

MONEY LAUNDERING AND RELATED MATTERS

PROJECT 104

REPORT

AUGUST 1996

SOUTH AFRICAN LAW COMMISSION

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To Mr AM Omar, MP, Minister of Justice

I am honoured to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973, (Act 19 of 1973), for your consideration the Commission's report on the investigation into money laundering and related matters.

I Mahomed
Chairperson
31 August 1996

INTRODUCTION

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

The members of the Commission are -

The Honourable Mr Justice I Mahomed (Chairperson)
The Honourable Mr Justice P J J Olivier (Vice-Chairperson)
The Honourable Madam Justice Y Mokgoro
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The researcher responsible for the investigation is Mr P K Smit. The project leader is Adv JJ Gauntlett SC.

SUMMARY OF RECOMMENDATIONS FOR REFORM

The recommendations in this report are contained in chapter 4 and in the Proposed Bill (Annexure A).

- (a) The Commission recommends the implementation of an administrative framework to facilitate the prevention, detection, investigation and prosecution of money laundering.
- (b) The administrative framework should have a wide scope of application going beyond the banking sector and including among others attorneys, accountants, insurers, investment intermediaries, gambling institutions and totalisator betting services.
- (c) Institutions must be required to identify their clients when business relationships are established or single transactions concluded with those clients. Institutions should also ascertain the identity of persons with whom transactions are concluded in the course of a business relationship.
- (d) Institutions must keep records of the information obtained in respect of the identity of their clients and of information relating to transactions performed by their clients.
- (e) The Commission recommends that information on transactions exceeding a prescribed threshold must be reported. The amount of the threshold must be determined by the Minister responsible for the administration of the administrative framework in consultation with all interested parties. Institutions must also report information in respect of suspicious transactions.
- (f) The Commission recommends that adequate protection should be afforded to persons making reports in terms of the reporting structure. This includes protection against liability for breach of confidential relationships and protection of their identity.
- (g) A statutory body called the Financial Intelligence Centre must be instituted to receive all reports made in terms of the reporting structure. It will be the function of the Centre to analyse, investigate and disseminate the reported information. The Centre must also supervise the enforcement of the administrative scheme by means of appropriate administrative sanctions.
- (h) The administrative scheme must be administered by the appropriate Ministry in consultation with the affected institutions. For this purpose the Commission recommends the institution of a statutory body called the Money Laundering Policy Board to represent all the relevant institutions and bodies. The main function of the Board should be to assist the Minister in developing and implementing an anti money-laundering policy.
- (i) Finally the Commission recommends the creation of a range of offences, in addition to the above-mentioned administrative sanctions, to enable the administrative scheme to be enforced.

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SELECT LEGISLATION

Australia

1988 Financial Transactions Reports Act, 1988

South Africa

1992 Drugs and Drug Trafficking Act, No.140 of 1992

United kingdom

1988 Criminal Justice Act, 1988

1993 Money Laundering Regulations, SI 1933/1993

United States of America

Bank Secrecy Act 31 USC

CHAPTER 1

1. ORIGIN OF THE INVESTIGATION AND INTRODUCTION

2

.1The Commission has previously proposed that the courts be empowered to confiscate the proceeds of crime in general. Together with this, the Commission also proposed the creation of a number of offences to criminalise money laundering and certain related acts.¹ **The Commission is, however, of the opinion that the mere criminalisation of money laundering will not provide an effective measure with which to combat this phenomenon. Following the recommendations on the criminalisation of money laundering the Commission therefore decided to undertake an investigation focusing specifically on administrative measures to combat money laundering.**

.1In the course of this investigation the Commission published two documents for general knowledge and comment. In the first, Issue Paper 1, certain issues were identified and various options for reform in respect of each issue were discussed. In the second, Discussion Paper 64, the Commission discussed its preliminary proposals for reform. These proposals were based on the directions indicated by the responses to Issue Paper 1 and were aimed at addressing the issues defined therein.

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.3The responses to Discussion Paper 64 have enabled the Commission, with the assistance of its project committee, to formulate its views on this matter and to make the recommendations contained in this report.

CHAPTER 2

1. THE PROBLEM

(a) Money laundering defined

.1 Money laundering can be described as the manipulation of illegally acquired wealth in order to obscure its true source or nature.ⁱⁱ **This is achieved by performing a number of transactions with the proceeds of criminal activities that, if successful, will leave the illegally derived proceeds appearing as the product of legitimate investments or transactions.**

.1 **The money-laundering process can generally be divided in at least three discernible stages namely the placement stage, the layering stage and the integration stage. During the placement stage the proceeds of criminal conduct, usually in the form of cash, are moved away from the location where it was obtained and placed in the financial system. Entry into the financial system is usually gained through financial institutions.**

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.3 **In the second stage the money, which is now in the form of electronic funds, is distributed through the financial system. This done by layering one transaction involving these funds on top of another by means of electronic transfers, shell companies, false invoices, etc. The result of these transactions is that the laundered money becomes indistinguishable from "legitimate" money.**

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.5 **In the integration stage the money that was diffused into the commercial sphere is collected and made available to the offender under the guise of being legitimate earnings. This description of the money-laundering process illustrates the vital importance of the financial system to the money launderer. It is used as a device to transfer his or her proceeds of crime and to alter the appearance of such proceeds.**

(b) Current legal position

.1The offence of "conversion of the proceeds of drug trafficking" under the Drugs and Drug Trafficking Act, 1992, (hereinafter referred to as the "Drugs Act")ⁱⁱⁱ is the only instance in the South African law where the issue of money laundering is addressed. Our law does at present not recognise the manipulation of the proceeds of crime in general as an offence. Consequently in cases where the Drugs Act does not apply, no offence will be committed unless the methods used to bring about the misrepresentation as to the origin or nature of the illegal proceeds constitute another offence such as fraud.

.1In respect of regulatory measures the Drugs Act creates a statutory obligation to report certain information relating to the proceeds of drug trafficking.^{iv} This obligation applies to any director, manager or executive officer of a financial institution, and compels such persons to report any suspicion that property acquired by the institution in the normal course of business is the proceeds of a crime to an officer of the Narcotics Bureau. The Drugs Act places a similar obligation on stock brokers and traders in financial instruments.^v A failure to report such information is punishable by imprisonment for up to 15 years, or any fine that the court deems fit, or both such imprisonment and fine.^{vi}

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.3As regards obligations of secrecy the Drugs Act provides that no such obligation will affect a person's obligation under the Act to report his or her suspicion.^{vii} The statutory obligation to report the relevant information under the Drugs Act therefore overrides a financial institution's obligation to treat the client's affairs as confidential.^{viii}

Compliance with the statutory obligation will serve as a defence against a claim based on a breach of the confidential relationship between a financial institution and its client. The scope of the protection under the Drugs Act is, however, restricted by the phrase "any obligation incurred by virtue of the provisions of subsections (2) or (3)".

Subsections (2) and (3) refer to the proceeds of a "defined crime"^{ix} which means that it is only in cases of suspicions that property is the proceeds of a "defined crime" that section 10(4) will offer protection against a breach of confidentiality towards a client. In the majority of cases, however, an official of a financial institution may form a suspicion that property has a criminal origin but will not be in a position to identify the specific offence. Financial institutions, therefore, follow a cautious approach and do not report suspicions unless it is absolutely clear that the property forms the proceeds of a drug offence. One of the problems with the current legislation on reporting information

seems therefore to be that it does not offer adequate protection to the body making the report.

.4

.5 Apart from these provisions, our law does not contain any measures by which money laundering can be controlled and combatted.

CHAPTER 3

1. OPTIONS FOR REFORM

(a) Introduction of administrative measures

.1 One of the items on the shopping list of a money launderer is an efficient financial system. Such a system can be used to move funds away from their place of origin, to perform numerous transactions with these funds and ultimately, to make these funds available to the offender under the guise of being legitimate earnings. The importance of the financial system to the money launderer is therefore that it is a device to transfer the proceeds of crime and to alter the appearance of such proceeds. If the control over access to the financial system is weak it will add to the attraction of the system to the money launderer.

.1In order to benefit from the fact that a money-laundering scheme needs to involve the financial system to accomplish its objective,^x **certain administrative measures that will apply to the institutions of the business community must be introduced. Such measures should facilitate the prevention, identification, investigation and prosecution of money-laundering activities. To accomplish this, a legislative framework comprising both criminal and administrative measures must be introduced.**

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.3**The Commission therefore accepts as a point of departure that an anti money-laundering policy should be developed. Such a policy should not only be aimed at punishing offenders, but should include mechanisms that are directed at the persons who are in a position to identify and prevent money-laundering practises.**

.4

(b) Scope of an administrative framework

.1The Financial Transactions Reports Act 1988 of Australia includes the following institutions in its scope: financial institutions, insurers and insurance intermediaries, futures brokers, trustees or managers of unit trust schemes, persons dealing in travellers' cheques, persons dealing in bullion, persons collecting and delivering currency on behalf of other persons, gambling institutions and totalisator betting services.^{xi} **The legal profession in Australia is not included in the scope of the regulatory framework introduced by the Financial Transactions Reports Act, 1988. However, the Australian Government is considering a proposal to impose a limited reporting obligation upon solicitors.**^{xii}

.1The British Money Laundering Regulations 1993^{xiii} include the following in its scope: deposit-taking business, the acceptance of deposits by building societies, the business of a credit union, investment business, financial leasing, money transmission services, issuing means of payment, trading in money market instruments, foreign exchange, futures and options and securities, money broking and portfolio management advice.^{xiv} In the United Kingdom legal practitioners are not included in the regulatory framework as set out in the Money Laundering Regulations. However, the scope of the offences of "Assisting another to retain the benefit of criminal conduct"^{xv} and "Acquisition, possession or use of proceeds of criminal conduct"^{xvi}, to which disclosure of a suspicion that a transaction involves the proceeds of crime is a defence, is broadly structured and includes legal practitioners.

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.3The Bank Secrecy Act of the United States of America as codified under Title 31 of the United States Code deals with currency transaction reporting. This applies to the following: banks, commercial banks or trust companies, private bankers, branches of foreign banks in the United States, thrift organisations, securities brokers, investment bankers or investment companies, currency exchanges, dealers in travellers' cheques, operators of credit card systems, insurance companies, dealers in precious metals, stones or jewels, pawnbrokers, finance companies, travel agencies, senders of money, telegraph companies, sellers of vehicles, the United States Postal Service and gambling institutions.^{xvii}

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.5From these examples it seems clear that in the interest of maximum effectiveness, the scope of an administrative framework should not be limited to the mainstream banking sector. Nearly all financial intermediaries can be used as a vehicle to bring illegally obtained cash into the financial system.

(c) Components of an administrative framework

.1Administrative measures that are applied in jurisdictions where anti money laundering-schemes are in place, consist mainly of the identification of clients, record keeping of particulars of clients and transactions and the reporting of information on certain transactions. The establishment of a body that can record and manage the information obtained through the reporting system is an integral part of administrative schemes to combat money laundering.

(d) Client-identification

.1The procedure to ensure that an effective audit trail is established begins with the proper identification of a client of a financial intermediary. 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.

.1The Australian Financial Transactions Reports Act provides that information identifying the account and account holder must be obtained when an account with a cash dealer is opened. If the required information is not received by the institution, such an account is blocked as soon as the balance in the account reaches a certain level for the first time after the opening of the account.^{xviii} **Verification of the required information is done by the financial institution under the Financial Transactions Reports Regulations.**

.2

.3**The British Money Laundering Regulations also require that information identifying a prospective customer is obtained.**^{xix} **This only applies to new and one-off transactions and business relationships. The information should be obtained as soon as possible and if it has not been obtained within a reasonable time the business relationship or transaction may not proceed.**^{xx} **The institution concerned must furthermore verify the information obtained from the customer.**^{xxi}

(e) Record-keeping

.1Once a transaction has occurred through which the proceeds of an offence have been laundered, the only effective way of identifying the transaction and those involved in it is to follow the so-called audit trail. This means that by identifying the nature of the transaction and the true participants in that transaction, not merely their agents, the money-laundering scheme can be exposed. This will only be possible if sufficient records have been kept by the institution at which the transaction had occurred. Mechanisms ensuring effective record-keeping must therefore be an essential part of an administrative scheme.

.1The Australian Financial Transactions Reports Act requires that records be kept of all information in respect of an account and a signatory to an account.^{xxii} **This includes all documents provided to the institution in question. These records must be kept for a period of at least seven years after the business relationship has ended.**^{xxiii}

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.3In the United Kingdom records of information on the identity of customers as well as on all transactions must be kept for at least five years after the account has been closed or the transaction has been finalised.^{xxiv}

(f) Reporting of information

.1The aim of a reporting system should be to identify transactions involving the proceeds of crime. Such transactions will probably, upon further investigation, appear to be part of a money-laundering scheme. It is therefore not the money-laundering scheme itself that has to be identified and reported, but any transaction that involves illegally derived assets or at least the suspicion that particular assets have an illegal origin.

.1Various options exist for criteria to base the identification of transactions to be reported on. The reporting requirement can be suspicion-based, or an amount can be set as a threshold together with certain other criteria. A combination of these methods can also be used as the reporting criterium.

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.3In Australia the Financial Transaction Reports Act introduced a range of provisions that relate to the reporting of information in connection with various types of financial activities. The first of these activities is that of cash transactions involving the transfer of amounts of Australian \$10 000 or more.^{xxv} Another instance of mandatory reporting is where an electronic fund transfer is made out of, or into Australia.^{xxvi} In this case no threshold is set, which means that all international fund transfers must be reported.

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.5The Australian Act also makes provision for suspicion-based reporting.^{xxvii} Where reasonable grounds exist to suspect that information regarding a transaction is relevant to an investigation or prosecution of any offence, or may be of assistance in the enforcement of the Proceeds of Crime Act, 1987,^{xxviii} the transaction must be reported. The obligation to report under these provisions applies to all cash dealers.^{xxix}

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.7The Australian statute furthermore makes it an offence to transfer Australian or foreign currency to the value of Australian \$5 000 or more into, or out of Australia, unless the person making the transfer has made a report on.^{xxx} This provision applies to all persons except a bank, where the currency is transferred on behalf of the bank by a commercial carrier.

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.9The information that must be reported generally includes the identity of the person making the report, the identity of the person conducting the transaction, the identity of

the person on whose behalf the transaction is conducted, the identity of the payee or beneficiary, the nature of the transaction, the amounts involved and the type and identifying number of the accounts that are affected by the transaction.^{xxxvi}

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.11The United States of America have a number of provisions dealing with the reporting of information on certain transactions. These are prescribed under Title 31 of the United States Code. The American provisions are mainly based on threshold reporting. This applies to domestic cash transactions,^{xxxvii} transactions in respect of the importing or exporting of monetary instruments^{xxxviii} and transactions with a foreign financial agency.^{xxxix} The Secretary of the Treasury is entitled to set the threshold in respect of domestic transactions and transactions with a foreign financial agency. This threshold is set at US\$10 000. The threshold for importing and exporting of monetary instruments is set by the Bank Secrecy Act at US\$10 000.^{xl}

.12

.13Title 31 of the United States Code also makes provision for suspicion-based reporting. Any financial institution and any person associated with a financial institution must report any suspicious transaction.^{xli} Institutions or persons making a report under this provision are protected from liability under any law.^{xlii}

.14

.15The system for reporting in the United Kingdom is purely suspicion-based. The Criminal Justice Act, 1988, creates *inter alia* the offences of assisting a person to benefit from crime^{xliii} and acquiring another's proceeds of crime.^{xliiii} In both cases the disclosure of a suspicion that the money involved is derived from criminal conduct excludes liability for the offences.^{xliiii}

.16

.17Suspicion-based reporting has the advantage that a person at the institution making the report 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.

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.19Reporting of this kind requires a certain level of training and insight from the persons to whom it applies. Otherwise they will not be able to notice irregular characteristics that should trigger their suspicion about a transaction. Under a suspicion-based reporting system responsible managers should therefore acquaint themselves of 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 is an integral part of implementing a suspicion-based reporting system.

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.21A system that ties the reporting requirement to easily ascertainable criteria, such a cash amount exceeding a set threshold, should be less complicated for institutions to comply with. With such a system the transactions that should be reported can be easily identified and relayed through the proper channels.

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.23A major advantage of a threshold-based reporting system is that it 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. Another 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 and will therefore immediately appear suspicious. In this way threshold-reporting can complement suspicion-based reporting.

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.25The main disadvantage of a threshold-based system of reporting is the overburdening of the available resources is indeed the. The success of a threshold-based reporting system is therefore absolutely dependant on the existence of a body or bodies that can manage the reported information effectively, either by analysing and distributing such information or by investigating it. The setting of a threshold should furthermore be coupled with other criteria such as the transaction being a cash transaction or a foreign exchange transaction. If this is not done the burden on both the reporting body and the body to whom reports must be made, will become intolerable.

(g) Internal policies

.1 Institutions should implement internal policies based on responsible business conduct in order to facilitate the implementation of the administrative measures. Care should be taken in any legislation on this topic not to be too prescriptive of the contents of the internal policies which these institutions are required to adopt. The contents of internal policies cannot necessarily be the same for all the types of institutions to which this requirement will apply. These policies will therefore have to be developed in conjunction with the various organisations to which they will apply.

.1 The Money Laundering Regulations 1993 of the United Kingdom requires the institutions to which they apply to maintain procedures in relation to client identification, record-keeping, internal reporting, internal control and communication to prevent money laundering and training of employees.^{xli} **The standard of these internal procedures must be in accordance with the regulations applicable to each of the above-mentioned topics.^{xlii} In order to determine whether an institution adheres to this standard reference may be had to any supervisory guidance that applies to that institution.^{xliii}**

(h) Financial Intelligence Units

.1 The tendency in other jurisdictions has been to set up a central institution to which all reports are made. Such an institution is referred to as a financial intelligence unit as its task is to gather intelligence for investigating authorities to base their investigations on. It receives and analyses reported information through the reporting structure and disseminates it to the investigating authorities concerned. A financial intelligence unit is an integral part of an administrative scheme as it facilitates the communication between the persons or institutions reporting certain information and the authority whose responsibility it is to use that information in the course of the investigation of money laundering and other criminal activities. Without such an institution the whole reporting exercise will be futile as there would be no way to add value to the reported information.

.1 Various options exist in respect of both the form and function of an institution that is concerned with gathering and disseminating information reported through a reporting structure. In Australia the financial intelligence unit is named Australian Transaction Reports and Analysis Centre (AUSTRAC) and it was instituted by the Financial Transactions Reports Act.^{xliv} **The American version of such an institution is the Financial Crimes Enforcement Network (FINCEN) and its equivalent in the United Kingdom is the**

National Criminal Intelligence Service (NCIS). In Italy information is reported to the Bank of Italy where it is placed on a national database. This information is collected and analysed by the Italian Exchange Office (UIC) which is a satellite of the Bank of Italy.^{xlv}

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.3The financial intelligence unit can be attached to a government department or to the central bank, or it can function independently from a specific organisation. Each of these scenarios has certain advantages and disadvantages. AUSTRAC is attached to the Office of the Attorney General but functions virtually independently. FINCEN is attached to the US Treasury which has very strong law enforcement branches. NCIS functions as an independent organisation. These multi-disciplined institutions all incorporate sections of their respective law enforcement communities which are represented in the financial intelligence units. The Italian financial intelligence unit is, however, connected to the central bank and provides its information to the so-called tax police who carry out the money-laundering investigations.

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.5By attaching the financial intelligence unit to an existing government department the unit will have immediate access to the human and other resources of that department. This will, however, necessitate the establishment of channels of communication with the institutions that will have to report to the unit, and with the investigating authorities that will have to utilise the information disseminated by the unit.

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.7Attaching the financial intelligence unit to the central bank has the advantage that there already exists a channel for communication between the banking sector and the central bank. A problem that may, however, be experienced in this respect is that it may exclude financial intermediaries outside the banking sector, who have little or no contact with the central bank, from the reporting structure

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.9The main benefit to be gained from the information provided by a financial intelligence unit is that it can facilitate money trail investigations of offences as an alternative to the traditional investigation of the primary criminal conduct itself. The worth of a financial intelligence unit will therefore lie in its ability to promote the idea that money trail investigation is a sound law enforcement approach. A financial intelligence unit that functions independently may be in a better position to distribute the relevant information among the different authorities whose task it will be to investigate the information with a view to instituting criminal proceedings. This will serve to enhance the credibility of the financial intelligence unit within the law enforcement community and to have the unit accepted as part of that community.

(i) Enforcement

.1 To provide for the enforcement of an administrative framework offences and penalties will have to be introduced. The use of the criminal law in this respect may, however, not be sufficiently effective to ensure the enforcement of the types of measures discussed in the previous paragraphs. For this reason administrative sanctions will probably have to be relied upon. Possible options in this respect are the imposition of pecuniary penalties, the revoking or suspension of licences or removal from the relevant registers.

.1A practical problem is the extent to which those contemplated for inclusion in a regulatory framework are themselves regulated through registration or some other system by which their existence and scope of operations are recorded. In respect of those institutions that are overseen by regulators or supervisors the enforcement of the regulatory system can be readily facilitated. A suitable government authority could be commissioned with the policing of these measures in respect of the institutions that are not regulated or supervised. In the absence of such an authority the normal law enforcement authorities will have to see to the enforcement of the regulatory system through the medium of the criminal law.

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.3 Emphasis should, however, be placed on fostering a culture of co-operation between the business community, the financial intelligence unit and the various law enforcement agencies. Experiences in other jurisdictions have shown that promoting such a spirit of co-operation is far more effective than strong handed enforcement in ensuring compliance with a regulatory framework.

.4

.5 The successful implementation of a regulatory scheme will also require self-regulation by the business world and its determination to prevent its institutions from becoming associated with criminals or being used as a channel for money laundering.

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CHAPTER 4

1. EVALUATION OF COMMENTS AND RECOMMENDATIONS FOR REFORM

(a) Scope of an administrative framework

.1The first question is which persons or bodies should be involved in an administrative system. The answer that immediately comes to mind is the banking sector. While it is true that banks are at risk of being abused for purposes of money-laundering schemes, it will be naive to assume that the banking sector alone should carry the responsibility of guarding against money laundering. The Commission recommends that the following institutions be included in the scope of an administrative framework: attorneys, accountants in respect of investment advice and services rendered, bureaux de change, executors, estate agents, dealers in securities, insurers, insurance agents and insurance brokers, unit trust schemes, banks, mutual banks, stokvels, the Post Office Savings Bank, persons acting as investment advisors and intermediaries, gambling institutions including totalisator betting services, money brokers, dealers in bullion, coins and Kruger Rands, and dealers in travellers' cheques and money orders.^{xlvi}

.1The inclusion of attorneys in the scope of the administrative framework needs further reference. The rationale behind this decision is that trust accounts can be easily used to facilitate money laundering with the advantage that the money launderer will be able to hide behind the cloak of the attorney-client privilege or confidentiality. Consequently the attorney becomes involved, albeit unwittingly, in some form of criminal enterprise. The same goes for other professionals who operate accounts similar to attorneys trust accounts such as chartered accountants for instance. Consideration should therefore be given to the inclusion of all such professionals in an administrative framework. An exception should, however, be made where an attorney is approached for advice or legal assistance in respect of an offence. In such a case disclosure of any information that may have a bearing on that specific case in which he or she is to represent the client, will be in conflict with the client's best interest which the attorney must promote, as well as the public interest in ensuring unfettered legal advice to accused persons.^{xlvii}

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.3A result of listing the institutions to which the administrative measures will apply is that there will always seem to be room for the expansion of the list. In this respect the Commission received a number of suggested additions to the institutions mentioned

paragraph 4.1 above. These include vehicle and art dealers, auditors and accounting officers of companies and close corporations, shippers and import - export companies.

.4

.5 Institutions such as import - export companies and shippers can easily be used to provide a cover for transactions by means of which international transfers of money are facilitated. This seems to indicate that there may be merit in including such institutions in the definition of “accountable institutions”. On the other hand the type of transactions that form part of the reporting scheme do not comfortably fit in with the type of business that these institutions carry on. Furthermore the methods used to provide this type of cover (such as over or under invoicing or false bills of lading and letters of credit) implies complicity with the money launderer which would amount to offences such as fraud or assisting a person to benefit from the proceeds of crime.^{xlviii} With these factors taken into account the Commission suggests that these institutions should not be included.

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.7 The auditor or accounting officer of a company or close corporation does not deal with the clients of the institution. Such a person will therefore not be in a position to comply with the duties of customer identification and record-keeping. An auditor or accounting officer will also not be in a position to report the required information on specific transactions. To include such persons will furthermore extend the scope of the proposed Bill too far and will make administration of the reporting scheme impossible. The Commission is therefore of the opinion that such persons should not be included.

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.9 Although the Commission proposed the inclusion of a wide range of institutions the Commission is of the opinion that the inclusion of certain institutions such as hotels, retailers, car rental companies etc would make an administrative framework unwieldy and impossible to administrate. Specifically in respect of retailers it would not be possible to justify the inclusion of some retailers and not others. To add to this it would be impossible to decide where to draw the line based on anything but purely arbitrary grounds. The Commission therefore decided not to propose the inclusion of these institutions in the scope of an administrative system.

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.11 Various respondents suggested that an open-ended list should be adopted, giving the responsible Minister (possibly the Minister of Finance, henceforth referred to as “the Minister”) the discretion to include other institutions without necessitating a subsequent amendment of the Act. This will facilitate flexibility and enhance the ability to adapt to changing circumstances. The Commission is, however, of the opinion that this approach will result in conferring a dispensing power upon the Minister and that the

scope of the Act will therefore not be fixed by the Act itself. It must be further kept in mind that the inclusion of an institution or type of institutions in the scope of the administrative measures will have to be preceded by a consultative process. This will negate any considerations of urgency in the amendment of the scope of the administrative framework. The Commission therefore suggests that the list contained in clause 1 should remain an exhaustive list which may be adapted through the normal procedure of legislative amendment.

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.13 Alternatively it was also suggested by some respondents that instead of listing all the institutions a generic definition should be adopted. This would be the preferable approach if a definition can be devised to include the same scope of institutions as are contained in the list of “accountable institutions” as well as others that ought to be included but may have been overlooked. Because of the wide variety of institutions that the Commission intends to include in the scope of the administrative framework it does, however, not seem to be possible to find suitable common characteristics to create an accurate generic definition without creating uncertainty about the scope of the administrative measures.

.14

.15 The general framework for the application of the administrative 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. These measures should in the final instance be complimented by the implementation of internal policies in the relevant institutions. The Commission accepts the fact that in many instances compliance with the proposed measures will increase the volumes of work within the relevant institutions as well as intrude on the flow of business. The Commission therefore recommends a procedure for exemptions from compliance with all or any of the provisions of the administrative framework. Such exemptions will be granted by the Minister where this is merited.^{xlix}

(b) Client-identification

.1 The starting point of an administrative system to combat money laundering is an institution’s ability to identify its customers. The aim in this respect should be the elimination of anonymous accounts and the identification of hidden principals or beneficial owners. Institutions should establish the actual ownership of accounts, and should refuse to enter into transactions with clients who fail to provide proof of their identity.

.1The Commission therefore proposes that institutions should be required to obtain proof of a client's identity when a business relationship is established or a single transaction is concluded with that client.¹ **The manner in which the required proof is to be obtained should be prescribed by regulation. This will probably entail that a copy must be made of an official identity document (or a passport in respect of a foreign national). Institutions should also ascertain the identity of all persons with whom transactions are concluded in the course of an established business relationship.ⁱⁱ The manner in which this is to be done should likewise be prescribed by regulation and will probably entail requesting sight of an identity document or passport. Institutions should also obtain the identifying particulars of all accounts at the institution that are involved in a transaction. Where a person fails to provide the required information the institution concerned will be precluded from proceeding to enter into a business relationship or to conclude a transaction with that person.**

.2

.3Respondents commenting on behalf of the gambling industry indicated that in that industry the vast majority of business is done through single transactions and mostly in cash. Especially on behalf of the Totalisator Agency Board of Kwazulu-Natal it was indicated that the duty to obtain proof of identity of all customers would be an impossible task. It is suggested that this problem may be addressed by means of a possible exemption under clause 54 of the Bill. The opportunity presented to a money launderer by a totalisator betting agency lies in the possibility that a person can buy successful betting tickets from punters against payment in cash and present the tickets to a totalisator agent for payment by cheque. This type of practise should, therefore, be kept in mind in considering regulations to prescribe the relevant method of proof and in considering the possible granting of exemptions.

.4

.5The Johannesburg Stock Exchange indicated that the duty to obtain proof of the identity of a person on whose behalf a prospective client is acting, would place an accountable institution in a position where it will obtain confidential information about the clients of the prospective client. The effect of this duty is in fact that an institution will be placed in a position where it is able to ascertain the identity of the person who is the true customer namely the beneficial party to the business relationship established by the prospective client. This is in keeping with internationally accepted principles such as those laid down by the Basle Committee on Banking Regulations and Supervisory Practices and the Financial Action Task Force.

.6

.7The fear of the Johannesburg Stock Exchange that this provision will require a member to obtain details of another member’s client when a transaction is concluded between the two members is unfounded. A member of the Stock Exchange trading with another member on the Exchange cannot be described as a “prospective client” concluding a transaction with an accountable institution. A member of the Johannesburg Stock Exchange will, however, in keeping with the principle of eliminating anonymous accounts and identifying hidden principals, have to obtain details of the person on whose behalf his or her client is acting.

.8

.9The Council of South African Banks indicated that the prohibition upon entering into a business relationship or transaction without having obtained the required proof would stifle the flow of business. A measure of this nature is, however, necessary in order to ensure that all institutions do take the necessary steps to identify their customers. An alternative to the proposed provision is to implement a suspension of all business activity pending the obtaining of the required proof of identity. The Commission therefore recommends that the establishment of a business relationship should be allowed, but no activity should take place in the course of that relationship until the required proof of identity is obtained. In the case of a single transaction the concluding of the transaction may be proceeded with but no effect may be given to the transaction until the required proof of identity is obtained.

(c) Record-keeping

.1Effective record-keeping is essential to the investigation of money-laundering schemes. The only way of identifying a transaction through which the proceeds of an offence have been laundered, and those involved in it, is to follow the so-called audit trail. This means that by identifying the nature of the transaction and the true participants in that transaction, the money-laundering scheme can be exposed. This will only be possible if sufficient records have been kept by the institution at which the transaction had occurred. Mechanisms ensuring effective record-keeping must therefore be part of an administrative scheme.

.1The Commission proposes measures to ensure that records are kept of information obtained when an account is opened or another form of business relationship is established.^{lii} This will be the information identifying the client that has to be obtained when the 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^{liii} or as single transactions.^{liv} In this case the records should reflect the

identity of the person who concluded the transaction, the identifying particulars of the accounts at the institution that are involved and the nature of the transaction.

.2

.3Recorded information should be kept for a period of at least five years. This should be sufficient to enable investigators to trace existing trends where a possible money-laundering scheme is uncovered. The manner in which records are kept should be prescribed by regulation and should include provision for the possibility of electronic storage of information. Further provision should be made for the admissibility as evidence of information stored in accordance with the regulations.^{lv}

.4

.5Some respondents indicated that it may be necessary for an investigator to be able to establish who dealt with a customer on behalf of the institution, especially if complicity with a money laundering scheme from within the institution is suspected. The Commission agrees with this suggestion. It is therefore recommended that the particulars of the identity of the person who obtained the information on behalf of the institution should also be reflected in the records.

(d) Reporting of information

.1The most important component of an administrative framework is a duty to report certain information. The aim of a reporting system should be to identify transactions involving the proceeds of crime. Such transactions will probably, upon further investigation, appear to be part of a money-laundering scheme. It is therefore not expected from institutions to identify the money-laundering scheme itself, but to identify transactions that may involve illegally derived assets or at least the suspicion that particular assets have an illegal origin.

.1The Commission proposes a reporting system that is based on a combination of threshold and suspicion-based reporting.^{lvi} **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.**

.2

.3The setting of an amount for a threshold is of course inherently arbitrary. However, there are a few important factors that should be kept in mind when deciding upon such an amount. The first is that the South African financial system is largely cash driven. Another is that the amount should make structuring of transactions to avoid the threshold without drawing the attention of a reporting body as difficult as possible. Thirdly the threshold should not be so low that the reporting system becomes clogged with reports of insignificant transactions. For these reasons 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 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.

.4

.5On the reporting of suspicious transactions some respondents indicated that an institution should also report an attempt to conclude a transaction that was aborted when the institution required information in compliance with this Bill. The Commission agrees with this suggestion and recommends that this type of information should also be reported.^{lvii}

.6

.7An issue raised in respect of the time limit for reporting of suspicious transactions is that circumstances will arise where an employee only forms a suspicion at a stage when the relevant period has already elapsed. In such a case the employee and / or the institution may be deterred from making a report by the fact that not making the report within the relevant period constitutes an offence. The Commission recommends that the time limit should be set at ten days after becoming aware of the grounds that gave rise to the suspicion.

.8

.9The 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 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.

.10

.11The information that should be reported should be prescribed 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, 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.

.12

.13The manner in which reports must be made should likewise be prescribed 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.

.14

.15It was suggested that a duty should also be imposed upon supervisory or regulatory bodies to report certain information. The Commission therefore recommends that supervisory and regulatory bodies should be included in the reporting structure.^{lviii}

.16

.17A very important issue in respect of the reporting of information is the protection of the person making a report. 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.^{lix}

.18

.19The 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 recommends that the identity of a person who has made a report as well as the basis for the report should be inadmissible as evidence, unless that person agrees to testify in criminal proceedings. The person who has made a report or initiated the making of a report should be a competent but not compellable witness.^{lx} This will mean that, should such a person refuse to testify in criminal proceedings, 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.

(e) Internal policies

.1 In their approach to implementing a framework of administrative measures, institutions should follow procedures that are based on responsible business practice. This entails that institutions should develop internal policies to ensure the implementation of procedures to facilitate compliance with the proposed administrative framework. Specific aspects that should be included in internal policies should be prescribed by regulation. Provisions in this respect can, however, not be too prescriptive of the contents of the internal policies that institutions are required to adopt. Furthermore the contents of internal policies will not necessarily be the same for all the types of institutions to which this requirement will apply.

.1 The implementation of a “know your customer” policy is essential to the success of an administrative 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.

.2

.3 A know your customer policy firstly entails being able to identify the customer. The proposals in this regard were already discussed. A know your customer policy further entails that an institution should be able to recognise trends in the manner in which a customer conducts his or her business with that institution. This should enable the institution to note transactions that do not conform with this trend and may for that reason appear suspicious. It may also enable the institution to note when such a trend itself appears suspicious.^{lxi}

.4

.5 Institutions should be required to develop and implement procedures to ensure effective record-keeping.^{lxii} This should include procedures to capture the information of which records must be kept. Such a policy should also include procedures to protect the privacy of the persons concerned against unauthorised use of the stored information.

.6

.7 Institutions should also develop policies on the identification of information to be reported and on the procedure to report such information.^{lxiii} 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.

.8

.9 Training is very important to the success of a system of administrative control measures. Institutions should therefore develop training policies to ensure that their staff at all levels are 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 that should raise suspicion.^{lxiv}

(f) Financial Intelligence Unit

.1A crucial element of a system to control money laundering is the establishment of a body to record and utilise reported information. The Commission therefore recommends that a statutory body referred to as the Financial Intelligence Centre (henceforth referred to as "the Centre") should be instituted.^{lxv} **The task of such a body will mainly be to receive information through the reporting system, to analyse that information, to conduct investigations into money-laundering activities and to disseminate information that warrants investigation to the appropriate investigating authorities. The Centre should also fulfil the function of a supervisory body to oversee the compliance by the relevant institutions with the administrative framework.**^{lxvi}

.1A 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, 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.

.2

.3In order to perform its functions efficiently a body such as the proposed Centre must have administrative support. For this reason the Commission recommends that the Centre should administratively fall under the Minister of Finance.

.4

.5Some difference of opinion exists between respondents on the main function of the Centre. Some suggest that this should be to investigate money laundering activities up to the stage where a prosecution can be instituted. The basis for this point of view is a strong perception that the existing investigating authorities will not be in a position to react to information supplied by the Centre and that this will create a lack of follow-through on the information supplied by the Centre. In this form the Centre will function as a money laundering investigation unit. The advantage of this approach is that it will ensure swifter action where a possible money laundering scheme is identified, and better follow-up on reported information indicating money laundering activities.

.6

.7A number of other respondents feel that the Centre should function in conjunction with existing investigating authorities as a body to identify information that warrants investigation, but should not itself investigate and prepare money-laundering cases for prosecution. The reason for this is that the investigation of crime is essentially a police responsibility. The creation of another body with similar investigating functions as the police and bodies such as the Office for Serious Economic Offences will add to the problem that too many bodies exist with similar powers, leading to fragmented investigations. In this regard it must be borne in mind that a successful money laundering investigation will in all probability uncover the initial offence from which the laundered proceeds were derived. From an investigator's point of view it would be preferable to investigate these offences whole. Another important fact in this regard is that not all money laundering investigation will stem from information reported to the Centre. Police officials regularly uncover information indicating the existence of money laundering activities during their investigations. This will probably happen more often as the attention of investigators is extended to the proceeds of an offence once the Proceeds of Crime Bill is enacted.

.8

.9The Commission views the utilisation of the information supplied by the Centre as a crucial element of the whole administrative system. The Commission is of the opinion that any inability of investigating authorities to utilise the information supplied by the Centre to its fullest potential will defeat the purpose of the whole administrative framework. This will render these measures to becoming a dead letter on the statute book with significant yet fruitless cost implications for the business community. These

concerns induced the Commission to recommend that the Centre should also have the function of an investigating authority in respect of money-laundering activities.^{lxvii}

.10

.11 If the Centre is to carry out money-laundering investigations its powers will have to be extended to enable it to do so efficiently. In this respect the Commission recommends that the Centre should have similar powers to that of the Office for Serious Economic Offences. The Commission further recommends that the Centre should also have powers similar to those used in respect of investigation into exchange control contraventions.^{lxviii}

.12

.13 An important aspect that is associated with a body such as the proposed Centre is 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. Access to this information should therefore be limited to investigating authorities. The Centre should also have the discretion to share information with its counter parts and other investigating authorities outside the Republic where this requested in the course of an investigation.^{lxix}

.14

.15 The issue of feedback to institutions by the Centre was raised by a number of respondents and also a number of times at a national money-laundering conference held in Midrand in July 1996. Institutions require feedback on specific transactions mainly to be able to decide how to proceed with their relationship with the client in question. A lack of feedback will also lead to the institutions losing interest in continued cooperation with the relevant authorities as their efforts are not seen to be accomplishing anything. Feedback by the Centre will also enhance the institutions' knowledge of money laundering which will facilitate a better quality of reporting. The giving of feedback to the relevant institutions is an operational matter of the Centre and should not be regulated by legislation. The recommended legislation should, however, be sensitive to this issue and should not render the giving of feedback, even on a case by case basis, impossible.^{lxx}

(g) Administration

.1The Commission realises the value of a co-operative approach to the administration of an administrative framework. The Commission therefore recommends the institution of a body, referred to as the Money-laundering Policy Board to assist the Minister in formulating, revising and implementing an anti money-laundering policy and in administering the administrative framework.^{lxxi} **Such a board should consist of representatives of all the types of institutions to which the framework will apply.**

.1The functions of the Board should include issuing guidance notes to the relevant institutions, assisting institutions in their efforts to comply with the administrative framework and monitoring compliance with the framework.^{lxxii} The Minister should be enabled to grant exemptions from the duties imposed by this proposed administrative framework. In executing this discretion the Minister should be assisted by the Board. The Board should also periodically interact with the Centre on issues concerning the manner in which the Centre's functions are performed.

.2

.3Public awareness is important to the success of an administrative 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 proposed administrative measures will go some way to alleviate the burden the implementation of such measures will place on the relevant institutions.

(h) Enforcement

.1The Commission is of the opinion that a dual approach should be relied upon in respect of enforcing these administrative measures. On the one hand offences together with appropriate penalties should be created to enable the framework to be enforced by means of the criminal law. On the other, appropriate administrative sanctions should be employed as the criminal law may not be sufficiently effective to ensure the enforcement of the framework.

.1One of the issues that was frequently raised by respondents is that the administrative framework should not result in criminalising the institutions of the business sector in an effort to combat the real criminals that are harder to track down. Administrative sanctions should therefore be developed to ensure compliance with the Proposed Bill. The Commission recommends that this function should also be performed by the Centre.^{lxxiii}

.2

.3The type of administrative sanction that the Commission recommends is an administrative penalty which is similar to an admission of guilt in that payment of the penalty is done voluntarily as an alternative to facing prosecution.^{lxxiv} Payment of the penalty does not amount to a criminal conviction but a prosecution may not be instituted once such a penalty is payed. To enable the Centre to justly come to the conclusion that an institution is guilty of contravening a provision of the Proposed Bill and to decide upon an appropriate penalty the Commission recommends provisions for the conducting of an inquiry.

.4

.5Emphasis 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 an administrative framework. It is hoped that the institution of a body such as the Money-laundering Policy Board will facilitate co-operation among all interested parties.

(i) General

.1It should be clear that implementing and maintaining a framework of administrative measures along the lines I have discussed, 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 Government's responsibilities for which it should bear the major part of the costs.

.1In 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.

.2

.3A 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 administrative scheme. As was indicated previously the effective

operation of the Centre will be vital to the success of the administrative system as whole. This will in particular require obvious budgetary planning and anticipatory allocations; swift steps to be taken 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.

.4

.5

.6

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

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

CHAPTER 1 INTERPRETATION

1. Definitions

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

(b)

“**accountable institution**” means –

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

(ii) a board of executors or a trust company or any other person that invests, keeps in safe custody, controls or administers trust property;

(iii) an estate agent as defined in the Estate Agents Act, 1976 (Act 112 of 1976);

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

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

- a) establishes a continuous pool of capital by raising funds by means of the subscriptions of members;
- b) is a formal or informal rotating credit scheme with entertainment, social, and economic functions;
- c) consists of members who have pledged mutual support to each other towards the attainment of specified objectives;
- d) grants credit to and on behalf of members;
- e) provides for members to share in profits and to nominate management; and
- f) relies on self-imposed regulation to protect the interests of its members;

(vi) 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;

(vii) a mutual bank as defined in the Mutual Banks Act, 1993 (Act 124 of 1993);

- (viii) a person, other than a bank, who carries on the business of –
 - a) collecting money from other persons into an account or a fund; and
 - b) 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;
- (ix) a person who carries on “insurance business” as defined in the Insurance Act, 1943 (Act 27 of 1943), and includes an insurance broker and an agent of an insurer;
- (x) a person who carries on “the business of a bank” as defined in the Banks Act, 1990 (Act 94 of 1990);
- (xi) a person who carries on the business of a casino or gambling institution;
- (xii) a person who carries on the business of dealing in bullion, coins or Kruger Rands;
- (xiii) 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;
- (xiv) a person who carries on the business of exchanging amounts in one currency for amounts in another currency;
- (xv) a person who carries on the business of lending money against the security of securities, excluding the South African Reserve Bank;
- (xvi) a person who carries on the business of rendering investment advice and investment broking services;
- (xvii) a person who issues, sells or redeems travellers’ cheques, money orders or similar instruments;
- (xviii) the Post Office Savings Bank as established under section 52 of the Post Office Act, 1958 (Act 44 of 1958);
- (xix) a public accountant as defined in the Public Accountants’ and Auditors’ Act, 1991 (Act 80 of 1991), in respect of investment advice or investment service rendered by such an accountant;
- (xx) a member of a stock exchange licenced under the Stock Exchanges Control Act, 1985 (Act 1 of 1985); and
- (xxi) a totalisator agency board or a person operating a totalisator betting service;

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

“cash” (a) means—

- (i) coin and paper money of the Republic;
- (ii) coin and paper money of a foreign country; and
- (iii) travellers’ cheques;

- (b) in respect of a payment made by a person who carries on the business of a casino, gambling institution or totalisator betting service, includes cheques;”

“**client**” means a 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 and includes a Deputy-Director;

“**Financial Intelligence Centre**” means the body established by section 21 and “Centre” has a similar meaning;

“**Minister**” means the Minister of Finance;

“**Money-laundering Policy Board**” means the body established by section 27, and “Board” has a similar meaning;

“**person**” includes a juridical person;

“**prescribed**” means prescribed by the Minister by regulation;

“**proceeds of criminal conduct**” means property or part thereof derived directly or indirectly from —

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

“**prospective client**” means a 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 to carry out an investigation, arising from or relating to a matter in connection with the disclosure of information in compliance with a duty imposed by section 8, 9, 10, 11 or 12;

“reportable transaction” means a transaction in respect of which information must be disclosed in terms of section 8, 9, 10, 11 or 12;

“restricted account” means an account opened with a bank for the purpose of section 28;

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

“supervisory body” includes

- (a) the Financial Services Board as established under the Financial Services Board Act, 1990 (Act 97 of 1990);
- (b) the Registrar of Banks as defined in the Banks Act, 1990, (Act 94 of 1990); and
- (c) the Registrar of Companies as defined in the Companies Act, 1973 (Act 61 of 19973);

“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 a regulation made under it.

- (2) Nothing in this Act shall be construed so as to infringe upon the common law right to legal professional privilege as between an attorney and his or her client.

CHAPTER 2

IDENTIFICATION PROCEDURES

2. Identification when establishing business relationship or concluding single transaction

- (a) 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.

(b) 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 —

(c)

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

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

(a) No accountable institution may do anything to give effect to a business relationship established, or a single transaction concluded, with the prospective client until the proof of identity required by subsection (1) or (2), as the case may be, has been obtained.

(b)

3. **Identification when concluding transaction in course of business relationship**

(a) 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 —

(b)

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

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

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

(a) 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—

(b)

(i) the identity of that person; and

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

(a) 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.

- (b)
- (c)

CHAPTER 3

RECORD-KEEPING

2. Record-keeping in respect of establishment of business relationship or conclusion of single transaction

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

(b)

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

(i) where applicable –

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

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

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

(i) the identifying particulars of all accounts at that accountable institution that are involved in that relationship or transaction; and

(i) the identity of the person, or persons, who obtained the information concerned on behalf of the accountable institution.

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

(b)

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

(d)

- (i) the relevant business relationship has ended; or
- (i) the activities taking place in the course of the relevant single transaction have been completed.

2. **Record-keeping in respect of transactions concluded in course of business relationship**

- (a) Whenever an accountable institution concludes a transaction in the course of a business relationship that accountable institution must keep records of —
- (b)
 - (i) the identity of the person by whom the accountable institution is approached to conclude that transaction;
 - (i) the identity of the client with whom the relevant business relationship was established;
 - (ii) 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;
 - (i) the nature of the transaction concluded;
 - (i) the identifying particulars of all accounts at that accountable institution that are involved in that transaction; and
 - (i) the identity of the person, or persons, who ascertained or obtained the information concerned on behalf of the accountable institution.

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

(b)

(c) 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 have been completed.

(d)

3. **Manner in which records must be kept**

- (a) All records kept by an accountable institution under this Act must be kept in the prescribed manner.
- (b)
- (c) An accountable institution must take reasonable steps to ensure that no person gains access to records kept by that institution under this Act, unless such a person is authorised to do so under this Act or any other Act.
- (d)
- (e)
- (f)
- (g)

3. **Admissibility of information of which record is kept**

Information kept in the records of an accountable institution under this Act in the prescribed form is, in that form, 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

2. **Reporting 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.

2. **Reporting suspicious transactions**

- (a) An 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, must 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 aware of such grounds.

(b)

(c) If a client or prospective client discontinues an attempt to conclude a transaction with an accountable institution, and there are reasonable grounds to suspect that the transaction, if concluded, may have resulted in the proceeds of criminal conduct coming into the possession of the institution, or may in some way have facilitated the transfer of the proceeds of crime, that institution must 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 aware of such grounds.

(d)

3. **Reporting 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.

2. **Reporting by supervisory bodies**

If a supervisory body has reasonable grounds to suspect that property that is or has been under the control of an accountable institution is the proceeds of criminal conduct or that any action by an accountable institution has facilitated or will facilitate the transfer of such proceeds, that body must report the suspicion together with the information that 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 aware of such grounds.

2. **Reporting conveyance of cash into or out of Republic**

A person who intends to 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.

2. **Manner in which reports must be made**

(a) 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 or that includes that institution.

(b)

(c) A report made under section 11 or 12 must be made in the manner prescribed in respect of each section.

(d) An accountable institution that has made a report under section 8, 9 or 10, or a supervisory body that has made a report under section 11, or a person that has made a report under section 12, 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.

(e)

3. Consequence of disclosing information

An accountable institution that has disclosed information in respect of a transaction in compliance with a duty imposed by sections 8, 9, 10 and 13 may continue carrying out that transaction unless that institution is directed by the Financial Intelligence Centre to suspend the carrying out of that transaction.

2. Confidentiality not to limit reporting duty

No duty of secrecy or confidentiality or any other restriction on the disclosure of 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 a duty imposed by section 8, 9, 10, 11, 12 or 13.

2. Protection of person making report

(a) No liability based on a breach of a duty as to secrecy or confidentiality or any other restriction on the disclosure of 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, made in good faith, of information in compliance with a duty imposed by section 8, 9, 10, 11, 12 or 13.

(b)

(c) A person who disclosed, or initiated the disclosure of information under sections 8, 9, 10, 11, 12 or 13 shall be competent, but not compellable, to give evidence in criminal proceedings in a court of law.

(d)

(e) No evidence as to the identity of a person who disclosed, or initiated the disclosure of information under sections 8, 9, 10, 11, 12 or 13, or the contents of such a disclosure or the grounds upon which such a disclosure was based is admissible as evidence in criminal proceedings in a court of law unless that person testifies at such proceedings.

(f)

(g) In proceedings in a court of law a certificate issued by the Director of the Financial Intelligence Centre is evidence of the fact that information in respect of a particular case was reported to the Centre.

(h)

(i)

CHAPTER 5 INTERNAL POLICIES

2. Content of internal policies

The Minister may prescribe aspects that must be addressed in internal policies formulated under sections 18, 19, 20 and 21 and, without limiting the contents of such policies to the aspects so prescribed, may prescribe different aspects in respect of different accountable institutions or classes of accountable institutions.

2. 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 a person whom the institution is required to identify under sections 2 and 3.

2. 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.

2. 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.

2. **Training**

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

- (i) ensure that persons in charge of, or employed by, the institution are aware of the institution's duties under this Act; and
- (i) provide persons in charge of or employed by the institution with training as to the recognition and handling of transactions concluded by, or on behalf of a person, that involves or appears to involve the proceeds of criminal conduct.

CHAPTER 6 FINANCIAL INTELLIGENCE CENTRE

2. **Establishment of Financial Intelligence Centre**

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

2. **Functions of Centre**

- (a) The functions of the Centre are —
- (b)
 - (i) to collect, retain, compile and analyse all information disclosed under sections 8, 9, 10, 11, 12 or 13;
 - (i) to conduct investigations into the commission of offences under this Act or under the Proceeds of Crime Act, 19...;
 - (i) to disseminate information to the relevant investigating authority where the Director is of the opinion that such information warrants a criminal investigation;

- (i) to provide advice and assistance to a relevant investigating authority;
- (i) to carry out analysis of information at the request of an investigating authority for the purposes of this Act;
- (i) to supply information relating to criminal conduct to an investigating authority at the request of that authority;
- (i) to supervise the compliance by accountable institutions with this Act; and
- (i) to perform any other function that the Centre is required or permitted to perform under this Act.

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

(b)

3. **Director, Deputy-Directors and staff**

(a) The Minister must appoint a person to the office of Director: Financial Intelligence Centre.

(b)

(c) The Minister must 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 any of the functions of the Director.

(d)

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

(f)

(g) The staff of the Centre consists of —

(h)

- (i) persons appointed by the Director; and

- (i) officers and employees placed at the disposal of the Centre in terms of the laws governing the public service.

2. **General powers of the Director**

(a) The Director may—

- (b)
 - (i) require an accountable institution to provide an official of the Centre with access to records that the institution is required to keep under this Act;
 - (ii) direct an accountable institution to suspend the carrying out of a transaction for a reasonable period to be determined by the Director after consultation with the accountable institution concerned for the purpose of performing a function contemplated in section 22;

- (i) exchange information in respect of the performance of a function by the Centre with—
 - a) such institutions outside the Republic performing mainly similar functions to that of the Centre, as the Director deems fit; and
 - a) such foreign investigating authorities as the Director deems fit.

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

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

2. **Director may conduct inquiry in respect of investigation by Centre**

- (a) If the Director has reason to suspect that an offence under this Act or under the Proceeds of Crime Act, 199..., has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may hold an inquiry on the matter in question.
- (b)
- (c) All proceedings at an inquiry must take place *in camera*.
- (d)
- (e) The procedure to be followed in conducting an inquiry is determined by the Director at his or her discretion, having regard to the circumstances of each case.
- (f)
- (g) The proceedings and evidence at an inquiry is recorded in such manner as the Director reasonably considers will serve the objects of this Act.
- (h)
- (i) For the purposes of an inquiry—

- (j)
 - (i) the Director may summon a person who is believed to be able to furnish information on the subject of the inquiry or to have in his or her possession or under his or her control a book, document or other object relating to that subject, to appear before the Director at a time and place specified in the summons, to be questioned or to produce that book, document or other object;
 - (i) the Director may question that person, under oath or affirmation administered by the Director, and examine or retain for further examination or for safe custody such a book, document or other object.
- (a) A summons referred to in subsection (5) shall—
 - (b)
 - (i) be in the prescribed form;
 - (i) contain particulars of the matter in connection with which the person concerned is required to appear before the Director;
 - (i) be signed by the Director; and
 - (i) be served in the prescribed manner.
- (a) (a) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court applies in relation to the questioning of a person in terms of subsection (5): Provided that such a person shall not be entitled to refuse to answer a question upon the ground that the answer would tend to expose him to a criminal charge.
 - (b) No evidence regarding any questions and answers contemplated in paragraph (a) is admissible in criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in section 44 or in section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).
- (a) A person appearing before the Director by virtue of subsection (5)—
 - (b)
 - (i) may be assisted at the examination by an advocate or an attorney of a division of the Supreme Court of South Africa;

(i) is entitled to such witness fees as he or she would be entitled to if he or she were a witness for the State in criminal proceedings in a magistrate's court.

2. **Director may enter upon premises**

(a) If the Director has reason to suspect that an offence under this Act or under the Proceeds of Crime Act, 199..., has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may, subject to this section, at a reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter a premises on or in which anything connected with that inquiry is or is suspected to be, and may—

(b)

(i) inspect and search those premises, and there make such enquiries as he or she may deem necessary;

(i) examine an object found on or in the premises which has a bearing or might have a bearing on the inquiry in question, and request from the owner or person in charge of the premises or from a person in whose possession or charge that object is, information regarding that object;

(i) make copies of or take extracts from a book or document found on or in the premises which has a bearing or might have a bearing on the inquiry in question, and request from a person suspected of having the necessary information, an explanation of an entry therein; and

(i) seize, against the issue of a receipt, anything on or in the premises which has a bearing or might have a bearing on the inquiry in question, or if he or she wishes to retain it for further examination or for safe custody.

(a) The premises referred to in subsection (1) may only be entered, and the acts referred to in subsection (1) may only be performed, by virtue of a warrant issued in chambers by a magistrate, regional magistrate or judge of the area of jurisdiction within which the premises is situated: Provided that such a warrant may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified.

(b)

(c) A warrant contemplated in subsection (2) may only be issued if it appears to the magistrate, regional magistrate or judge from information on oath or affirmation that there are

reasonable grounds for believing that anything referred to in subsection (1) is on or in such premises or suspected to be on or in such premises.

(d)

(e) A warrant issued in terms of this section may be issued on any day and shall be of force until—

(f)

(i) it has been executed;

(i) it is cancelled by the person who issued it or, if such person is not available, by a person with like authority; or

(i) the expiry of three months from the day of its issue,

whichever may occur first.

(a) (a) A person who acts on authority of a warrant issued in terms of this section may use such force as may be reasonably necessary to overcome any resistance against the entry and search of the premises, including the breaking of a door or window of such premises: Provided that such person must first audibly demand admission to the premises and state the purpose for which he or she seeks to enter such premises.

(b)

(b) The proviso to paragraph (a) does not apply where the person concerned is on reasonable grounds of the opinion that an object, book or document which is the subject of the search may be destroyed, tampered with or disposed of if the provisions of the said proviso are first complied with.

(a) A warrant issued in terms of this section must be executed by day unless the person who issues the warrant authorises the execution thereof by night at times which must be reasonable in the circumstances.

(b)

(c) A person executing a warrant in terms of this section must immediately before commencing with the execution—

(d)

(i) identify himself or herself to the person in control of the premises, if such person is present, and hand to such person a copy of the warrant or, if such person is not present, affix such copy to a prominent place on the premises; and

(i) supply such person at his or her request with particulars regarding his or her authority to execute such a warrant.

(a) The Director may without a warrant enter upon a premises and perform the acts referred to in subsection (1) if the person who is competent to do so consents to such entry, search, seizure and removal.

(b)

(c) An entry upon or search of a premises in terms of this section must be conducted with strict regard to decency and order, including—

(d)

(i) a person's right to, respect for and the protection of his or her dignity;

(i) the right of a person to freedom and security; and

(i) the right of a person to his or her personal privacy.

(a) No evidence regarding questions and answers contemplated in subsection (1) is admissible in a subsequent criminal proceedings against a person from whom information in terms of that subsection is acquired if the answers incriminate him or her, except in criminal proceedings where the person concerned stands trial on a charge contemplated in section 45.

(b)

(c) If during the execution of a warrant or the conducting of a search in terms of this section, a person claims that anything found on or in the premises concerned contains privileged information and refuses the inspection or removal of such thing, the person executing the warrant or conducting the search must, if he or she is of the opinion that the thing contains information which is relevant to the inquiry and that such information is necessary for the inquiry, request the registrar of the Supreme Court which has jurisdiction or his or her delegate, to seize and remove that thing for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.

(d)

3. **Director may restrict flow of money**

(a) The Director may by notice in the *Government Gazette* order any person specified in such an order to pay any amount of money which the Director reasonably suspects of being involved in the commission of an offence under this Act or under the Proceeds of Crime Act, 199..., into a restricted account.

(b)

(c) Any amount of money paid into a restricted account by virtue of an order contemplated in subsection (1) is repaid to the person against whom the order was made within a period of 20 days after the publication of the order in the *Government Gazette*, unless the Director, before the expiry of such period, applies for a restraint order in terms of the Proceeds of Crime Act, 199..., in respect of property that includes that amount.

(d)

(e) No person may in any manner deal with an amount of money paid into a restricted account before the expiry of the period of 20 days contemplated in subsection (2) or the making of a restraint order in respect of property that includes that amount, whichever may occur first, except with the permission of the Director and on the conditions that he or she reasonably deems fit.

(f)

3. **Director may inform Attorney-General**

The Director may, whether or not he or she holds an inquiry contemplated in section 25, and, if he or she does hold such an inquiry, at any time prior to, during or after the holding of the inquiry, if he or she is of the opinion that the facts disclose the commission of an offence by a person, notify the attorney-general concerned accordingly.

2. **Director may conduct inquiries against accountable institutions**

(a) If the Director receives a complaint, charge or allegation or has reason to suspect that an accountable institution has contravened or failed to comply with a provision of this Act, and that accountable institution—

(b)

(i) agrees to abide by the Director's decision; and

(i) deposits with the Director such sum, not exceeding the maximum fine which may be imposed upon a conviction for the contravention or failure in question, as the Director may require or makes such arrangements or complies with such conditions with regard to securing the payment of such sum as the Director may require, the Director may institute an inquiry into such a complaint, charge or allegation, and, on finding that such an accountable institution has contravened or failed to comply with a provision of this Act the Director may order the forfeiture by way of penalty of the whole or a part of the amount so deposited or secured.

(a) There is a right of appeal to the Minister from a determination or order of the Director under subsection (1), and such right must be exercised within a period of three months from the date of such determination or order.

(b)

(c) The imposition of a penalty under subsection (1) is not regarded as a conviction in respect of a criminal offence, but no prosecution for the relevant offence shall thereafter be competent.

(d)

(e) The Director may, whenever he or she is in doubt as to whether an inquiry should be held in connection with the complaint, charge or allegation concerned, consult with or seek information from the Attorney-General of the area in respect of which the court has jurisdiction.”

(f)

(g)

3. **Delegation**

(a) The Director may, either generally or otherwise, delegate all or any of his or her powers or functions under this Act to a member of the staff of the Centre.

(b)

(c) A power or function so delegated, when exercised or performed by the delegate, is deemed to have been exercised or performed by the Director.

(d)

(e) The delegation of a power or function under this section does not prevent the exercise or performance of that power or function by the Director.

(f)

(g)

(h)

(i)

3. **Annual report**

The 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

2. **Access to information retained by Centre**

- (a) No person may obtain information retained by the Centre, except —
- (b)
- (i) a relevant investigating authority in respect of information in connection with a reportable transaction;
 - (i) an investigating authority, inside or outside Republic, in respect of which the Director reasonably believes that such information is required for the purpose of investigating criminal conduct;
 - (ii) an authority outside the Republic performing mainly similar functions to that of the Centre in respect of which the Director reasonably believes that such information, or an analysis thereof, is required for the purpose of investigating criminal conduct;
 - (i) an accountable institution, in respect of such information as the Director deems fit, relating to a transaction reported by that institution;
 - (i) the Commissioner for Inland Revenue; and
 - (i) to the extent that he or she may be entitled to that information by virtue of an order of a court or under any law.
- (b) If the Director is of the opinion that information is required as contemplated in subsection (1)(b) or (c) he or she must permit the person concerned in writing to obtain the required information.
- (c)
- (d) A permission given under paragraph (a) must 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.
- (e)
- (f) 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.
- (g)
- ## 3. **Information not to be divulged**

No person may, directly or indirectly, communicate to another person information obtained

from the Centre except for the purpose of performing his or her duties or exercising his or her powers or for the objects of this Act.

CHAPTER 8

ADMINISTRATION

2. Establishment of Money-laundering Policy Board

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

2. Functions of the Board

(a) The functions of the Board are to —

(b)

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

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

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

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

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

(i) advise the Minister on the granting of exemptions from a of the provision of this Act to an accountable institution or class of accountable institutions; and

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

2. Composition of the Board

(a) The Minister must appoint as members of the Board, the Director of the Centre and as many other persons as he or she deems appropriate and under the terms and conditions he or she deems fit.

(b)

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

(i) an accountable institution, or class of accountable institutions;

(i) a State Department; and

(i) a public or other body associated with the supervision or regulation of an accountable institution or class of accountable institutions.

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

(b)

3. **Committees of the Board**

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

(b)

(c) A committee consists of as many members of the Board, or as many members of the Board and as many other persons, as the Board deems necessary.

(d)

(e) The Board must appoint the chairperson and vice-chairperson of a committee.

(f)

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

(h)

(i) The Board is not absolved from responsibility for the performance of any functions entrusted to a committee.

(j)

3. **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****2. Proceeding with business relationship or single transaction without obtaining required proof of identity**

(a) An accountable institution that performs any action to give effect to a business relationship established, or single transaction concluded with a prospective client 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.

(b)

(c) An 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.

(d)

3. Failure to keep records

(a) An 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.

(b)

(c) An 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.

(d)

(e)

(f)

(g)

3. Tampering with records

A person who in any way tampers with information of which records are kept under section 4 or 5, shall be guilty of an offence.

2. Failure to report information

An 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.

2. Failure to formulate and implement internal policies

An accountable institution that fails to formulate and implement an internal policy referred to in section 18, 19, 20 or 21 or fails to include an aspect prescribed under section 17 in such a policy, shall be guilty of an offence.

2. Failure to suspend carrying out of transaction

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

2. Offences by witnesses summoned by Director to appear at inquiry

(a) A person who has been summoned to appear before the Director and who, without sufficient cause, fails to appear at the time and place specified in the summons or to remain in attendance until he or she is excused by the Director from further attendance, shall be guilty of an offence.

(b)

(c)

(d)

(e)

(f) A person who, at his or her appearance before the Director—

(g)

(i) fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce; or

(i) refuses to be sworn or to make an affirmation after he or she has been asked by the Director to do so;

shall be guilty of an offence.

(a) A person who, having been sworn or having made an affirmation—

(b)

(i) fails to answer fully and to the best of his or her ability a question lawfully put to him or her; or

- (i) gives false evidence knowing that evidence to be false or not knowing or not believing it to be true;

shall be guilty of an offence.

2. **Obstruction of official in executing search warrant**

- (a) A person who obstructs or hinders the Director or another person in the performance of his or her functions in terms of section 26, shall be guilty of an offence.
- (b)
- (c) A person who, when he or she is asked in terms of section 26(1) for information or an explanation relating to a matter within his or her knowledge, refuses or fails to give that information or explanation or gives information or an explanation which is false or misleading, knowing it to be false or misleading, shall be guilty of an offence.
- (d)
- (e)

3. **Failure to pay money into restricted account**

Any person who fails to comply with an order by the Director to pay any amount into a restricted account, shall be guilty of an offence.

2. **Dealing with money in restricted account**

Any person who deals with any money paid into a restricted account except as permitted by the Director or contravenes or fails to comply with any condition set by the Director in terms of section 28(3), shall be guilty of an offence.

2. **Misuse of information**

- (a) A 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.
- (b)
- (c) A person who communicates information obtained from the Centre to another person in any manner, except for the purpose of performing his or her functions under this Act, shall be guilty of an offence.
- (d)

- (e) A person who, knowing or suspecting—
- (f)
 - (i) that information has been disclosed to the Centre under the provisions of this Act; or
 - (i) that an investigation is being, or may be, conducted as a result of such a disclosure;

directly or indirectly brings information which is likely to prejudice such an investigation to the attention of another, shall be guilty of an offence.

(a) A person who, destroys or in any other way tampers with information kept by the Centre for the purposes of this Act, shall be guilty of an offence.

(b)

3. Penalties

(a) A person who is convicted of an offence contemplated in section 40, 41, 44, 46 or 47 shall be liable to imprisonment not exceeding a period of *five* years or to a fine within the penal jurisdiction of the court.

(b)

(c) A person who is convicted of an offence contemplated in section 42, 43, 45, 48, 49 or 50 shall be liable to imprisonment for a period not exceeding *fifteen* years or to a fine within the penal jurisdiction of the court.

(d)

(e)

CHAPTER 10 MISCELLANEOUS

2. Act not to limit powers of investigating authority

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

2. Regulations

(a) The Minister may make regulations—

(b)

- (i) prescribing the documents or other means that may be accepted as proof of a person's identity where a person is required to obtain proof of another person's identity under this Act;
 - (i) prescribing the manner in which a person must ascertain another person's identity where it is required under this Act;
 - (i) prescribing the particulars of an account that may be accepted to identify an account;
 - (i) prescribing the manner in which records that a person is required under this Act to keep, must be kept;
 - (i) prescribing the amount in respect of which information relating to cash transactions must be disclosed;
 - (i) prescribing the amount in respect of which the transfer or conveyance of cash into or out of the Republic must be disclosed;
 - (ii) prescribing the information that must be disclosed to the Centre in respect of a report made under section 8, 9, 10, 11 or 12;
 - (i) prescribing the manner in which information must be reported to the Centre under sections 8, 9, 10, 11 or 12;
 - (i) prescribing the aspects that must be addressed in an internal policy formulated under section 18, 19, 20, or 21; and
 - (i) providing for a 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.
- (a) The Minister must, when making regulations in respect of a matter referred to in paragraphs (a) to (i) of subsection (1), act in consultation with the Board.
 - (b)
 - (c) The Minister may make different regulations in respect of different accountable institutions, or classes of accountable institutions.
 - (d)
3. **Minister may grant exemptions**

- (a) The Minister may grant to an accountable institution, or class of accountable institutions, exemption from compliance with all or any of the provisions of this Act.
- (b)
- (c) The Minister may grant the exemption referred to in subsection (1) on the conditions and for the period he or she reasonably considers will serve the objects of this Act if he or she is satisfied that it is not reasonably practical for such institution or class of institutions to comply with such provision or provisions.
- (d)
- (e) The Minister must, when considering an application for an exemption, act in consultation with the Board.
- (f)

3. **Indemnity**

No person may claim compensation from the Minister or an executive officer, employee, member or a person otherwise associated with the Centre or the Board for damage suffered as a consequence of any action taken under this Act or otherwise performed in good faith.

2. **Amendment of laws**

The laws mentioned in the Schedule to this Act are hereby amended to the extent indicated in the third column thereof.

2. **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*.

SCHEDULE

Number and year of law	Short title	Extent of amendment
Act 140 of 1992	Drugs and Drug Trafficking Act, 1992	1. Amendment of section 1 by deleting the definition of—

- (a) “conversion”; and
- (b) “economic offence”.
2. Repeal of section 7.
 3. Amendment of section 10 by deleting subsections (2) and (3).
 4. Amendment of section 14 by deleting paragraph (b).

Act ... of 19...

Proceeds of Crime
Act, 19...

1. Amendment of section 15 by substituting for subsection (1) the following subsection:

“The attorney-general concerned, or any public prosecutor authorised thereto in writing by him or her or the Director of the Office for Serious Economic Offences or any person authorised thereto in writing by him or her or the Director of the Financial Intelligence Centre or any person authorised thereto in writing by him or her may by way of an *ex parte* application apply to a competent superior court or a judge in chambers for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates.”.

2. Repeal of section 30.

3. Insertion before section 32 of the following section:

“31A Persons may report suspicions regarding proceeds of crime

(1) If a person has reason to suspect that property that comes into his or her possession may be the proceeds of crime, he or she may report such suspicion and the grounds upon which it rests to the Centre.

(2) (a) 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 prevent a person from making a report under subsection (1).

(b) 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, made in good faith, of any information under subsection (1).”.

LIST OF RESPONDENTS

Attorney-General: Cape Town

Attorney-General: Grahamstown

Messrs Barkers (on behalf of the Totalisator Agency Board Kwazulu-Natal)

Bond Exchange (incorporating comments by Eskom)

Centre for Business Law; University of the Orange Freestate

Coopers & Lybrand

Council of South African Banks

Department of Exchange Control; SA Reserve Bank

Development Bank of Southern Africa

Financial Services Board

First National Bank

Dr D Germishuys
Johannesburg Stock Exchange

Law Society of the Cape of Good Hope

Life Offices Association

Prof FR Malan (on behalf of the South African Futures Exchange)

Office for Serious Economic Offences

Province of Kwazulu-Natal

Provincial Administration: Western Cape

Messrs Rashid Patel & Co

Society of Advocates of South Africa Transvaal Provincial Division

South African Institute of Chartered Accountants

South African Police Service:

National Crime Investigation Service

South African Narcotics Bureau

Transvaal Law Society

Mr CL van Heerden

Adv J Wild: Society of Advocates of Natal

ⁱChapter 5 of the proposed Proceeds of Crime Bill, Annexure B to the Commission's Report on International Co-operation in Criminal Matters (Project 98).

ⁱⁱRider 1996 **Journal of Financial Crime** 238.

ⁱⁱⁱSection 14(b) read with section 1(1) and section 7 of the Drugs Act.

^{iv}Section 10(2) read with section 1(1) of the Drugs Act.

^vSection 10(3) of the Drugs Act.

^{vi}Section 17(d) read with section 15(1) and section 10(2) and (3) of the Drugs Act.

^{vii}Section 10(4) of the Drugs Act.

^{viii}*Ibid.*

^{ix}In terms of section 1(1) read with section 13 and section 5 of the Drugs Act a "defined crime" includes dealing in dangerous and undesirable dependence producing substances and conversion of the proceeds of such dealing.

^xNamely to cause the proceeds of crime to appear as legitimate earnings.

^{xi}Definition of "cash dealer" in section 3 of the Financial Transactions Reports Act 1988.

^{xii}This will require Australian solicitors to report cash transactions exceeding Australian \$10 000.

^{xiii}Statutory Instrument 1933 of 1993.

^{xiv}The definition of "relevant financial business" in section 4 of the Money Laundering Regulations, Statutory Instrument 1933 of 1993.

^{xv}Section 93A of the Criminal Justice Act, 1988.

^{xvi}Section 93B of the Criminal Justice Act, 1988.

^{xvii}The definition of "financial institution" in section 5312 of USC 31.

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- ^{xxviii}Section 18 of the Financial Transactions Reports Act 1988.
- ^{xix}Regulations 7 and 9 of the Money Laundering Regulations, Statutory Instrument 1933 of 1993.
- ^{xx}Regulation 7 of the Money Laundering Regulations, Statutory Instrument 1933 of 1993.
- ^{xxi}Regulation 11 of the Money Laundering Regulations, Statutory Instrument 1933 of 1993.
- ^{xxii}Section 23 of the Financial Transaction Reports Act 1988.
- ^{xxiii}*Ibid.*
- ^{xxiv}Regulation 12 of the Money Laundering Regulations, Statutory Instrument 1933 of 1993.
- ^{xxv}Section 7 read with section 3 of the Financial Transactions Reports Act 1988.
- ^{xxvi}Section 17B of the Financial Transactions Reports Act 1988.
- ^{xxvii}Section 16 of the Financial Transactions Reports Act 1988.
- ^{xxviii}Which deals with the confiscation of the proceeds of crime and criminalises money laundering.
- ^{xxix}Section 3 of the Financial Transactions Reports Act 1988.
- ^{xxx}Section 15 of the Financial Transactions Reports Act 1988; proposals were made to raise this threshold to Australian \$10 000.
- ^{xxxi}Schedules 1 to 4 of the Financial Transactions Reports Act 1988.
- ^{xxxii}Section 5313(a) of USC 31.
- ^{xxxiii}Section 5316(a) of USC 31.
- ^{xxxiv}Section 5314(a) of USC 31.
- ^{xxxv}Section 5316(a) of USC 31.
- ^{xxxvi}Section 5318(g)(1) of USC 31.
- ^{xxxvii}Section 5318(g)(3) of USC 31.
- ^{xxxviii}Section 93A of the Criminal Justice Act 1988.
- ^{xxxix}Section 93B of the Criminal Justice Act 1988.
- ^{xl}Sections 93A(3) and 93B(5) of the Criminal Justice Act 1988.
- ^{xli}Regulation 5(1) of the Money Laundering Regulations, Statutory Instrument 1933 of 1993.
- ^{xlii}*Ibid.*
- ^{xliiii}Regulation 5(3) of the Money Laundering Regulations, Statutory Instrument 1933 of 1993.
- ^{xliv}Section 35 of the Financial Transactions Reports Act 1988.
- ^{xlv}*Cinelli et al* at 7.
- ^{xlvi}See clause 1(1) of the Proposed Bill, Annexure A.
- ^{xlvii}See clause 1(2) of the Proposed Bill, Annexure A.
- ^{xlviii}The offence of “assisting another to benefit from the proceeds of crime” is proposed by the Commission in the Report on International Co-operation in Criminal Matters, Project 98.
- ^{xlix}See clause 54 of the Proposed Bill, Annexure A.
- ^lSee clause 2 of the Proposed Bill, Annexure A.
- ^{li}See clause 3 of the Proposed Bill, Annexure A.
- ^{lii}See clause 4 of the Proposed Bill, Annexure A.

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- ^{liii}See clause 5 of the Proposed Bill, Annexure A.
- ^{liv}See clause 4 of the Proposed Bill, Annexure A.
- ^{lv}See clause 7 of the Proposed Bill, Annexure A.
- ^{lvi}See clauses 8 and 9 of the Proposed Bill, Annexure A.
- ^{lvii}See clause 9(2) of the Proposed Bill, Annexure A.
- ^{lviii}See clause 11 of the Proposed Bill, Annexure A.
- ^{lix}See clause 16(1) of the Proposed Bill, Annexure A.
- ^{lx}See clause 16(2) and (3) of the Proposed Bill, Annexure A.
- ^{lxi}See clause 18 of the Proposed Bill, Annexure A.
- ^{lxii}See clause 19 of the Proposed Bill, Annexure A.
- ^{lxiii}See clause 20 of the Proposed Bill, Annexure A.
- ^{lxiv}See clause 21 of the Proposed Bill, Annexure A.
- ^{lxv}See clause 22 of the Proposed Bill, Annexure A.
- ^{lxvi}See clause 23(1)(g) of the Proposed Bill, Annexure A.
- ^{lxvii}See clause 22(1)(b) of the Proposed Bill, Annexure A.
- ^{lxviii}See clauses 26, 27, 28 and 29 of the Proposed Bill, Annexure A.
- ^{lix}See clause 33(1)(a) to (d) of the Proposed Bill, Annexure A.
- ^{lxx}See clause 33(1)(d) of the Proposed Bill, Annexure A.
- ^{lxxi}See clause 35 of the Proposed Bill, Annexure A.
- ^{lxxii}See clause 36 of the Proposed Bill, Annexure A.
- ^{lxxiii}See clause 22(1)(g) of the Proposed Bill, Annexure A.
- ^{lxxiv}See clause 30 of the Proposed Bill, Annexure A.