SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 64

Project 104

MONEY LAUNDERING AND RELATED MATTERS

Closing date for comment: 8 July 1996

ISBN: 0-621-17453-X

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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PREFACE

This discussion paper (which reflects information gathered up to the end of May 1996), has been prepared by the research staff of the Commission to elicit responses and together with those responses, to serve as a basis for the Commission's deliberations. The discussion paper, which includes a proposed Bill, is published in full so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission. The views, conclusions and recommendations which follow should not at this stage be regarded as the Commission's final views.

The Commission will assume that respondents agree to reference by the Commission to responses received and the identification of respondents, unless representations are marked confidential. Respondents should be aware that the Commission may be obliged to release information contained in representations under the Constitution of the Republic of South Africa, Act 200 of 1993, pursuant to the constitutional right to freedom of information.

Respondents are requested to submit written comments, representations or requests to the Commission by 8 July 1996 at the address appearing on the previous page.

The project leader responsible for this project is Adv JJ Gauntlett SC and the researcher, who may be contacted for further information, is Mr P K Smit.

CONTENTS

CHAPTER 1
INTRODUCTION

1.1 The Commission has recently published an Issue Paper on money laundering and related matters for general knowledge and comment.[1] Based on responses to the Issue Paper the Commission now makes certain preliminary proposals for a regulatory framework to combat money laundering. These proposals for reform are discussed in this discussion paper together with an evaluation of the comments received in respect of Issue Paper 1. A proposed Bill to embody the Commission's proposals is also included in this Paper.[2] It is to be emphasised that this Paper is published for discussion: it represents the preliminary views of the Commission's project committee (drawing on various fields of expertise), adapted in the light of a number of valuable responses to Issue Paper 1. The urgent consideration of this Paper and the submission of comments upon it by 8 July1996 are invited.

1.2 The phenomenon of money laundering has in the recent past become a focus point of discussions on combatting crime, especially white collar, organised and drug related crime. It is commonly described as the manipulation of the proceeds of crime in order to obscure their true source or nature and thereby to avoid detection and prosecution. The Commission has previously proposed a range of offences to criminalise money laundering as described here.[3] However, the Commission is of the opinion that the mere criminalisation of money laundering will not provide an effective measure with which to combat this phenomenon. This proposition is unanimously supported by the respondents who commented on Issue Paper 1. The Commission therefore accepts as a point of departure that a legislative scheme to introduce regulatory measures is a necessary step in combatting money laundering.

CHAPTER 2

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1 Issue Paper 1: Money laundering and related matters.

2 Annexure A

3 Annexure B to the Report on International Co-operation in Criminal Prosecutions.

EVALUATION OF COMMENTS AND PROPOSALS FOR REFORM

2 Scope of a regulatory framework

2.1 In Issue Paper 1 the Commission discussed the option of a regulatory framework with a wide scope of application. This includes institutions that fall outside the mainstream banking sector. The comments received support such an approach. The inclusion of attorneys and other professionals in the regulatory framework enjoyed much support because of the possibility that trust or similar accounts can be utilised with ease as a medium to infuse illegally obtained cash into the financial system.

2.2 The Commission proposes that the following institutions be included in the scope of a regulatory framework: attorneys, accountants, executors, estate agents, dealers in securities, insurers and insurance brokers, unit trust schemes, banks, stokvels, gambling institutions, money brokers, dealers in bullion and dealers in travellers' cheques and money orders.[4]

2.3 The general framework for the application of regulatory measures to the institutions referred to in the preceding paragraph should in the first place consist of the fundamental functions and duties contained in the proposed Bill. This should be extended by means of regulations in respect of specific institutions or classes of institutions. Provision should be made for the possibility of granting exemptions where this is warranted. These measures should in the final instance be complimented by the implementation of internal policies in the relevant institutions.

3 Record-keeping

3.1 An investigating authority that needs to identify a transaction through which the proceeds of an offence was laundered, and those involved in it, has to follow the so-called audit trail. This means that by identifying the nature of the transaction and the true participants in that transaction (and not merely their agents) an investigator can

4 Clause 1 of the proposed Bill, Annexure A.

expose a money-laundering scheme. This can only be possible if sufficient records were kept by the institution at which the transaction had occurred. Mechanisms ensuring effective record keeping must therefore be part of a regulatory scheme.

3.2 The Commission therefore proposes measures to ensure that records are kept of information obtained when an account is opened or another form of business relationship is established. It is also proposed that records must be kept of information in respect of specific transactions, carried out either in the course of a business relationship or as single transactions.[5]

3.3 In Issue Paper 1 it was suggested that records should be kept for a period of five years. Respondents from within the banking community stated that provision should be made for records to be kept in a cost-effective and manageable manner such as electronic storage. The Commission therefore proposes that the manner in which records must be kept should be prescribed by the responsible Minister (being the Minister of Finance, henceforth referred to as "the Minister") and that consideration should be given to the possibility that this may include electronic storage. The Commission also proposes that provision should be made for the admissibility of such records as evidence in court proceedings.[6]

4 Reporting of information

4.1 In Issue Paper 1 three options for reform were discussed in respect of the basis for a reporting system. These were a threshold-based reporting system, a suspicion-based reporting system or a combination of threshold and suspicion-based reporting. The majority of the comments received indicate support for a dual-based reporting system.

4.2 Some respondents indicated a preference for a solely suspicion-based reporting system. The reason for this is that it is expected that a system involving threshold

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5 Clauses 4 and 5 of the proposed Bill, Annexure A.

6 Clause 7 of the proposed Bill, Annexure A.

reporting will generate a workload with which the relevant authorities and institutions will not easily cope. It is accepted that the amount of information reported by means of a threshold-based system will by far exceed the amount of information reported by means of a suspicion-based system. The success of a system involving threshold-reporting is therefore absolutely dependent on the existence of a body that can manage the reported information effectively.[7] The Commission's proposals in respect of such a body are discussed below.[8]

4.3 Suspicion-based reporting has the advantage that a person at a reporting institution has had to apply his or her mind to the matter at hand. As a result the investigating authority is provided with information on which to base an investigation namely the grounds upon which the suspicion was founded. This leads to a better quality of disclosure of information to the investigating authority.

4.4 On the other hand a threshold-based system can ensure that a transaction at a reporting institution which appears totally innocent when seen in isolation, is reported and can be found to warrant investigation when compared with information reported by other institutions. A major advantage of a threshold-based system is that it tends to cause a variation in the behavioural pattern of criminals who want to launder the proceeds of crime. Such criminals will usually attempt to structure the transactions placing these proceeds in the financial system in order to avoid the threshold. In doing so they may perform transactions that do not make any economic sense at all and will therefore immediately appear suspicious. In this way threshold-reporting can complement suspicion-based reporting.

4.5 Based on the comments of the majority of respondents and the remarks in the preceding paragraphs the Commission proposes a reporting system that is based on a combination of threshold and suspicion-based reporting.[9]

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7 Such as a financial intelligence unit discussed in Issue Paper 1.

8 See paragraphs 6.2 to 6.5 *infra.*

9 Clauses 8 and 9 of the proposed Bill, Annexure A.

4.6 Suspicious transactions will include transactions that appear unnecessarily complex, unusual transactions, regular transactions that form a peculiar pattern and transactions that may have been structured to avoid the threshold. Responsible managers should acquaint themselves with the fact of money-laundering and how it affects the type of institution in which they are engaged. They should also make sure that their staff, especially the frontline staff who deal with the customers, are acquainted with the sort of circumstance that ought to appear suspicious and their legal obligations in this regard. The development of guidelines and training material specifically aimed at each type of organisation required to make reports on suspicious transactions will have to be formulated to assist institutions in this regard.[10] The responsibility of financial intermediaries will include the setting up of internal policies and procedures to enable them to comply with the legal requirements.

4.7 As a point of departure the Commission suggested that a threshold of R30 000 should be considered.[11] Although the majority of respondents agree with this amount, the Commission notes that the Council of South African Banks proposes a threshold of R100 000 in relation to banking transactions. The setting of an amount for a threshold is of course inherently arbitrary. For this reason the Commission is of the opinion that the threshold(s) for reporting transactions should not be prescribed in primary legislation. These should rather be determined by the Minister by regulation. This will facilitate greater flexibility in adapting to changing circumstances and will also provide for the possibility that different thresholds may be set in respect of different institutions or types of institutions. This flexibility in the application of a reporting duty can be enhanced further by providing for the possibility that the Minister may grant exemptions from this requirement were this is warranted.[12]

4.8 The types of transactions that should be reported are all transactions where amounts of cash exceeding the proposed threshold are involved, all transactions where funds of any amount are transferred across our borders electronically or by other

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10 See paragraph 7.2 *infra* in this regard.

11 Paragraph 4.17 of Issue Paper 1.

12 Clause 43 of the proposed Bill, Annexure A.

means, all transactions involving the import or export of amounts of cash exceeding the proposed threshold, all currency exchanges exceeding the proposed threshold and any transaction that appears suspicious regardless of the type of transaction.

4.9 The information that should be reported should be prescribed by the Minister by regulation. These requirements will not necessarily be the same for all types of institutions but should ideally be sufficient to enable investigating authorities to identify, the person or persons carrying out the relevant transaction, the numbers of the accounts that are involved, the true holders of accounts (not their agents or nominees), the nature of the transaction, the payee or beneficiary, the form of payments or transfers as well as the origin and destination of funds. In respect of a suspicious transaction the reported information should also indicate whether the transaction is part of a regular tendency in that particular relationship with the client.

4.10 The manner in which reports must be made should be prescribed by the Minister by regulation. These requirements should be based on a manner and form that will best suit the needs of the body to which the information is to be reported and the institutions making the report. The internal procedure of an institution to facilitate the reporting of the relevant information should be determined by means of an internal policy formulated by the institution concerned. Guidelines should be given to institutions on the contents of such policies.[13]

4.11 The persons or institutions making reports should be protected from any liability for breach of confidential relationships or any other form of civil liability. This protection should override any privilege or obligation to secrecy or confidentiality irrespective of the basis for its existence.

4.12 The protection for persons reporting information, especially in respect of suspect transactions, should, however, go further than protection against liability. The identity of such a person and the fact that he or she has made such a report should be kept absolutely confidential for obvious reasons. To accomplish this the Commission

13 See also paragraphs 5.7 and 7.2 *infra* in this regard.

proposes that the identity of a person who has made a report has been made as well as the basis for the report should be inadmissible as evidence.[14] This will mean that the investigating and prosecuting authorities will not be able to base their case on the fact that a report was made or that the person who made the report was suspicious of the relevant transaction. The reporting of the relevant transaction will accordingly only serve as intelligence to identify an occurrence that should be investigated and will not in itself provide evidence of any criminal conduct. It will then be up to the investigating and prosecuting authorities to build their case upon the relevant bank records and other evidence they may find.

4.13 The Commission also proposes that provision should be made for the submission of an affidavit by an official of the body to which a report is made stating that such a report was received without identifying the source of the report.[15] That affidavit may then provide evidence of the fact that a report was made in a certain instance. It will, however, not serve to provide evidence of the facts that gave rise to the forming of a suspicion by the person who made the report. The investigating and prosecuting authorities will still have to build their case without relying upon the facts which formed the basis of the suspicion. It is suggested that affording this type of protection to a person making a report will be necessary in order to ensure the co-operation of the persons to whom this requirement will apply. Such protective measures will therefore be in the interest of the success of the regulatory framework as a whole.

5 Business conduct

5.1 In their approach to implementing a regulatory framework, institutions should follow prosedures that are based on responsible business practice. This entails that institutions should formulate and implement internal policies to ensure the implementation of procedures within the institution for compliance with the regulatory framework.

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14 Clause 15(2) of the proposed Bill, Annexure A.

15 Clause 15(3) of the proposed Bill, Annexure A.

Know your customer

5.2 The implementation of a "know your customer" policy is essential to the success of a regulatory framework to combat money-laundering. This is especially so if such a framework includes a suspicion-based reporting system as it is only through applying this policy that an institution will be enabled to notice suspicious or peculiar conduct on the part of a client.

5.3 The first requirement for the successful implementation of a know your customer policy is to be able to identify the customer effectively. This means that anonymous accounts, accounts held under a false name or pseudonym and accounts held by nominees as well as transactions done through agents where the beneficial owners or principals are unknown to the institution should not be allowed. The Commission proposes that institutions should be required to obtain proof of a client's identity and to ascertain the identity of all persons with whom transactions are concluded. Institutions should also obtain the identifying particulars of all accounts at the institution that are involved in a transaction.[16]

5.4 The manner of obtaining and verifying a client's identity should be prescribed by the Minister by regulation. These regulations may differ in respect of different types of institutions but should ideally include the production of an identity document or passport or the constitution and a list of the names of directors, executive officers, chairpersons or other persons in control of a juridical person.

Record-keeping

5.5 Institutions should be required to formulate and implement procedures to ensure effective record-keeping. This should include procedures to capture the information of which records must be kept.[17]

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16 Clauses 2, 3 and 17 of the proposed Bill, Annexure A.

17 Clause 18 of the proposed Bill, Annexure A.

Identification and reporting information

5.6 The Commission proposes that institutions should be required to formulate and implement policies on the identification of information that must be reported as well as on procedures to ensure that such information is indeed reported.[18] Policies on the identification of the relevant information should complement an institution's know your customer policies.

5.7 Internal procedures for the reporting of information will differ from one institution to another but should ideally include the appointment of a reporting officer or reporting office, depending on the size of the institution. Such an officer should serve as a central communication point between an institution and the body to which information must be reported. If such an officer is granted access to the institution's records on clients and transactions it will enhance the institution's ability to identify suspicious behaviour by a client.

Training

5.8 The formulation and the effective implementation of a training policy in South African institutions should be required as part of the regulatory system. This should be aimed at making members of staff at all levels aware of the phenomenon of money-laundering and the effects thereof. Staff should also be informed of the relationship between money-laundering and the proceeds of crime and should be guided as to the circumstances which should raise suspicion.[19]

5.9 If there are specific aspects that should be included in any internal policy, those should be prescribed by the Minister by regulation. Different requirements will probably have to be set for different types of institutions.[20]

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18 Clause 19 of the proposed Bill, Annexure A.

19 Clause 20 of the proposed Bill, Annexure A.

20 Clause 16 of the proposed Bill, Annexure A.

6 Financial intelligence centre

6.1 The basic premise of the institution of a central body to which all reports in terms of the regulatory framework are made was unanimously supported. The general view among commentators was that this body should function independently from any existing government authority.

6.2 The Commission therefore proposes that a statutory body should be instituted to fulfil the function of a financial intelligence unit. Such a body may be referred to as the Financial Intelligence Centre.[21] The function of the Centre should primarily be to receive and analyse information from the relevant institutions and to disseminate the analysed information to the investigating authorities concerned. The Centre should furthermore assist investigating authorities by analysing and supplying information on request by investigating authorities. To facilitate effective investigation, especially in connection with the Commission's proposals on the restraining and confiscation of the proceeds of crime,[22] it is proposed that the Centre should have the power to direct an institution to suspend the carrying out of a transaction. The duration of the suspension will be determined by the Centre in consultation with the institution concerned. This power will, however, have to be used only in cases of extreme urgency, for instance where a person is about to transfer funds out of the Republic.

6.3 A body such as the proposed Centre must have administrative support in order to function effectively. For this reason the Commission proposes that the Centre should administratively fall under the Minister of Finance. The staff of the Centre should consist of officials from the Department of Finance, the various branches and units of South African Police Service that will be concerned with so called money-trail investigations, the Department of Justice and specifically the Offices of the Attorneys-General and the Office for Serious Economic Offences, and from any other appropriate body.

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21 Clause 21 of the proposed Bill, Annexure A.

22 Annexure B of the Commission's report on International Co-operation in Criminal Prosecutions.

6.4 A body such as the proposed Centre will have to be well-resourced in order to cope with the workload associated with its proposed functions. This will be even more so if a reporting system involving threshold reporting is adopted. In this regard it may be of interest to note that there are various software packages that are developed for analysing reported information, drawing the necessary conclusions about transactions and links between various accounts at different institutions and persons operating such accounts. The types of transactions that may be classified as anomalous or unexpected are transactions involving disproportionately high amounts, economically unjustifiable transactions, numerous transactions by one client that appear similar, frequent transactions on the behalf of third parties who never appear in person, cash transactions, short term transfers of funds between accounts and currency exchanges. It must, however, be remembered that this is an aid to identify transactions that are sufficiently suspicious to warrant investigation, and is not aimed at replacing the investigating authority.

6.5 An important aspect that is associated (following the systems in other countries) with a body such as the proposed Financial Intelligence Centre is the control over access to the information held by the Centre. The information in the possession of such a body will naturally reflect the manner in which a person conducts his or her business. It is likely that this information can be used to gain an unfair business advantage or to infringe upon a person's privacy. It is also possible that information held by the Centre can indicate the identity of a person who made a report in a specific case. For these reasons the Commission is of the opinion that restricting access to the information held by the Centre is constitutionally defensible. In this respect the Commission proposes that access to such information should be strictly limited to investigating authorities and the Commissioner for Inland Revenue.[23] The inclusion of the Commissioner for Inland Revenue is based upon the fact that the laundering of the proceeds of crime invariably also entails a criminal evasion of income taxation. The Centre should also have the discretion to share information with its counter parts outside the Republic where this requested in the course of an investigation.

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23 Clause 27 of the proposed Bill, Annexure A.

7 Administration

7.1 The Commission realises the value of a co-operative approach to the administration of a regulatory framework. The Commission therefore proposes the institution of a body to assist the Minister in formulating, revising and implementing an anti-money-laundering policy and in administering the regulatory framework. This body may be referred to as the Money-laundering Policy Board.[24] Such a board should consist of representatives of all the types of institutions to which the framework will apply.

7.2 The functions of the Board should include issuing guidance notes to the relevant institutions, assisting institutions in their efforts to comply with the regulatory framework and monitoring compliance with the framework. The Minister should be enabled to grant exemptions from the obligations under the regulatory framework and in executing this discretion the Minister should be assisted by the Board. The Board should also periodically interact with the Financial Intelligence Centre on issues concerning the manner in which the Centre's functions are performed.

7.3 Public awareness is an important issue to the success of a regulatory framework. The conducting of a public awareness campaign on an ongoing basis should be part of the Board's functions. Fostering public support for the measures that will form part of a regulatory framework will go some way to alleviate the burden the implementation of such measures will place on the relevant institutions.

8 Enforcement

8.1 The Commission is of the opinion that a dual approach should be relied upon in respect of enforcing the regulatory framework. On the one hand offences together with appropriate penalties should be created to enable the framework to be enforced by

24 Clause 29 of the proposed Bill, Annexure A.

means of the criminal law. As the criminal law may not be sufficiently effective to ensure the enforcement of the framework appropriate administrative sanctions should be employed in this respect. This will, however, be the function of the various bodies concerned with the regulation, supervision or control of the institutions to which the framework will apply. In this respect the Commission suggests that serious consideration should be given to the inclusion of provisions in accordance with the proposed regulatory framework in codes of conduct or similar documents.

8.2 Emphasis should, however, be placed on fostering a co-operative relationship between the business community and other interested parties. Experience in other jurisdictions has shown that promoting such a spirit of co-operation is far more effective than heavy-handed enforcement in ensuring compliance with a regulatory framework. It is hoped that the institution of a body
such as the Money-laundering Policy Board would facilitate co-operation among all interested parties.

9 General

9.1 It should be clear that implementing and maintaining a regulatory framework along the lines discussed above will be costly to the institutions and bodies involved. It must be accepted that combatting money laundering is in the national interest of the Republic as it is one of the measures that can be implemented to combat large scale crime. Furthermore money laundering poses a threat to the national economy of the Republic. Combatting money laundering should therefore be one of the government's responsibilities for which government should bear the major part of the costs.

9.2 In this respect the Commission urges the Department of Finance and other relevant authorities to consider the creation of a fund into which the confiscated proceeds of crime can be deposited. The funds accumulated in such a fund can be applied to defray the cost of investigations and prosecutions as well as facilitate compensation for persons who suffered loss as a consequence of the offence in question. The expenditure of bodies such as the Financial Intelligence Centre and the

Money-laundering Policy Board will also have to be budgeted for by the department who takes responsibility for these bodies. An "asset forfeiture fund" may also be able to provide funds in this respect.

9.3 A serious concern of the Commission is that little purpose will be served by enacting the proposed legislation unless the executive, through the appropriate ministries, is committed to implementing the entire regulatory scheme. This will in particular require obvious budgetary planning and anticipatory allocations; swift steps to be taken (particularly in liaison with the institutions referred to in paragraph 6.3 above) to identify and recruit appropriate staff; and immediate decision-making relating to the establishment of the Centre. Unless this commitment and these steps are forthcoming, the legislation will be an empty gesture with a significant yet pointless burden upon and cost to the private sector bodies.

9.4 It must also be noted that another facet of the implementation of the regulatory scheme will be the drafting of appropriate regulations. This will be a substantial task which will in turn require extensive consultations with interested parties. Those are, however, not matters covered by the proposed Bill and will have to receive attention in due course.

9.5 Clearly potentially affected institutions[25] will likewise have to give expeditious consideration to the necessary forward planning.

9.6 Interested parties are earnestly requested to treat this matter as urgent, and respond (if wishing to do so) with all possible expedition in relation to matters raised in this Paper. Attention is again drawn to the date indicated in the Preface.

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25 See the definition of "accountable institution" in clause 1 of the proposed Bill, Annexure A, in this regard.

PROPOSED BILL ANNEXURE A

BILL

To prevent the manipulation and concealment of proceeds of crime; in this regard to provide for duties of identification, record-keeping and reporting of information; the establishment of a Financial Intelligence Centre; the establishment of a Money-laundering Policy Board; and for incidental matters.

ARRANGEMENT OF SECTIONS

BE IT ENACTED by the Parliament of the Republic of South Africa as follows:

CHAPTER 1
INTERPRETATION

1 Definitions

(1) In this Act, unless the context indicates otherwise —

"accountable institution" means –

(a) an attorney as defined in the Attorneys Act, 1979 (Act 53 of 1979);

(b) a board of executors or a trust company or any other institution that invests, keeps in safe custody, controls or administers trust property;an estate agent as defined in the Estate Agents Act, 1976 (Act 112 of 1976);

(c) a financial instrument trader as defined in the Financial Markets Control Act, 1989 (Act 55 of 1989);

(d) a group of persons that may be described by the term or concept known as "stokvel" which –

(i) establishes a continuous pool of capital by raising funds by means of the subscriptions of members;

(ii) is a formal or informal rotating credit scheme with entertainment, social, and economic functions;

(iii) consists of members who have pledged mutual support to each other towards the attainment of specified objectives;

(iv) grants credit to and on behalf of members;

(v) provides for members to share in profits and to nominate management; and

(vi) relies on self-imposed regulation to protect the interests of its members;

(e) a managing company registered under the Unit Trusts Control Act, 1981 (Act 54 of 1981) or a unit trust scheme as defined in that Act;

(f) a person, other than a bank, who carries on the business of –

(i) collecting money on behalf of other persons into an account or a fund; and

(ii) depositing the money in such an account or fund into a bank account on behalf of the persons from whom he or she had collected the money;

(g) a person who carries on "insurance business" as defined in the Insurance Act, 1943 (Act 27 of 1943);

(h) a person who carries on "the business of a bank" as defined in the Banks Act, 1990 (Act 94 of 1990);

(i) a person who carries on the business of a casino or gambling institution;

(j) a person who carries on the business of dealing in bullion;

(k) a person who carries on the business of effecting a money lending transaction directly between a lender and a financial institution as borrower through his or her intermediation;

(l) a person who carries on the business of exchanging amounts in one currency for amounts in another currency;

(m) a person who carries on the business of lending money against the security of securities, excluding –

(i) the South African Reserve Bank;

(ii) any person registered as a bank under the Banks Act, 1990 (Act 94 of 1990); and

(iii) any person registered as an insurer under the Insurance Act, 1943 (Act 27 of 19943);

(n) a person who issues, sells or redeems travellers' cheques, money orders or similar instruments;

(o) a public accountant as defined in the Public Accountants' and Auditors' Act, 1991 (Act 80 of 1991);

(p) a stockbroker as defined in the Stock Exchanges Control Act, 1985 (Act 1 of 1985); and

(q) a totalisator agency board or any person operating a totalisator betting service;

"business relationship" means any arrangement between a client and an accountable institution for the purpose of concluding transactions on a regular basis;

"client" means any person who has entered into a business relationship or a single transaction with an accountable institution**;**

"days" means working days;

"Deputy-Director" means a Deputy-Director of the Financial Intelligence Centre;

"Director" means the Director of the Financial Intelligence Centre;

"Financial Intelligence Centre" means the body established by section 21 of this Act and "Centre" has a similar meaning;

"Minister" means the Minister of Finance;

"Money-laundering Policy Board" means the body established by section 27 of this Act, and "Board" has a similar meaning;

"person" includes a juridical person;

"prescribed" means prescribed by or under this Act;

"proceeds of criminal conduct" means any property or part thereof derived directly or indirectly from —

(a) the commission in the Republic of an offence; or

(b) any act or omission outside the Republic that, if it had occurred in the Republic, would have constituted an offence;

"prospective client" means any person seeking to enter into a business relationship or a single transaction with an accountable institution;

"relevant investigating authority" means an investigating authority that is carrying out an investigation under any law, or that is requested by the Director or Deputy-Director to carry out an investigation, arising from or relating to any matter in connection with the disclosure of any information in compliance with any duty imposed by section 8, 9, 10, 11 or 12;

"reportable transactions" means any transaction in respect of which information must be disclosed under section 8, 9, 10, 11 or 12;

"single transaction" means a transaction other than a transaction concluded in the course of a business relationship;

"transaction" means a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution;

"this Act" includes any regulation made under it.

(2) Nothing in this Act shall be construed so as to apply to an attorney who is approached to provide legal assistance to a client in respect of that client's alleged commission of an offence under the Proceeds of Crime Act, 19... (Act no ... of 19...), or

in respect of any proceedings to make a restraint order or a confiscation order, as defined in that Act, instituted against such a client.

CHAPTER 2
IDENTIFICATION PROCEDURES

2 Identification when establishing a business relationship or concluding a single transaction

(1) If an accountable institution is approached by a prospective client to establish a business relationship or to conclude a single transaction that institution must, as soon as is reasonably practicable after it is so approached, obtain the prescribed proof of the prospective client's identity.

(2) Where a prospective client is, or appears to be acting otherwise than as principal, the accountable institution concerned must as soon as is reasonably practicable after contact is first made with the client, obtain the prescribed proof of —

(a) the identity of the person on whose behalf the prospective client is acting; and

(b) the authority of the prospective client to establish that relationship or to conclude that transaction.

(3) No accountable institution may proceed with entering into a business relationship or concluding a single transaction until the proof of identity required by subsection (1) or (2), as the case may be, has been obtained.

3 Identification when concluding a transaction in the course of a business relationship

(1) If an accountable institution is approached to conclude a transaction in the course of a business relationship, that institution must, as soon as is reasonably practicable, ascertain in the prescribed manner —

(a) the identity of the person who approached the accountable institution;

(b) the identity of the client with whom the relevant business relationship was established; and

(c) the identifying particulars of all accounts at that accountable institution that are involved in that transaction.

(2) Where the accountable institution is approached by a person other than the client with whom the relevant business relationship was established, that accountable institution must obtain the prescribed proof of —

(a) the identity of that person; and

(b) the authority of that person to conclude the transaction.

(3) No accountable institution may conclude a transaction in the course of a business relationship until the factors referred to in subsection (1) have been ascertained and, where applicable, the proof referred to in subsection (2) has been obtained.

CHAPTER 3
RECORD-KEEPING

4 Record-keeping in respect of a business relationship or single transaction

(1) Whenever an accountable institution establishes a business relationship or concludes a single transaction, that accountable institution must keep records of —

(a) the identity of the client with whom the business relationship is established or the single transaction is concluded;

(b) where applicable –

(i) the identity of each person on whose behalf the client is acting in establishing that relationship or concluding that transaction; and

(ii) the authority of the client to establish that relationship or to conclude that transaction;

(c) the nature of the business relationship so established or the single transaction so concluded; and

(d) the identifying particulars of all accounts at that accountable institution that are involved in that relationship or transaction.

(2) The records referred to in subsection (1) shall include certified copies of all documentation presented to the accountable institution under section 2 as proof of a person's identity.

(3) An accountable institution must keep all records under this section for a period of at least *five* years commencing on the date that —

(a) the relevant business relationship has ended; or

(b) the activities taking place in the course of the relevant single transaction has been completed.

5 Record-keeping in respect of transactions concluded in the course of a business relationship

(1) Whenever an accountable institution concludes a transaction in the course of a business relationship that accountable institution must keep records of —

(a) the identity of the person by whom the accountable institution is approached to conclude that transaction;

(b) the identity of the client with whom the relevant business relationship was established;

(c) where the institution is approached by a person other than the client with whom the relevant business relationship was established, the authority of such a person to conclude that transaction;

(d) the nature of the transaction concluded; and

(e) the identifying particulars of all accounts at that accountable institution that are involved in that transaction.

(2) The records referred to in subsection (1) shall include certified copies of all documentation presented to the accountable institution under section 3 as proof of a person’s identity.

(3) An accountable institution must keep all records under this section for a period of at least *five* years commencing on the date the activities taking place in the course of the relevant transaction has been completed.

6 Manner in which records must be kept

(1) All records kept by an accountable institution under this Act must be kept in the prescribed manner.

(2) An accountable institution must take reasonable steps to ensure that no person shall gain access to any records kept by that institution under this Act, unless such a person is authorised to do so under this or any other Act.

7 Admissibility of information of which record is kept

Any information kept in the records of an accountable institution under this Act in the prescribed form shall, in that form, be admissible as evidence in any proceedings in a court of law in so far as it is not inadmissible at such proceedings because of some other prohibition upon its admissibility.

CHAPTER 4
REPORTING OF INFORMATION

8 Reporting of transactions above prescribed limit

An accountable institution that is a party to a transaction involving the payment or receipt by the institution of an amount of cash exceeding the amount prescribed from time to time, must report the prescribed details in respect of that transaction to the Financial Intelligence Centre as soon as is reasonably possible but not later than *five* days after having become a party to such a transaction.

9 Reporting of suspicious transactions

Any accountable institution that is party to a transaction in respect of which there are reasonable grounds to suspect that the transaction brings, or will bring the proceeds of criminal conduct into the possession of the institution, or will in some way facilitate the transfer of the proceeds of crime, that institution shall report the suspicion, together with the information the Minister may prescribe for this purpose, to the Financial Intelligence Centre as soon as is reasonably possible but not later than *ten* days after having become a party to such a transaction.

10 Reporting of international electronic fund transfers

An accountable institution that sends funds out of the Republic or receives funds from outside the Republic by electronic means, and in so sending or receiving is acting on behalf, or at the request of, another person who is not a bank, must report that transfer together with the prescribed information to the Financial Intelligence Centre as soon as is reasonably possible but not later than *five* days after the funds were so sent or received.

11 Reporting of the transfer of cash into or out of the Republic

Any person who intends to transfer or convey an amount of cash in the form of South African currency or foreign currency, exceeding the amount prescribed from time to time, out of or into the Republic must report the prescribed details in respect of that transfer to the Financial Intelligence Centre before the transfer takes place.

12 Manner in which reports must be made

(1) A report made under section 8, 9 or 10 must be made in the manner prescribed in respect of the institution concerned or a class of accountable institutions that include that institution.

(2) A report made under section 11 must be made in the prescribed manner.

(3) An accountable institution that has made a report under section 8, 9 or 10, or a person that has made a report under section 11, must upon request by an official of the Financial Intelligence Centre or the relevant investigating authority provide the information specified in the request to the extent that the institution or person concerned has that information.

Consequence of disclosing information

(4) An accountable institution that has disclosed information in respect of a transaction in compliance with any duty imposed by sections 8, 9, 10 and 12 may continue carrying out that transaction unless that institution is directed by the Financial Intelligence Centre to suspend the carrying out of that transaction.

13 Confidentiality not to limit reporting duty

No duty of secrecy or confidentiality or any other restriction on the disclosure of any information as to the affairs of a client or customer of an accountable institution, whether imposed by any law, the common law or any agreement shall affect any duty imposed by section 8, 9, 10, 11 or 12.

14 Protection of person making report

(1) No liability based on a breach of a duty as to secrecy or confidentiality or any other restriction on the disclosure of any information as to the affairs of a client or customer, whether imposed by any law; the common law or any agreement, or based on any other cause of action, shall arise from a disclosure of any information in compliance with any duty imposed by section 8, 9, 10, 11 or 12, or otherwise in good faith.

(2) No evidence as to the identity of a person who disclosed information, or initiated the disclosure of information under sections 8, 9, 10, 11 or 12 or the contents of such a disclosure or the grounds upon which such a disclosure was based shall be admissible as evidence in any proceedings in a court of law.

(3) In any proceedings in a court of law a certificate issued by the appropriate official of the Financial Intelligence Centre shall be evidence of the fact that information in respect of a particular case was reported to the Centre.

CHAPTER 5
INTERNAL POLICIES

15 Content of internal policies

The Minister may prescribe aspects that must be addressed in internal policies formulated under sections 17, 18, 19 and 20 and, without limiting the contents of such policies to the aspects so prescribed, may prescribe different requirements in respect of different accountable institutions or classes of accountable institutions.

16 Identification of customers and transactions

An accountable institution must formulate and implement an internal policy or policies on the procedures to establish and verify the identity of any person whom the institution is required to identify under sections 2 and 3.

17 Record-keeping

An accountable institution must formulate and implement an internal policy or policies on the procedures to ensure the capture of all information of which record must be kept under sections 4 and 5.

18 Identification and reporting information

An accountable institution must formulate and implement an internal policy or policies on the identification of reportable transactions and reporting of the prescribed information in respect of such transactions.

19 Training

An accountable institution must formulate and implement an internal policy or policies on the procedures to —

(a) ensure that, where appropriate, persons in charge of or employed by the institution are aware of their duties to enable the institution to fulfill its duties under this Act; and

(b) provide persons in charge of or employed by the institution with training, where appropriate, as to the recognition and handling of transactions concluded by, or on behalf of any person, that involves or appears to involve the proceeds of criminal conduct.

CHAPTER 6

FINANCIAL INTELLIGENCE CENTRE

20 Establishment of Financial Intelligence Centre

There is hereby established a body to be known as the Financial Intelligence Centre.

21 Functions of the Centre

(1) The functions of the Centre are —

(a) to collect, retain, compile and analyse all information disclosed under sections 8, 9, 10, 11 and 12;

(b) to disseminate analysed information to the relevant investigating authority where the Director or Deputy-Director or Deputy-Director or Deputy-Director is of the opinion that such information warrants a criminal investigation;

(c) to provide advice and assistance to a relevant investigating authority;

(d) to carry out analysis of information at the request of an investigating authority for the purposes of this Act;

(e) to supply information relating to criminal conduct to an investigating authority at the request of that authority; and

(f) to perform any other function that the Centre is required or permitted to perform under this Act.

(2) The Centre shall from time to time consult with the Money-laundering Policy Board concerning the manner in which the Centre's functions are performed.

22 Director or Deputy-Director, Deputy-Director or Deputy-Directors and staff

(1) The Minister shall appoint a person to the office of Director or Deputy-Director: Financial Intelligence Centre.

(2) The Minister shall appoint two or more persons to the posts of Deputy-Director or Deputy-Directors: Financial Intelligence Centre to perform, subject to the control of the Director or Deputy-Director, any of the functions of the Director or Deputy-Director.

(3) The Director or Deputy-Director and Deputy-Director or Deputy-Directors hold office on the terms provided for under this Act or as prescribed by the Minister.

(4) The staff of the Centre shall consist of —

(a) officers of the Department of Finance designated for that purpose by the Director or Deputy-Director-General: Finance;

(b) officers of any State Department seconded to the service of the Centre in terms of the laws governing the public service;

(c) any person in the service of any public or other body who are by arrangement with that body seconded to the service of the Centre; and

(d) any other person whose services are obtained by the Director or Deputy-Director for the purposes of a particular matter concerning the performance of the functions of the Centre.

23 Powers of the Director or Deputy-Director

(1) The Director or Deputy-Director has the power to —

(a) require an accountable institution to provide an official of the Centre with access to any records that the institution is required to keep under this Act;

(b) direct an accountable institution to suspend the carrying out of a transaction for a reasonable period to be determined by the Director or Deputy-Director after consultation with th accountable institution concerned for a purpose contemplated in section 22;

(c) exchange information in respect of the performance of any function by the Centre with such institutions outside the Republic performing mainly similar functions to that of the Centre, as the Director or Deputy-Director or Deputy-Director or Deputy-Director deems fit;

(d) engage persons having suitable qualifications and experience to perform services as consultants under written contracts; and

(e) exercise any other power that the Centre is required or permitted to exercise under this Act.

24 Delegation

(1) The Director or Deputy-Director and Deputy-Director or Deputy-Directors may, either generally or otherwise, delegate all or any of their powers or functions under this Act to a member of the staff of the Centre.

(2) A power or function so delegated, when exercised or performed by the delegate, shall be deemed to have been exercised or performed by the Director or Deputy-Director or Deputy -Director or Deputy-Directors, as the case may be.

(3) The delegation of any power or function under this section shall not prevent the exercise or performance of that power or function by the Director or Deputy-Director or Deputy-Director or Deputy-Directors, as the case may be.

25 Annual report

(1) The Director or Deputy-Director must, as soon as is practicable after the last day in December each year, prepare and hand to the Minister a report of the Centre's operations during the year ending on that day.

CHAPTER 7
ACCESS TO INFORMATION

26 Access to information retained by the Centre

(1) No person shall be entitled to obtain any information retained by the Centre, except —

(a) a relevant investigating authority in respect of information in connection with a reportable transaction;

(b) an investigating authority in respect of which the Director or Deputy-Director or Deputy-Director or Deputy-Director reasonably believes that such information is required for the purpose of investigating criminal conduct;

(c) an authority outside the Republic performing mainly similar functions to that of the Centre in respect of which the Director or Deputy-Director or Deputy-Director or Deputy-Director reasonably believes that such information, or the analysis of information, is required for the purpose of investigating criminal conduct;

(d) the Commissioner for Inland Revenue; and

(e) to the extent that he or she may be entitled to that information by an order of a court or under any other law.

(2) If the Director or Deputy-Director is of the opinion that information is required as contemplated in subsection (1)(b) or (c) he or she shall authorise the person concerned in writng to obtain the required information.

(3) An authorisation given under paragraph (a) shall specify the information or class of information to which the person concerned is entitled and the purpose for which such information is to be used.

(4) A person who is entitled to obtain information retained by the Centre may use that information only for the purposes of performing his or her functions.

27 Information not to be divulged

No person shall, directly or indirectly, communicate to another person any information obtained
from the Centre except for the purpose of performing his or her duties or exercising his or her powers or for the purposes of this Act.

CHAPTER 8
ADMINISTRATION

28 Establishment of Money-laundering Policy Board

There is hereby established a body to be known as the Money-laundering Policy Board.

29 Functions of the Board

(1) The functions of the Board are to —

(a) formulate, and revise form time to time, a national policy on combatting money-laundering;

(b) advise the Minister on the steps to be taken to implement such a policy;

(c) take the steps the Board deems necessary to promote public awareness of such a policy;

(d) advise accountable institutions on their duties under this Act;

(e) issue guidance notes to accountable institutions or classes of accountable institutions;

(f) advise the Minister on the granting of any exemptions from any of the provisions of this Act to an accountable institution or class of accountable institutions; and

(g) monitor compliance by accountable institutions with this Act.

30 Composition of the Board

(1) The Minister shall appoint as members of the Board, as many persons as he or she deems necessary and under the terms and conditions he or she deems fit.

(2) The Minister shall make the appointments under subsection (1) from a list of persons nominated by —

(a) any accountable institution, or class of accountable institutions;

(b) any State Department; and

(c) any public or other body associated with the supervision or regulation of an accountable institution or class of accountable inststutions.

(3) The Minister shall appoint a chairperson and vice-chairperson from the members of the Board.

31 Committees of the Board

(1) The Board may nominate one or more committees, that may, subject to the instructions of the Board, perform the functions the Board may determine.

(2) Such a committee shall consist of as many members of the Board, or as many members of the Board and as many other persons, as the Board deems necessary.

(3) The Board shall appoint the chairperson and vice-chairperson of a committee.

(4) The Board may at any time dissolve or reconstitute a committee.

(5) The Board shall not be absolved from responsibility for the performance of any functions entrusted to any committee.

32 Annual report

The Board must, as soon as is practicable after the last day in December each year, prepare and hand to the Minister a report of the Board’s affairs and functions during the year ending on that day.

CHAPTER 9
OFFENCES AND PENALTIES

33 Entering into a business relationship or concluding a transaction without obtaining required proof of identity

(1) Any accountable institution that enters into a business relationship or concludes a single transaction without having obtained the proof of identity required under section 2(1) or (2), as the case may be, shall be guilty of an offence.

(2) Any accountable institution that concludes a transaction in the course of a business relationship without ascertaining the factors referred to in section 3(1) or, where applicable, having obtained the proof required under section 3(2) shall be guilty of an offence.

34 Failure to keep records

(1) Any accountable institution that, having established a business relationship or concluded a single transaction, fails to keep the records required under section 4(1), or fails to keep such records in the prescribed manner, or destroys such records before the expiry of the period prescribed under section 4(3) shall be guilty of an offence.

(2) Any accountable institution that, having concluded a transaction in the course of a business relationship, fails to keep the records prescribed under section 5(1), or fails to keep such records in the prescribed manner, or destroys such records before the expiry of the period referred to in section 5(3), shall be guilty of an offence.

35 Failure to report information

Any accountable institution that fails to report the prescribed information in respect of a reportable transaction to the Centre within the prescribed period shall be guilty of an offence.

36 Failure to suspend carrying out of transaction

Any accountable institution that fails to comply with a direction of the Centre to suspend the carrying out of any transaction shall be guilty of an offence.

37 Failure to formulate and implement internal policies

Any accountable institution that fails to formulate and implement any internal policy referred to in section 16, 17, 18 or 19 or fails to include any aspect prescribed under section 20, in such a policy shall be guilty of an offence.

38 Abuse of information

(1) Any person who uses information obtained from the Centre for any purpose that is not related to the performing of his or her functions under this or any other Act shall be guilty of an offence.

(2) Any person who communicates any information obtained from the Centre to any other person in any manner, except for the purpose of performing his or her functions or exercising his or her powers under of this Act, shall be guilty of an offence.

39 Penalties

(1) Any person who is convicted of an offence contemplated in section 34, 35 or 38 shall be liable to imprisonment not exceeding a period of *five* years or to a fine within the penal jurisdiction of the court..

(2) Any person who is convicted of an offence contemplated in section 36, 37 or 39 shall be liable to imprisonment for a period not exceeding *fifteen* years or to a fine within the penal jurisdiction of the court.

CHAPTER 10

MISCELLANEOUS

40 Act not to limit powers of investigating authority

Nothing contained in this Act shall limit any power that an investigating authority may exercise under any other law, to obtain information.

41 Regulations

(1) The Minister may make regulations —

(a) prescribing the documents or other means that may be accepted as proof of a person's identity where any person is required to obtain proof of another person's identity under this Act;

(b) prescribing the manner in which a person must ascertain another person's identity where it is required under this Act;

(c) prescribing the particulars of an account that may be accepted to identify an account;

(d) prescribing the manner in which any records that any person is required under this Act to keep, must be kept;

(e) prescribing the amount in respect of which information relating to cash transactions must be disclosed;

(f) prescribing the amount in respect of which the transfer or conveyance of cash into or out of the Republic must be disclosed;

(g) prescribing the information that must be disclosed to the Centre in respect of any report made under section 8, 9, 10 or 11;

(h) prescribing the manner in which information must be reported to the Centre under sections 8, 9, 10 or 11;

(i) prescribing the aspects that must be addressed in an internal policy formulated under section 16, 17, 18, or 19; and

(j) providing for any matter, whether connected with a matter referred to in paragraphs (a) to (i) or not, that he or she considers necessary or expedient with a view to achieving the objects and purposes of this Act.

(2) The Minister may make different regulations in respect of different accountable institutions, or classes of accountable institutions.

42 Minister may grant exemptions

(1) The Minister may grant to any accountable institution, or class of accountable institutions, exemption from compliance with all or any of the provisions of this Act.

(2) The Minister may grant the exemption referred to in subsection (1) on the conditions and for the period he or she deems fit.

(3) The Minister shall, when considering an application for an exemption, act in consultation with the Board.

43 Indemity

No person shall be entitled to claim compensation from the Minister or any executive officer, employee, member or any person otherwise associated with the Centre or the

Board for damages suffered as a consequence of any action taken under this Act or otherwise performed in good faith.

44 Short title and commencement

This Act shall be called the Money-laundering Control Act, 19..., and shall come into operation on a date fixed by the President by proclamation in the *Gazette.*