

SUPRABHAT
GOOD MORNING

સાલ 23

૨૩૨૯ સંવત્સરના આરંભે જાણ સંવત્સરના, ગુરુ, ભારત

A SIMPLE GUIDE TO LPP v POCA



OR HOW TO STAY OUT OF TROUBLE

23rd commonwealth law conference, Goa, India

JEROME LYNCH KC
TROTT & DUNCAN

LPP v POCA

Not a Twenty20 game but a full test match

You can tell me who you think wins at the conclusion of this session



LPP

If a lawyer made a disclosure without good reason there is a breach of client confidentiality and/or LPP, with a potential claim against them by their client and regulatory sanctions.

v



POCA

Yet a failure to disclose may result in criminal sanctions against the lawyer under POCA or equivalent legislation and regulatory sanctions.

LEGAL PROFESSIONAL PRIVILEGE

LPP is an absolute right, protected by common law; in some jurisdictions by legislation or even the constitution, it has human rights and Regulatory obligations, it cannot be overridden by other interests.

It can be waived by the client, **not us**, and can and should only be abrogated by the clearest terms or the necessary implications of a specific statutory provision in the clearest language.

LPP

LEGAL PROFESSIONAL PRIVILEGE

1. LITIGATION PRIVILEGE

This covers all work done in anticipation of litigation and for the litigation – the courts generally narrowly construe this privilege.

2. LEGAL ADVICE PRIVILEGE

This covers all general legal advice and is widely construed

United Nations Basic Principles on the Role of Lawyers (1990)

Lawyers shall always respect the interests of their clients.

Governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.'

International Bar Association Core Principles of the Legal Profession (2018)

- A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.
- Lawyers cannot claim the protection of confidentiality when assisting and abetting the unlawful conduct of their clients. Some jurisdictions also allow or require a lawyer to reveal information relating to the representation of the client to the extent the lawyer reasonably believes it necessary to prevent certain crimes.

- Recent legislation imposing special duties upon lawyers to assist in the prevention of criminal phenomena such as terrorism, money laundering or organised crime has led to further erosion of the protection of the lawyer's duty of confidentiality.
- They should also provide all relevant information to their clients, in order to protect their clients' interests and advise them competently, subject to any contrary law or ethics rule.
- Lawyers must not engage in, or assist their client with, conduct that is intended to mislead or adversely affect the interest of justice, or wilfully breach the law.

Council of Bars and Law Societies of Europe Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers (2018)

Principle (b) – the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy

Really sets out the rationale for why LPP is regarded as a Human Right

It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others - the most intimate personal details or the most valuable commercial secrets - and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there can be no trust.

Observing confidentiality is not only the lawyer's duty - it is the client's fundamental human right. The rules of LPP prohibit communications between lawyer and client from being used against the client.

But LPP or confidentiality is not the same everywhere – whilst in some jurisdictions the right to confidentiality is seen as belonging to the client alone, in other jurisdictions “professional secrecy” may also require that the lawyer keeps secret even from his own client communications from the other party’s lawyer imparted on the basis of confidence.

Not only is the law different in different regimes so are the conditions in which they operate.

In small countries lawyers may often know the legitimate client before he became a client, so that formal KYC is on its face already known.

At the other end of the scale the unscrupulous client may react violently towards a lawyer whom he may believe reported a suspicious transaction.

TWO OTHER ISSUES TO CONSIDER

1. WAIVER

Only the client can waive **his** right to rely upon LPP – The lawyer has no right to do so is the basic principle. But here again there are exceptions, especially in Europe where the lawyer suspects a serious crime may be committed.

2. CRIME FRAUD EXCEPTION

No lawyer is bound by LPP if he **knows** the transaction is criminal. LPP protects advice given to avoid committing a crime or warning him that **if** he proceeded upon a proposed course he would be committing a crime.

The real issue for us as lawyers centres around the idea that you are now required by the State to be their gatekeeper such that if you merely suspect a transaction has the intention of furthering a criminal offence you are required to report it. *If your suspicions are correct, communications with the client are not privileged. If the suspicions are unfounded, the communications should remain privileged and are therefore non-disclosable.*

Rock and hard place comes to mind.

LPP

Ahead on runs but we have lost some of our best players to injury

SO WHAT OF OUR MATCH?

v



POCA

Pads are on but yet to bat. They do look very threatening

Money Laundering - Facts and Figures:

- Estimated 2-5% of global GDP, i.e. \$800 billion - \$2 trillion, is laundered globally each year.
- 15,55,000 crores is the estimate for India – that's INR 15,550,000,000,000 = \$200 billion USD
- Over £90 billion a year estimated money laundering in UK
- Al Capone alone laundered 1.4billion a year, partly through Laundromats, in 1920's

POCA

Everyone recognises the need for confiscating the proceeds of crime from the criminal. Lawyers are committed to the administration of justice and embrace the need to do so.

By and large there are three primary offences of money laundering which the world has embraced that is targeted at the criminal:

1- where a person conceals, disguises, converts or transfers **criminal property** or removes **criminal property** from the jurisdiction

2 - where a person enters into or becomes concerned in an arrangement which he knows or suspects facilitates the acquisition, retention, use or control of **criminal property** by or on behalf of another person

3 - where a person acquires, uses or has possession of **criminal property**.

This is couched differently in different jurisdictions but the broad nature of the offences are the same. The key is that it must be **Criminal Property**.

WHO DOES IT AFFECT?

DNFBP

Designated Non-Financial Businesses and Professions -

Us

If you are involved in any of the areas of business shown here & you can add tax advice

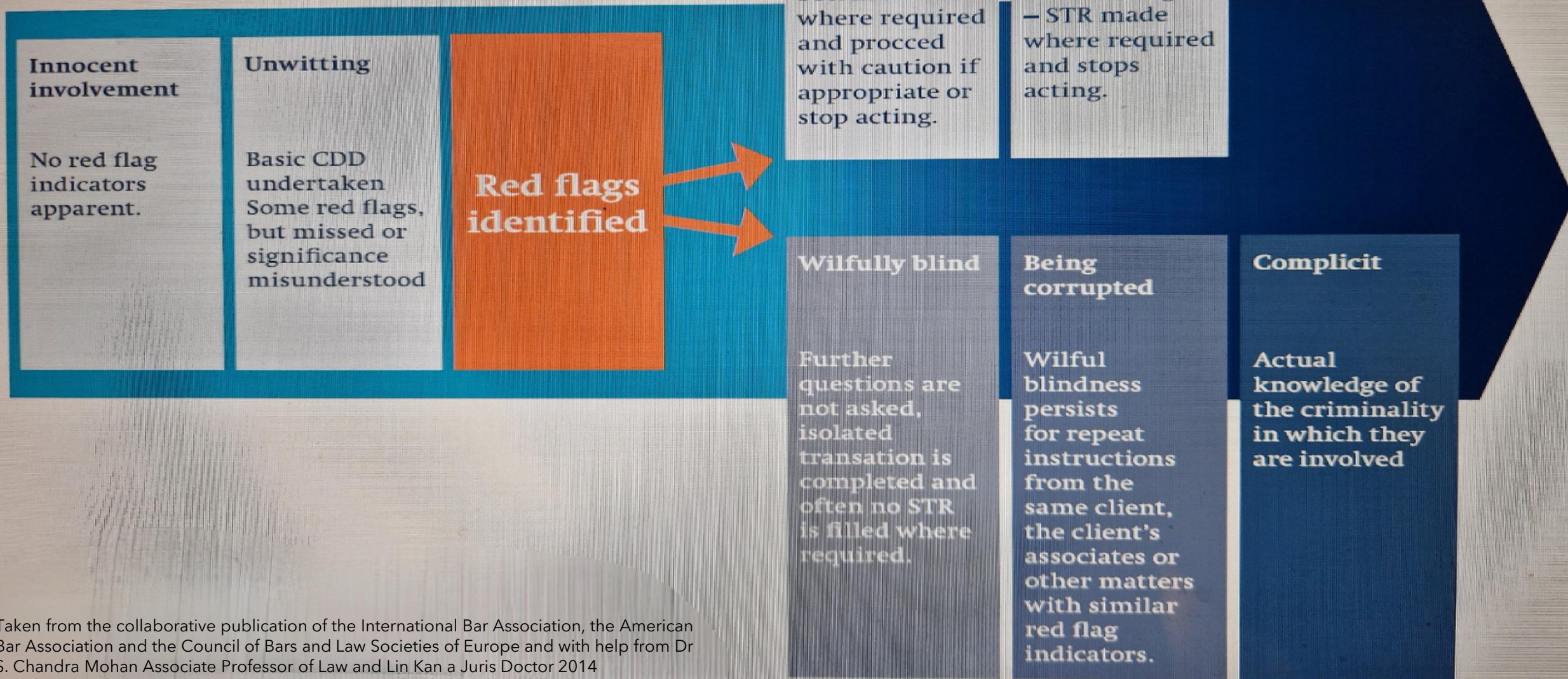


POCA

Assuming you are in one of the areas of work that affect you what must you do?

- 1 - Is the work you are carrying out covered by the legislation/ rules of your jurisdiction? If yes.
- 2 - Undertake a risk assessment.
- 3 - Undertake CDD - Client Due Diligence - KYC.
- 4 - Undertake enhanced CDD where he is from a high-risk country or he is a PEP.
- 5 - you must not make any form of disclosure to the authorities of information protected by LPP. So determine if the information you have is covered by LPP.

HOW DO YOU APPROACH YOUR TASK ?



What are the Red Flags?

Of course many are common sense but the Legal Sector Affinity Group Anti Money Laundering guidance 2021 has managed to cover ten pages of closely typed script of “examples” of red flags!

Financial Action Task Force, FATF, have managed it in two pages.

There is no difficulty where we know the money is related to criminal property if we know in advance of being engaged we would simply refuse the work. If we find out later it's a greater problem particularly where our knowledge comes from the information our client has given us in confidence albeit not LPP.

Many jurisdictions allow for the defence of "reasonable excuse" and for a legal professional where the information came to him in privileged circumstances – LPP – but not everywhere.

STR Suspicious Transaction Report or **SAR** Suspicious Activity Report

This is the offence that we as lawyers face because it is an offence where we know or **suspect**, or have reasonable grounds for knowing or **suspecting**, that another person (your client) is engaged in money laundering, and that information came to you in the course of your business in the regulated sector, (as lawyers we are) and you fail to disclose.

The Money Laundering offences are often drafted so wide that the predicate offence may be merely regulatory in character but which would nonetheless trigger your need to file a SAR to the Regulator.

The burden gets greater...

Having made the report to the authorities you **MUST NOT** tell your client as that is committing an offence yourself of “tipping-off” for which you can go to jail.

Different regimes have different time lines between when you make a report and when you receive authority to carry on or not. In the UK it is 7 days during which you have to pretend there is nothing wrong.

Should you forewarn a client of the obligations your country places upon you to make reports and not to tip off before you accept the work?

What happens if he asks you if you have made a report?

What happens if he accuses you of having made a report?

1. where you have
2. where you have not

Australia

Their AML and Counter Terrorism Financing Act 2006 contains some broad reporting obligations and offences for failing to report but currently does not have any requirements on lawyers as gatekeepers to perform CDD or KYC. One of only three FATF countries who do not along with Haiti and Madagascar. There is some doubt as to the application of LPP.

Looks like that is all set to change although the Law Council of Australia have made detailed submissions opposing the changes and burdens sought to be placed on lawyers.

Cases

France - Michaud v France European Court held that the requirement to file an STR was not a breach of Art.8 (the right to a private life which ordinarily protects confidentiality) of the ECHR.

Canada - AG v Federation of Law Societies of Canada from first to last the Canadian Courts have held that the application of the CDD obligations was constitutionally invalid as it required an unacceptable infringement of the independence of the legal professional because law enforcement might obtain and use the material to investigate clients. In particular it was not regarded as proportional as between the needs of AML and the LPP/CDD obligations and was therefore unconstitutional.

UK - Bowman v Fels there is nothing in the language of the POCA that has the effect of overriding LPP. Much stronger language would have to be used by Parliament to demonstrate such an intent. "Fundamental rights cannot be overridden by general...words."

ECJ - Ordre des barreaux francophones et germanophone et al. v. Conseil des Ministres Legal advice remains subject to the obligation of professional secrecy unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes.

Jamaica - Jamaican Bar Association v AG and General Legal Council 2014 - Court of Appeal

Sykes J ‘The crusade against ‘dirt money’ has now arrived on the door steps of the legal profession.’

The Court acknowledged importance of LPP for clients and public – “the lawyer must uphold the privilege even at the risk of significant inconvenience to himself.”

“This court concludes that given the nature of LPP, should that confidentiality be breached, such information in the hands of the state would lead to irreparable damage. The human experience has been that governments and state agents, without restraints, inevitably abuse their powers.”

Sadly the JCPC did not share the Jamaican CoA scepticism of the Jamaican system preferring to rely on the court of first instance decision of compatibility.

AG and General Legal Council v Jamaican Bar Association JCPC 2023

JCPC held that it was compatible with Jamaica's constitutional rights, in summary that there was no conflict with LPP, there was an infringement on confidentiality – but that was a proportionate measure. Also held that criminal sanctions, rather than simply disciplinary, were within the discretion of the legislature they distinguished the Canadian position upon which much reliance was placed.

AG and General Legal Council v Jamaican Bar Association JCPC 2023

“There is simply no obligation to report on the basis of LPP, and the ability to take specialist advice without liability for tipping-off provides a practicable mechanism which, if used, should enable an attorney to know whether in any particular case LPP displaces the STR obligation”.

“If, as the Court of Appeal found, the Regime infringed LPP then one could well understand the conclusion that aspects of the Regime are not proportionate given the importance and (almost) absolute nature of LPP. However, the Board has found that LPP is protected and the infringement is of attorney-client confidentiality rather than LPP. That is a much less serious matter.”

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POCA

So what is the score? Who wins?
Or is the jury still out?