business that is carried on, and irrespective of whether or not the business is being carried out on behalf of another person, e.g. under an outsourcing arrangement.
24. Where an *MLRO* who is part of a group receives information relating to suspicious activities within that group but with no specific Jersey connection, such information is not considered to have come to the *MLRO* in the course of carrying on a *financial services business*. This means that such matters, in the absence of a specific Jersey connection, are not required to be reported.

#### Statutory Requirements

25. Under Article 34D(4) of the *Proceeds of Crime Law*, a relevant person and employee of that relevant person are required to make a report where two conditions are fulfilled.
26. The first is that they know, suspect or have reasonable grounds for suspecting that:
  - › Another person is engaged in *money laundering* or the *financing of terrorism*; or
  - › Any property constitutes or represents the proceeds of criminal conduct.

<sup>1</sup> See [Part 2](#) of the AML/CFT Handbook.

27. *The second is that the information or matter on which the knowledge or suspicion is based, or which gives reasonable grounds for suspicion, comes to them in the course of the carrying on of a financial services business.*
28. *Such a report must be made to a designated police officer or designated customs officer (or, in the case of an employee, to the relevant person's MLRO (or deputy MLRO)), delivered in **good faith**, and made as soon as is practicable after the information or other matter on which the knowledge or suspicion is based, or which gives reasonable grounds for suspicion, comes to their attention.*
29. *However, under Article 34D(5) of the Proceeds of Crime Law, a person does not commit an offence if they have a reasonable excuse for not disclosing the information or other matter, or the person is a professional legal adviser and the information or other matter comes to them in the circumstances of legal privilege (except items held with the intention of furthering a criminal purpose).*
30. *Under Article 34D(6) of the Proceeds of Crime Law, an employee of a relevant person does not commit an offence of failing to disclose if he or she has not been given material training and, as a result, did not know or suspect that the other person was engaged in money laundering or the financing of terrorism.*
31. *Under Article 34D(9) of the Proceeds of Crime Law, a report made to a designated police officer or designated customs officer (or to the relevant person's MLRO or deputy MLRO) shall not be treated as a breach of any restriction imposed by statute, contract or otherwise.*
32. *When considering a report made under the Proceeds of Crime Law or Terrorism Law, Article 21(2) and (3) of the Money Laundering Order states that, if the MLRO (or deputy MLRO) knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering or the financing of terrorism, he or she must report to a designated police officer or designated customs officer as soon as is practicable using the **approved form**. Inter alia, delivery of the **approved form** must comply with the requirements (including those in respect of delivery) indicated on the **approved form**.*
33. *Subsequent to making a report, Article 21(4) of the Money Laundering Order requires a MLRO (or deputy MLRO) to provide a designated police officer or designated customs officer (within a set period of time) with such additional information relating to that report as may reasonably be requested.*
34. *A person who fails to make a report under Article 34D of the Proceeds of Crime Law is liable to imprisonment for a term not exceeding 5 years or to a fine or to both. An individual who fails to make a report using the **approved form** under Article 21(2) of the Money Laundering Order is liable to imprisonment for a term not exceeding 2 years or to a fine or to both. A body corporate who fails to make a report using the **approved form** under Article 21(2) of the Money Laundering Order is liable to a fine.*
35. *Article 34A of the Proceeds of Crime Law contains a similar requirement to report. In a case where a relevant person, or employee, knows or suspects that another person is engaged in money laundering or the financing of terrorism and the information or other matter on which that knowledge or suspicion is based comes to their attention in the course of **any trade, profession, business or employment** (other than carrying on of a financial services business), they must report that knowledge or suspicion and information or other matter to a police officer (or, in the case of an employee, to the relevant person's MLRO (or deputy MLRO)), in good faith and as soon as is practicable after the information or other matter comes to their attention.*

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36. *Under Article 34A(3) of the Proceeds of Crime Law, a report made to a designated police officer or designated customs officer (or to the relevant person's MLRO or deputy MLRO) under Article 34A shall not be treated as a breach of any restriction imposed by statute, contract or otherwise.*
37. *Article 8 of the Money Laundering Order requires a relevant person to ensure that the MLRO (or deputy MLRO) has timely access to all records that are necessary or expedient for the purpose of performing his or her functions as a reporting officer, including, in particular, the records that a relevant person must keep under Article 19.*
38. *"Criminal conduct" is defined in Article 1(1) of the Proceeds of Crime Law as conduct that constitutes an offence specified in Schedule 1, or, if it occurs outside Jersey, would have constituted such an offence if occurring in Jersey.*
39. *Articles 19 to 22 of the Terrorism Law contain similar reporting requirements in respect of the financing of terrorism.*
40. *In particular, Article 21 of the Terrorism Law requires a relevant person and employee of that relevant person to make a report where two conditions are fulfilled.*
41. *The first is that they know, suspect or have reasonable grounds for suspecting that:*
  - › *Another person is engaged in the financing of terrorism; or*
  - › *Any property is, or may be, terrorist property.*
42. *The second is that the information or matter on which the knowledge or suspicion is based, or which gives reasonable grounds for suspicion, **comes to them in the course of the carrying on of a financial services business.***
43. *Terrorist property is defined in Article 3 of the Terrorism Law to mean property which is intended to be used, or likely to be used, for the purposes of terrorism or support of a terrorist entity. A terrorist entity is an entity which commits, prepares or instigates an act of terrorism or facilitates the commission, preparation or instigation of an act of terrorism.*
44. *The meaning of "terrorism" is defined in Article 2 of the Terrorism Law and the meaning of "terrorist entity" is defined in Article 4.*

### 8.2.2 Protective Report

#### Overview

45. In the course of carrying on its business, employees of a firm will raise an internal SAR in order to be protected where they suspect or believe that:
  - › Property constitutes or represents the proceeds of criminal conduct;
  - › Property is terrorist property; or
  - › They are providing a service for the purposes of terrorism or for the support of a terrorist entity.
46. This will be so **irrespective of the underlying nature of the business that is carried on**, and irrespective of whether or not the business is being carried out on behalf of another person, e.g. under an outsourcing arrangement.
47. A firm's MLRO (or deputy MLRO) must consider all internal SARs as soon as practicable.
48. Under the Proceeds of Crime Law, a firm's MLRO (or deputy MLRO) will make an external SAR before the firm does a particular act, or as soon as reasonably practicable after the person has done the act in order to be protected.

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49. Under the *Terrorism Law*, a firm's *MLRO* (or *deputy MLRO*) will make an external SAR before the firm does a particular act or as soon as reasonably practicable after the person becomes involved in the transaction or arrangement.
50. In most cases, where the person making the report does any act or deals with the property in any way which would otherwise amount to the commission of a *money laundering* or the *financing of terrorism* offence, the person shall not be guilty of that offence (where certain conditions are fulfilled) where it makes such a protective report.
51. Under the *Proceeds of Crime Law*, protection for reporting applies in relation to the proceeds of criminal conduct which constitutes an offence specified in Schedule 1 of the *Proceeds of Crime Law*, or if it occurs, or has occurred, outside Jersey, would have constituted such an offence if occurring in Jersey.
52. Under the *Terrorism Law*, protection for reporting applies in relation to property which is intended to be used or likely to be used for the purposes of terrorism in Jersey or elsewhere or for the support of a terrorist entity in Jersey or elsewhere.
53. In this section for the purpose of Article 21 of the Money Laundering Order "approved form" means the form approved by the Minister, which could be changed from time to time.

#### Statutory Requirements

54. Where a relevant person and employee of a relevant person suspect or believe that any property constitutes or represents the proceeds of criminal conduct and make a report to a police officer (or to the relevant person's *MLRO* or *deputy MLRO*) under Article 32 of the *Proceeds of Crime Law*, they will not have committed a money laundering offence if the report is made in **good faith** and either:
- › If the report is made before the person does the act in question, the act is done with the consent of a police officer; or
  - › If the report is made after the person does the act in question, it is made on the person's own initiative and as soon as reasonably practicable after the person has done the act in question.
55. In proceedings against a person for an offence under Article 30 of the *Proceeds of Crime Law*, it shall be a defence under Article 32(7) to provide that the alleged offender intended to make a report and there is a reasonable excuse for the failure to have made a report.
56. Under Article 32(2) of the *Proceeds of Crime Law*, a report made to a police officer (or to the relevant person's *MLRO* or *deputy MLRO*) under Article 32 shall not be treated as a breach of any restriction imposed by statute, contract or otherwise, and shall not involve the person making it in liability of any kind.
57. When considering a report made under the *Proceeds of Crime Law* or *Terrorism Law*, Article 21(2) and (3) of the *Money Laundering Order* states that, if the *MLRO* (or *deputy MLRO*) knows or suspects that another person is engaged in money laundering or financing of terrorism, he or she must report to a designated police officer or designated customs officer as soon as is practicable using the approved form. Inter alia, delivery of the approved form must comply with the requirements (including those in respect of delivery) indicated on the approved form.
58. Subsequent to making a report, Article 21(4) of the *Money Laundering Order* requires a *MLRO* (or *deputy MLRO*) to provide a designated police officer or designated customs officer (within a set period of time) with such additional information relating to that report as may reasonably be requested.

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59. An individual who fails to make a report using the *approved* form under Article 21(2) of the Money Laundering Order is liable to imprisonment for a term not exceeding 2 years or to a fine or to both. A body corporate who fails to make a report using the *approved* form under Article 21(2) of the Money Laundering Order is liable to a fine.
60. Article 8 of the Money Laundering Order requires a relevant person to ensure that the MLRO (or deputy MLRO) has timely access to all records that are necessary or expedient for the purpose of performing his or her functions as a reporting officer, including, in particular, the records that a relevant person must keep under Article 19.
61. "Criminal conduct" is defined in Article 1(1) of the Proceeds of Crime Law as conduct that constitutes an offence specified in Schedule 1, or, if it occurs outside Jersey, would have constituted such an offence if occurring in Jersey.
62. Article 18 of the Terrorism Law contains similar provisions in circumstances where the financing of terrorism offences would otherwise be committed. In particular:
- › Article 18(1) provides that no financing of terrorism offence is committed if a person is acting with the express consent of a police officer or customs officer.
  - › Article 18(2) provides that no financing of terrorism offence is committed if a person discloses a suspicion or belief that property is terrorist property after they have become involved in a transaction or arrangement to a police officer or customs officer in good faith and as soon as reasonably practicable.
  - › Article 18(3) provides that no financing of terrorism offence is committed if a person discloses a suspicion or belief to a police officer or customs officer that a service is being, or is to be, provided for the purposes of terrorism or for the support of a terrorist entity, after they have become involved in a transaction or arrangement, in good faith and as soon as reasonably practicable.
63. However, unlike the Proceeds of Crime Law, an employee who makes a report to the relevant person's MLRO or deputy MLRO may still be charged with an offence. In such a case, it will be a defence under Article 18(8) for the employee to prove that a report was made in good faith and in accordance with the employer's procedures.

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### 8.2.3 What Constitutes Knowledge or Suspicion

#### Guidance Notes

64. The three mental elements of knowledge, suspicion, and reasonable grounds for suspicion, which are relevant to statutory offences are not terms of art and are not defined within the statutes. However, case law has provided some guidance on how they should be interpreted.

#### 8.2.4 Knowledge

65. Knowledge means actual knowledge. There is some suggestion that wilfully shutting one's eyes to the truth may amount to knowledge. However, the current general approach from the criminal courts is that nothing less than actual knowledge will suffice.

#### 8.2.5 Suspicion

66. The term 'suspects' is one which the court has historically avoided defining; however because of its importance in English criminal law, some general guidance has been given. In the case of *Da Silva* [1996] EWCA Crim 1654, Longmore LJ stated:
- 'It seems to us that the essential element in the word "suspect" and its affiliates, in this context, is that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice.'

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67. There is no requirement for the suspicion to be clear or firmly grounded on specific facts, but there must be a degree of satisfaction, not necessarily amounting to belief, but at least extending beyond speculation.
68. The test for whether a person holds a suspicion is an objective one. If someone thinks a transaction is suspicious, they are not expected to know the exact nature of the criminal offence or that particular funds were definitely those arising from the crime. They may have noticed something unusual or unexpected and, after making enquiries, the facts do not seem normal or make commercial sense. There does not have to be evidence that *money laundering* is taking place for there to be a suspicion.
69. The meaning of suspicion detailed above was also confirmed by the Court of Appeal in the case of *K v NatWest [2006] EWCA Civ 1039*.
70. If someone has not yet formed a suspicion, but they have cause for concern, a firm may choose to ask the client or others more questions. This choice depends on what is already known, and how easy it is to make enquiries.
71. If there is a belief that a client is innocent, but there are suspicions that another party to a transaction is engaged in *money laundering*, a firm may need to consider referring the client for specialist advice regarding the risk that they may be a party to one of the principal offences.
72. Sections 2.3.1.1 and 3.3.4 of this Handbook contains a number of standard warning signs which increase the vulnerabilities of law firms and which may give cause for concern. However, whether someone has a suspicion is a matter for their own judgement.

#### 8.2.6 Reasonable Grounds to Suspect: the Objective Test of Knowledge or Suspicion

73. Articles 30 and 31, when read with Article 29 of the *Proceeds of Crime Law* and Articles 15 and 16 of the *Terrorism Law* provide for an offence to be committed when dealing, using, concealing etc with criminal or terrorist property where there are reasonable grounds to know or suspect that property represents the proceeds of crime or terrorist property.
74. This means that a person would commit an offence even if they did not know or suspect that a *money laundering* offence was being committed, if they had reasonable grounds for knowing or suspecting that it was. In other words, were there factual circumstances from which an honest and reasonable person, engaged in a similar business, should have inferred knowledge or formed the suspicion that another was engaged in *money laundering*, or was there knowledge of circumstances which would put an honest and reasonable person on enquiry.

### 8.3 Procedures for Reporting

#### Overview

75. Reporting procedures provide the interface between *CDD* measures carried out by a firm and the work of the *JFCU*'s intelligence wing. Like all *policies and procedures*, they should be drafted in a way that can be readily understood by employees, should be tailored to the firm's risk assessment, and applied in every case where functions are outsourced (in line with Section 2.4.4 of this Handbook).

#### Statutory Requirements

76. *Article 21 of the Money Laundering Order requires that a relevant person must establish and maintain reporting procedures which:*
  - › *communicate to employees the identity of the MLRO (and any deputy MLROs) to whom an internal SAR is to be made;*

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- › provide for that report to be considered by the MLRO (or a deputy MLRO) in the light of all other relevant information for the purpose of determining whether or not the information or other matter contained in the report gives rise to knowledge, suspicion or reasonable grounds for knowledge or suspicion that another person is engaged in money laundering or the financing of terrorism;
- › allow the MLRO (or a deputy MLRO) to have access to all other information which may be of assistance in considering the report;
- › provide for the information or other matter contained in an internal SAR to be disclosed as soon as is practicable by the MLRO (or deputy MLRO) to a designated police officer or designated customs officer using the approved form, where the MLRO (or deputy MLRO) knows, suspects or has reasonable grounds to know or suspect that another person is engaged in money laundering or the financing of terrorism; and
- › provide for additional information relating to a report to be given by the MLRO (or deputy MLRO) to a designated police officer or designated customs officer.

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77. Article 22 of the Money Laundering Order states that if a deputy MLRO, on considering an internal SAR, concludes that it does not give rise to knowledge, suspicion or reasonable grounds for knowledge or suspicion that another person is engaged in money laundering or the financing of terrorism, the deputy MLRO need not forward it to the MLRO. If a deputy MLRO, on considering a report, has concluded that it does give rise to knowledge, suspicion or reasonable grounds for knowledge or suspicion that another person is engaged in money laundering or the financing of terrorism, although the SAR must still be forwarded to the MLRO, the MLRO need not consider that question. The effect of this is to require a report to be forwarded to the MLRO only in a case where the deputy MLRO is not able to come to a conclusion.

### 8.3.1 Internal SARs

#### AML/CFT Codes of Practice

78. In addition to the reporting procedures that must be maintained under Article 21 of the *Money Laundering Order*, a firm must maintain procedures that:
- › highlight that reporting requirements extend to business relationships and one-off transactions that are declined (i.e. where no business relationship is established or transaction carried out);
  - › highlight that internal SARs are to be made regardless of the amount involved in a transaction or relationship and regardless of whether, amongst other things, it is thought to involve tax matters;
  - › highlight the importance attached to making an internal SAR as soon as practicable;
  - › require internal SARs to be made in a set format and to include as full a statement as possible of the information or matter giving rise to knowledge, suspicion or reasonable grounds for knowledge or suspicion, date that the information or matter came to the employee's attention, and full details of the client, transaction or activity that it has on its records;
  - › require internal SARs to be acknowledged by the MLRO (or a deputy MLRO) as soon as is practicable;
  - › require the MLRO (or deputy MLRO) to record all internal SARs in a register (including details of the date of the internal SAR, identity of the individual making the internal SAR, and information to allow supporting documentation to be retrieved on a timely basis).

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79. A firm must not allow internal SARs to be filtered by line management such that they do not reach the *MLRO* (or *deputy MLRO*). Where procedures allow employees to discuss relationships and transactions with line managers before an internal SAR is made, they must emphasise that the decision on reporting remains with that employee.
80. A firm must establish and maintain arrangements for disciplining any employee who fails, without reasonable excuse, to make an internal SAR where he or she has knowledge, suspicion or reasonable grounds for knowledge or suspicion, or does not do so as soon as is practicable.

#### Guidance Notes

81. A firm may demonstrate that it has established and maintained arrangements for disciplining employees by ensuring that employment contracts and employment handbooks provide for the imposition of disciplinary sanctions for failing to report knowledge, suspicion or reasonable grounds for knowledge or suspicion without reasonable excuse, or as soon as it is practicable.
82. A firm may demonstrate that employees make internal SARs as soon as practicable where the *MLRO* (or *deputy MLRO*) periodically considers (by business area if appropriate):
- › The period of time between information or a matter coming to an employee's attention and the date of the internal SAR and concludes that it is reasonable.
  - › The number and content of internal SARs, and concludes that both are consistent with the firm's business risk assessment.

#### 8.3.2 External SARs

##### Overview

83. The *MLRO* (or *deputy MLRO*) must consider each internal SAR. In order to do so, the *Money Laundering Order* requires that the *MLRO* (or *deputy MLRO*) has access to all necessary records. The *MLRO* (or *deputy MLRO*) may also require further information to be obtained from the client. Any such approach will need to be made sensitively and probably by someone other than the *MLRO* (or *deputy MLRO*) to minimise the risk of alerting the client that a report to the *JFCU* may be being considered (though this may not yet be tipping off).
84. When considering an internal SAR, the *MLRO* (or *deputy MLRO*), taking account of the risk posed by the transaction or activity being addressed, will need to strike the appropriate balance between the requirement to make a report to the *JFCU* as soon as practicable, especially if consent is required, and any delay that might arise in searching a number of unlinked systems and records that might hold relevant information.

#### AML/CFT Codes of Practice

85. In addition to reporting procedures that must be maintained under Article 21 of the *Money Laundering Order*, a firm must maintain procedures that:
- › Require the *MLRO* (or *deputy MLRO*) to document all enquiries made in relation to each internal SAR.
  - › Require the *MLRO* (or *deputy MLRO*) to document the basis for reporting to the *JFCU* or deciding not to make such a report, which must be retained with the internal SAR.
  - › Require the *MLRO* (or *deputy MLRO*) to record all external SARs in a register (including the date of the report and information to allow supporting documentation to be retrieved on a timely basis).
  - › Require the *MLRO* (or *deputy MLRO*) to inform the *JFCU* where relevant information is subsequently discovered.

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#### Guidance Notes

86. A firm may demonstrate that an internal *SAR* is considered in light of all other relevant information when it considers:
- › The business and risk profile for the subject of the report.
  - › The complexity and duration of the business relationship.
  - › Transaction patterns and volumes, and previous patterns of instructions.
  - › Any connected matters or relationships. Connectivity can arise through commercial connections, e.g. linked transactions or common referrals, or through individuals, e.g. third parties, beneficial owners and controllers or account signatories.
  - › The risk that assets will dissipate.
87. A firm may demonstrate that the *MLRO* (or *deputy MLRO*) reports as soon as practicable where senior management considers:
- › The typical period of time taken by the *MLRO* (or *deputy MLRO*) to process an internal *SAR* (being the period between the date of the internal *SAR* and date of the external *SAR* (or decision taken not to report)).
  - › The number of internal *SARs* not processed within a period of time set by senior management, together with an explanation.

## 8.4 JFCU Consent

### Overview

88. Protective reports before or after doing an act are not equal options which a firm can choose between.
- › A report should be made **before doing an act** where a client instruction is received prior to an activity or transaction taking place, or arrangements being put in place. However, when an activity or transaction which gives rise to concern has already been actioned and where a delay would lead to a breach of a contractual obligation, the *MLRO* (or *deputy MLRO*) may need to let the activity or transaction proceed and report it later.
  - › A report should be made **after doing an act** where something appears suspicious only with the benefit of hindsight or following the receipt of additional information.
89. The receipt of a protective report concerning an act (transaction or activity) that has already occurred in an established business relationship (the continuation of which is considered to be another future act) will be acknowledged by the *JFCU*, and in the absence of any instruction to the contrary from the *JFCU*, a firm will generally be provided with consent to maintain the client relationship (the future act) under normal commercial circumstances (referred to as consent to operate normally). However, receipt of such consent from the *JFCU* in these circumstances does not indicate that the knowledge or suspicion is with or without foundation, and other future acts (transactions or activity) should continue to be monitored and reported, as appropriate.
90. In the vast majority of cases in which an external *SAR* is made, consent to continue an activity, process a transaction, or continue a business relationship is provided by the *JFCU* within seven working days of receipt of a report (indeed, the *JFCU* responds within two working days in the majority of cases). However, it should be noted that the *JFCU* is not obligated to provide consent within a particular time frame, or at all.

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91. Consent may be delayed where information is required by the *JFCU* from an overseas financial intelligence unit. Consent may also be withheld where the report lacks sufficient detail to allow the *JFCU* to form a view on consent.
92. While waiting for the *JFCU* to provide consent to proceed with an activity or transaction (where it is necessary for consent to be provided), or in the event that the *JFCU* notifies a firm that consent will not be given, a firm should be aware of the risk of committing a tipping off offence where it fails to act on a client's instruction.
93. Where a firm is refused consent it should contact the *JFCU* for guidance on what, if any, information can be provided to the client (though the *JFCU* is not obligated to provide such guidance). In circumstances where consent is withheld, the *JFCU* may expressly allow the firm to notify the client of the fact that they are the subject of a police investigation without the risk of committing a tipping off offence. Such notification will not be sanctioned by the *JFCU* where it might prejudice a domestic or overseas investigation.
94. Where a firm does not wish to act upon a client's instruction, this may lead to civil proceedings being instituted by the client for breach of contract. It may be necessary in circumstances where a client has instigated civil proceedings for a firm to seek the directions of the court.
95. A firm may reduce the potential threat of civil proceedings by ensuring that clients' terms of business specifically:
  - › Allowing an instruction to be delayed or deferred, pending investigation.
  - › Exclude breaches in circumstances where following a client instruction may lead to the firm committing an offence.

## 8.5 Tipping Off

### Overview

96. Except where otherwise provided, where a person knows or suspects that a *SAR* has been or will be made, a person will commit a tipping off offence where they disclose to another person:
  - › The fact that they have made, or will make, an internal or external *SAR*; or
  - › Any information relating to such a *SAR*.
97. Except where otherwise provided, where a person knows or suspects that the Attorney General or any police officer is acting or proposing to act in collection with a criminal investigation that is, or is about to be, conducted into *money laundering* or the *financing of terrorism*, a person will commit a tipping off offence where it:
  - › Discloses to another person any information relating to the investigation; or
  - › Interferes with material which is likely to be relevant to such an investigation.
98. Inter alia, the effect of this is that a firm or employee of a firm:
  - › Cannot, at the time, tell a client that a transaction or activity is being delayed because an internal *SAR* is about to be made or has been made to the *MLRO* (or *deputy MLRO*).
  - › Cannot, at the time, tell a client that a transaction or activity is being delayed because an external *SAR* is about to be made or awaiting consent from the *JFCU*.
  - › Cannot later tell a client that a transaction or activity was delayed because an internal or external *SAR* had been made.
  - › Cannot tell the client that law enforcement is conducting an investigation.

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99. However, a tipping off offence is not committed when a firm discloses: that an internal SAR has been made; that it will make, or has made, an external SAR; information relating to such SARs; or information relating to a criminal investigation to its:
- › **Lawyer** - in order to obtain legal advice or for the purpose of legal proceedings (except where the disclosure is made with a view to furthering a criminal purpose); or
  - › **Accountant** – for the purpose of enabling the accountant to provide certain services, e.g. in order to provide information that will be relevant to the statutory audit of a firm’s financial statements (except where the disclosure is made with a view to furthering a criminal purpose).
100. Nor is a tipping off offence committed when a **lawyer** discusses that disclosure with its client where this is in connection with the provision of legal advice or for the purpose of actual or contemplated legal proceedings (except where the discussion is with a view to furthering a criminal purpose). **However, no similar provision is made for an accountant to discuss the disclosure with its client.**
101. In addition, a tipping off offence will not be committed where a disclosure is permitted under the Proceeds of Crime and Terrorism (Tipping Off – Exceptions) (Jersey) Regulations 2014 (the **Tipping Off Regulations**) – a **protected disclosure**. So long as a disclosure meets conditions that are set in the *Tipping Off Regulations*, a disclosure will be a protected disclosure where it is:
- › Made as a result of a legal requirement;
  - › Made with the permission of the JFCU;
  - › Made by an employee of a person to another employee of the same person;
  - › A disclosure within a financial group or network;
  - › Made to another *relevant person* (but not an *equivalent business*); or
  - › Made to the *Commission*.
102. Except where a disclosure is made pursuant to a legal requirement or with the permission of the JFCU, a disclosure will not be a protected disclosure under the *Tipping Off Regulations* unless it is made in good faith for the purpose of preventing or detecting *money laundering or the financing of terrorism*.
103. Whereas the *Tipping Off Regulations* permit disclosure of the fact that a SAR has been or will be made and/or any information relating to the SAR, they do not permit the **SAR form** or copy of the **SAR form** to be disclosed (except where done pursuant to a legal requirement or by one employee of a person to another employee of that person within Jersey).
104. In a case where a firm:
- › Is the client of a financial institution or designated non-financial business or profession (A) that is not a *relevant person*; and
  - › Is acting for one or more third parties; and
  - › Has undertaken to make a disclosure to A when it makes a SAR in respect of any of those third parties,
- a tipping off offence is committed other than where such a disclosure is made with the permission of the JFCU.
105. Care should be exercised where a person is also subject to legislation in force outside Jersey. Notwithstanding that a disclosure may be a protected disclosure under the *Tipping Off Regulations*, this protection will not extend to an offence that is committed where a disclosure is not permitted under that other legislation.

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106. In this section, a reference to a “disclosure” is to the disclosure of matters related to a SAR, or an investigation (and not the disclosure of suspicion or knowledge through a SAR).

#### Statutory Requirements

107. *Article 35(4) of the Proceeds of Crime Law and Article 35(4) of the Terrorism Law make it an offence to disclose the fact that a SAR has been or will be made, or any information otherwise relating to such a SAR, if a person knows or suspects that a SAR has been, or will be, made - except if the disclosure is a **protected disclosure** under the Tipping Off Regulations.*
108. *Article 35(2) of the Proceeds of Crime Law and Article 35(2) of the Terrorism Law make it an offence to disclose any information relating to an investigation, or to interfere with material which is likely to be relevant to such an investigation, where a person knows or suspects that the Attorney General or any police officer is acting or proposing to act in connection with money laundering or the financing of terrorism investigation - except if the disclosure is a **protected disclosure** under the Tipping Off Regulations.*
109. *It is a defence under Article 35(5) of both the Proceeds of Crime Law and Terrorism Law for a person charged with an offence to prove that they had a reasonable excuse for the disclosure or interference.*
110. *However, Articles 35(2) and (4) do not apply to the disclosure of an investigation or SAR which is made by a relevant person to:*
  - › *a professional legal adviser in connection with the provision of legal advice or for the purpose of actual or contemplated legal proceedings; or*
  - › *an accountant for the purpose of enabling that person to provide external accounting services, tax advice, audit services or insolvency services,**so long as it is not made with a view to furthering a criminal purpose*
111. *A person who is guilty of an offence under Article 35 is liable to imprisonment for a term not exceeding 5 years or a fine, or to both.*
112. *Regulation 2 of the Tipping Off Regulations lists disclosures that are protected disclosures. A disclosure will be protected where:*
  - › *It is made in good faith for the purpose of preventing or detecting money laundering or the financing of terrorism and it falls with any of the cases specified in Regulations 3 to 7.*
  - › *It is made in good faith for the purpose of preventing or detecting money laundering or the financing of terrorism and it is made to a person’s MLRO (or deputy MLRO).*
  - › *It is required to be made by statute in Jersey or law elsewhere.*
  - › *It is made with the permission of the JFCU.*
113. *A disclosure that is required to be made by statute or law may include transmission of **the form** used to make a SAR (or copy thereof).*
114. *Regulation 3 of the Tipping Off Regulations permits an employee of a relevant person (“D”) to make a disclosure to another employee of the same person (“R”). Such a disclosure may include transmission of **the form** used to make a SAR (or copy thereof) so long as the recipient of the disclosure is a person within Jersey. Such a disclosure may also include the name of the individual who has made the internal SAR.*
115. *Where a further disclosure is made by R in accordance with the Tipping Off Regulations (other than under Regulation 3), it may **not** disclose the identity of D.*

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116. Regulation 4 of the Tipping Off Regulations permits a relevant person and employee of such a person ("D") to make a disclosure to a person in another part of its financial group or with whom D shares common ownership, management or compliance control ("R"). Such a disclosure may **not** include transmission of **the form** used to make a SAR (or copy thereof). **Nor** may it disclose the identity of the individual who has made the internal SAR.
117. Where a further disclosure is made by R in accordance with the Tipping Off Regulations, it may not disclose the identity of D, where D is an individual.
118. Regulation 5 of the Tipping Off Regulations permits a relevant person and employee of such a person ("D") to make a disclosure to another relevant person ("R") where the disclosure relates to a person who is a customer (or former customer) of both D and R, or relates to a transaction, or provision of a service, including both D and R. Such a disclosure may **not** include transmission of **the form** used to make a SAR (or copy thereof). **Nor** may it disclose the identity of the individual who has made the internal SAR.
119. Where a further disclosure is made by R in accordance with the Tipping Off Regulations, it may not disclose the identity of D nor D's MLRO (or deputy MLRO).
120. Regulation 6 of the Tipping Off Regulations permits a relevant person and employee of a relevant person to make a disclosure to any of the following:
  - › A customs officer, a police officer or any employee of the JFCU.
  - › The Commission.
121. Where a further disclosure is made by any of the above in accordance with the Tipping Off Regulations (other than under Regulation 6), it may not disclose the identity of the relevant person, except where the recipient is a customs officer, a police officer, any employee of the JFCU, or the Commission.

#### AML/CFT Code of Practice

122. In addition to reporting procedures that must be maintained under Article 21 of the *Money Laundering Order*, a firm must maintain procedures that remind employees making internal SARs of the risk of committing a tipping off offence.

#### 8.5.1 CDD Measures

##### Overview

123. Article 13(1) of the *Money Laundering Order* requires identity to be found out and evidence of identity obtained **before** the establishment of a business relationship or **before** carrying out a one-off transaction, except in some limited circumstances. Article 13(1)(c) of the *Money Laundering Order* further requires that *identification measures* be applied, where a firm suspects *money laundering* or *the financing of terrorism* (at any time) or has doubts about the veracity or adequacy of documents, data or information previously obtained under *CDD* measures during the course of a business relationship.
124. Where a firm suspects *money laundering* or *the financing of terrorism*, the application of *identification measures* could unintentionally lead to the client being tipped off, where the process is managed without due care.
125. In circumstances where an external SAR has been made, and where there is a requirement to conduct *identification measures*, the risk of tipping off a client (and its advisers) may be minimised by:
  - › Ensuring that employees applying *identification measures* are aware of tipping off provisions and are provided with adequate support, such as specific training or assistance.

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- › Obtaining advice from the JFCU where a firm is concerned that applying *identification measures* will lead to the client being tipped off.
126. Where a firm reasonably believes that the application of *identification measures* could lead to the client being tipped off, then under Article 14(6) of the *Money Laundering Order* it is not necessary to apply such measures, where an external SAR has been made and the JFCU has agreed that the measures need not be applied.
127. Reasonable enquiries of a client conducted in a tactful manner regarding the background to a transaction or activity that is inconsistent with the usual pattern of transactions of activity is prudent practice, forms an integral part of *CDD* measures, and should not give rise to the tipping off offence.

#### 8.5.2 Terminating a Business Relationship

##### Overview

128. The giving of consent by the JFCU following an external SAR is not intended to override normal commercial judgement, and a firm is not committed to continuing a business relationship with a client if such action would place the firm at commercial risk.
129. A decision to terminate a business relationship is essentially a commercial decision (except where there is a requirement to do so under Article 14 of the *Money Laundering Order*), and a firm must be free to make such judgements. However, in certain circumstances, a firm should consider liaising with the JFCU to consider whether it is likely that termination would alert the client or affect an investigation in any way. If there is continuing suspicion and there are funds which need to be returned to the client, a firm should seek advice from the JFCU.

#### 8.6 Disclosure to Group Companies and Networks

##### Overview

130. Whereas the focus of the *Money Laundering Order* is on the role that a particular *relevant person* has in preventing and detecting *money laundering* and *the financing of terrorism*, where a firm is part of a group or larger network, it is important that it should be able to play its part in the prevention and detection of *money laundering* and *the financing of terrorism* at group or network level.
131. Accordingly, it is important that there should be no legal impediment to providing certain information to a group company or network.
132. Where a firm also wishes to disclose information to another *relevant person* (something that is anticipated under the *Tipping Off Regulations*), it will first be necessary to ensure that there is a proper basis for doing so, e.g. it has the consent of its client to do so in certain circumstances.

##### Statutory Requirements

133. Article 22A of the *Money Laundering Order* allows a *relevant person* to disclose the following to any person or institution with which the *relevant person* shares common ownership, management or compliance control, or (where different) any person within the same financial group, where such disclosure is appropriate for the purpose of preventing and detecting money laundering and the financing of terrorism:
- › Information contained in any report made to the MLRO (or deputy MLRO).
  - › Information provided to the JFCU that is in addition to that contained in an external SAR.
  - › Any other information that is kept under the *Money Laundering Order*.

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134. *Article 1(5) of the Money Laundering Order states that a person is a member of the same financial group as another person if there is, in relation to the group, a parent company or other legal person that exercises control over every member of that group for the purposes of applying group supervision under:*
- › *the Core Principles for Effective Banking Supervision published by the Basel Committee on Banking Supervision;*
  - › *the Objectives and Principles of Securities Regulation issued by IOSCO; or*
  - › *the Insurance Supervisory Principles issued by the International Association of Insurance Supervisors.*

## 8.7 Investigation and the Use of Court Orders

### Overview

135. Following the receipt of a disclosure and initial enquiries by the JFCU, reports are allocated to financial investigation officers for further investigation. Intelligence from reports submitted to the JFCU is then disseminated to other intelligence agencies, as appropriate.
136. Where additional information is required from a reporting institution following a SAR, it will generally be obtained pursuant to a production order issued by the Royal Court under *Proceeds of Crime Law*, *Terrorism Law*, *Investigation of Fraud (Jersey) Law 1991* and the *Criminal Justice (International Co-operation) (Jersey) Law 2001*, or a customer monitoring order under the *Terrorism Law*. It is a criminal offence to fail to comply with the terms of any order.
137. During the course of an investigation, a firm may be served with an order designed to restrain particular funds or property pending the outcome of an investigation. It should be noted that the restraint order may not apply to all funds or assets involved within a particular business relationship and a firm should consider what, if any, property may be utilised subject to having obtained the appropriate consent from the JFCU.
138. Upon the conviction of a defendant, a court may order the confiscation of their criminal proceeds or the confiscation of assets to a value representing the benefit of their criminal conduct, which may require the realisation of legitimately obtained assets. A firm may be served with a confiscation order in relation to any funds or property belonging to that defendant. For example, if a person is found to have benefited from drug dealing to a value of £100,000, then the court may order the confiscation of any assets belonging to that person to a value of £100,000. Confiscation of the proceeds of criminal conduct is becoming common place within many jurisdictions, and legislation in place in Jersey provides a mechanism by which overseas criminal confiscation orders may be recognised. Overseas civil confiscation orders may also be recognised in Jersey.
139. Property may also be forfeited in Jersey utilising civil proceedings under the *Terrorism Law*.
140. From time to time, with a view to obtaining additional intelligence, the JFCU will issue general liaison notices to all *relevant persons*, or to a particular category of business. The JFCU will ensure that the requests contained within such notices are proportionate and reasonable in the circumstances. Firms are requested to respond with any relevant information as soon as is reasonably practicable.

### 8.7.1 Feedback from the JFCU

#### Overview

141. Because a significant proportion of SARs received by the JFCU relate to the accounts or transactions of non-Jersey residents and so are disseminated to overseas intelligence agencies,

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it may not be possible for the JFCU to provide regular feedback on individual disclosures. However, on a regular basis, the JFCU will provide statistics, trends and advice to enhance the quality of disclosures, or issue periodic newsletters. In addition the States of Jersey Police Annual Report contains some information on disclosures, prosecutions and confiscations.

## 8.8 Legal professional privilege (LPP)

### Overview

142. Lawyers are under a duty to keep the affairs of their clients confidential, and the circumstances in which they are able to disclose client communications are strictly limited.
143. 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) by persons working in businesses that fall within Schedule 2 of the *Proceeds of Crime Law* (Schedule 2 business). The Laws also provide individuals who work for law firms conducting Schedule 2 business with certain defences to 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 an MLRO in accordance with procedures set down by their employer.
144. This Section examines aspects of the potential tensions between a lawyer's duty of confidentiality to his client and the disclosure requirements imposed under the *Proceeds of Crime Law* and *Terrorism Law*.

### Statutory Requirements

145. 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 Schedule 2 business commits an offence if they come into 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 money laundering (i.e. an offence under Article 30 or 31 of the *Proceeds of Crime Law* (Article 30 (dealing with criminal property) and Article 31 (concealing criminal property)), an offence under Articles 15 and 16 of the *Terrorism Law* (Article 15 (use and possession etc. of property for purposes of terrorism) and Article 16 (dealing with terrorist property) 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 a police officer or to the MLRO in accordance with their employer's procedures.
146. 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 JFCU.
147. 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*, as amended, for example). Legal privilege is defined in the three Laws (see Article 1(1) of the *Proceeds of Crime Law*, as amended, for example). The exemptions do not apply to information or other matters communicated or given with a view to furthering a criminal purpose.
148. 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 or to a representative of a client of the legal adviser in connection with the giving by the adviser of legal advice to the client; or

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- › to any person
    - a. in contemplation of or in connection with legal proceedings, and
    - b. for the purpose of those 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.

#### 8.8.1 Duty of Confidentiality

##### Overview

149. Lawyers are professionally and legally obliged to keep the affairs of their clients confidential. This obligation extends to all matters revealed to a lawyer, from whatever source, by a client or someone acting on the client's behalf.
150. In exceptional circumstances, this general obligation of confidence may be overridden.
151. The most relevant instances are where a court orders disclosure or disclosure is required by statute.

#### 8.8.2 Application of LPP

##### Overview

152. Certain confidential communications between a lawyer and *his* client will fall into a category known as *LPP*. *LPP* is a privilege against disclosure, ensuring clients know that certain documents and information provided to lawyers cannot be disclosed without the client's consent. It recognises a client's fundamental right to be candid with their legal adviser, without fear of later disclosure to their prejudice. It is an absolute right and cannot be overridden by any other public interest. *LPP* can, however, be waived and it can be overridden by statute (*R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563).
153. *LPP* does not extend to everything lawyers have a duty to keep confidential. *LPP* protects only those confidential communications falling under either of the two heads of privilege – advice privilege or litigation privilege.
154. For the purposes of *LPP*, lawyers include Advocates, Écrivains, barristers, solicitors, in-house lawyers and their employees.

#### 8.8.3 Advice Privilege

##### Guidance Notes

##### 8.8.3.1 Principle and Scope

155. Communications between a lawyer, acting in their capacity as a lawyer, and a client, are privileged if they are both:
- › confidential; and
  - › for the purpose of seeking advice from a solicitor or providing it to a client.
- (*Bene Ltd. v. VAR Hanson & Partners* 1997 JLR N-10)
156. Communications are not privileged merely because a client 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
- (*Three Rivers District Council and Others v Governor and Company of the Bank of Scotland* (No 6) [2004] UKHL 48).

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157. Case law has given some examples of what advice privilege covers:

**Communications subject to advice privilege:**

- › A lawyer's bill of costs and statement of account (*Chant v Brown (1852) 9 Hare 790*); and
- › Information imparted by prospective clients in advance of a retainer will attract LLP if the communications were made for the purpose of indicating the advice required (*Minster v Priest [1930 AC 558 per Lord Atkin at 584]*).

**Communications not subject to advice privilege:**

- › Notes of open court proceedings (*Parry v News Group Newspapers (1990) 140 New Law Journal 1719 and Pacific Investments Ltd. v Christensen 1996 JLR N-7*) are not privileged, as the content of the communication is not confidential;
- › A client account ledger maintained in relation to the client's money (*Nationwide Building Society v Various Solicitors [1999] P.N.L.R. 53*);
- › An appointments diary or time record on an attendance note, time sheet or fee record relating to a client (*R v Manchester Crown Court, ex p. Rogers [1999] 1 W.L.R 832 and Bene Ltd. v VAR Hanson & Partners 1997 JLR N-10*)); and
- › Conveyancing documents are not communicated so not subject to advice privilege (*R v Inner London Crown Court ex p. Baines and Baines [1988] QB 579*).

#### 8.8.3.2 Advice within a Transaction

158. All communications between a lawyer and their client relating to a transaction in which the lawyer has been instructed for the purpose of obtaining legal advice are covered by advice privilege, notwithstanding that they do not contain advice on matters of law and construction, provided that they are directly related to the performance by the lawyer of their professional duty as legal adviser of their client. (*Three Rivers District Council v the Bank of England [2004] UKHL 48 at 111*).
159. 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 client, 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.

#### 8.8.4 Litigation Privilege

##### Guidance Notes

160. This privilege, which is wider than advice privilege, protects confidential communications made in pursuance of, or contemplation of, litigation, between either:
- › a lawyer and a client;
  - › a lawyer and an agent, whether or not that agent is a lawyer; or
  - › a lawyer and a third party.
- (*Bene Ltd. v VAR Hanson & Partners 1997 JLR N-10*)
161. Such communications must be for the sole or dominant purpose of litigation, either:
- › for seeking or giving advice in relation to it;
  - › for obtaining evidence to be used in it; or

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- › for obtaining information leading to obtaining such evidence.

### 8.8.5 Important Points to Consider

#### Guidance Notes

162. An original document not brought into existence for privileged purposes and so not already privileged, does not become privileged merely by being given to a lawyer for advice or another privileged purpose.
163. Furthermore, where a lawyer has a corporate client, communication between the lawyer and the employees of the corporate client may not be protected by LLP if the employee cannot be considered to be 'the client' for the purpose of the retainer. As such, some employees will be clients, while others will not. (*Three Rivers District Council v the Governor and Company of the Bank of England (no 5)* [2003] QB 1556).
164. It is not a breach of LPP to discuss a matter with your MLRO for the purpose of receiving advice on whether to make a disclosure. Privilege will continue to apply whilst such a determination is being made.

### 8.8.6 Crime/Fraud Exception

#### Guidance Notes

165. LPP protects advice a lawyer gives to a client on avoiding committing a crime (*Bullivant v Att-Gen of Victoria* [1901] AC 196) or warning them that proposed actions could attract prosecution (*Butler v Board of Trade* [1971] Ch 680). LPP does not extend to documents which themselves form part of a criminal or fraudulent act (*Hume v Attorney General* 2006 JLR N-36), or communications which take place in order to obtain advice with the intention of carrying out an offence (*R v Cox and Railton* (1884) 14 QBD 153). It is irrelevant whether or not the lawyer is aware that they are being used for that purpose (*Banque Keyser Ullman v Skandia* [1986] 1 Lloyd's Rep 336).
166. 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, that the disclosure will not be treated as a breach of any restriction on disclosure contained in any statute, contract or otherwise.
167. It is not just a client's intention which is relevant for the purpose of ascertaining whether information was communicated for the furtherance of a criminal purpose. It is also sufficient that a third party intends the lawyer/client communication to be made with that purpose (e.g. where the innocent client is being used by a third party) (*R v Central Criminal court ex p Francis & Francis* [1989] 1 AC 346).

### 8.8.7 Determining When to Submit a Suspicious Activity Report

#### Guidance Notes

168. The direct reporting obligations 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 three Laws). A lawyer may, however, wish to consider making a joint report with his client. The agreement of the lawyer's client to waive LPP is necessary in order for this to be possible.
169. If information leading to a 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 when they do so.

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170. If a lawyer commits an offence under Articles 30 of the *Proceeds of Crime Law* or Article 16 of the *Terrorism Law* they should make a disclosure to a police officer, otherwise they will not be able to avail themselves to the defences which operate under those Articles.
171. As the application of *LPP* is complex, it is recommended that firms consider requiring that reports be made to the *MLRO* on each occasion that there is knowledge, suspicion, or reasonable grounds to suspect *money laundering* or the *financing of terrorism*. The *MLRO* can then discuss the situation with the fee earner concerned and, as necessary, take advice from an appropriate partner.

#### 8.8.8 CDD Measures and LPP

##### Guidance Notes

172. It would be prudent, and would facilitate a firm's compliance with the requirements of the *Proceeds of Crime Law*, for consideration to be given to the need to separate all material on client files so that it is clear what material is non-privileged and the material for which privilege is claimed.
173. *CDD* and risk assessment documents should be completed, where possible, in a way which distinguishes privileged and non-privileged information. It would be prudent where possible, to include guidance to this effect in internal procedure manuals. This will assist in ensuring that the *Commission* can undertake audits of firms with the minimum disruption to business and that firms comply with their obligations to the *Commission*.

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