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MONEY LAUNDERING: ITS EFFECTS ON THE BANKS' DUTY OF CONFIDENTIALITY AND THE POSSIBLE MEASURES AVAILABLE TO COMBAT IT IN NEW ZEALAND

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TABLE OF CONTENTS

I INTRODUCTION 1

II THE MONEY LAUNDERING PROBLEM 2

A *Money Laundering in General* 2

B *The Problem Money Laundering Poses to the Financial Sector* 3

III BANK SECRECY AND THE BANKS' DUTY OF CONFIDENTIALITY 6

A *The Development of Bank Secrecy Laws* 6

B *The Bank's Duty of Confidentiality in New Zealand* 8

1 *The banks' duty of confidentiality under Tournier* 8

(a) Implied duty of confidentiality 8

(b) Type of confidential information 10

2 *Exceptions to the banks' duty of confidentiality* 11

(a) In Switzerland 11

(b) In New Zealand 12

(i) Disclosure under compulsion by law 13

(ii) Duty to the public to disclose 14

(iii) The interests of the bank require disclosure 16

(iv) Disclosure made by express or implied consent of the customer*New Zealand Banks* 18

IV THE EFECT OF EFFORTS TO REDUCE MONEY LAUNDERING ON NEW

ZEALAND BANKS' DUTY OF CONFIDENTIALITY 19

A *Statutory Efforts Currently Present to reduce Money Laundering in New Zealand Banks* 20

1 *Production orders* 21

2 *Monitoring orders* 22

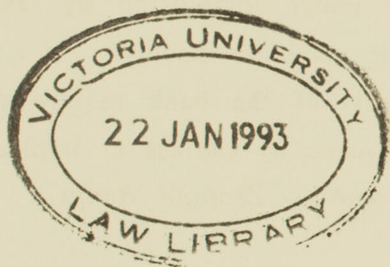
3 *Analysis of production and monitoring orders* 23

B *Practical Efforts by the Banks to Reduce Money Laundering* 24

1 *Efforts by the Reserve Bank of New Zealand* 24

2 *Basle Statement of Principles* 25

3 *Banking industry standards for the deterrence and detection of money laundering* 26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V THE EXTRATERRITORIAL EFFECTS OF MONEY LAUNDERING ACTIVITIES 28
A *Traditional Methods of Discovery* 29
1 *Letters rogatory* 29
2 *Subpoenas duces tecum* 30
B *Mutual Legal Assistance Schemes orTreaties* 31

VI A SUITABLE ANTI-MONEY LAUNDERING REGIME FOR NEW ZEALAND? 33
A *A Brief Outline of Various Anti-Money Laundering Regimes* 33
1 *The United States and Australia* 34
2 *Switzerland and the United Kingdom* 35
B *What Scheme Should New Zealand Implement* 37
1 *Detailed transation reporting scheme or general guidelines* 37
2 *How efficient would any scheme be in reducing money laundering?* 39
3 *The Serious Fraud Office* 40

VII CONCLUSION 40

In recent years, money laundering activities have increased steadily due to the growing trade in illicit drugs. Money laundering is a growing concern in the financial sectors of a country as illegal profits are usually 'laundered' through the banks to change it into legitimate and useful income. Efforts to combat this growing menace has had significant effects on the banker-customer relationship. The object of this paper is to examine the effects of money laundering activities on the banks' duty of confidentiality to their clients. The paper concentrates mainly on the New Zealand banks' duty of confidentiality as established by *Tournier*. The paper argues that the efforts to combat money laundering activities have significantly derogated the duty of confidentiality between the bank and its client. However, the paper shows that the banks are seldom (if ever) held liable for the disclosure of information required to stop money laundering activities. The international dimensions of money laundering are also explored. As money laundering is not yet an offence in New Zealand, the paper considers the possible types of anti-money laundering regime that can be implemented in New Zealand. A brief look is taken of the anti-money laundering regimes available in other countries for assistance with this question. The paper concludes that the most likely regime for New Zealand is a detailed cash transactions reporting regimes.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 12,400 words.

I INTRODUCTION

The money laundering phenomenon is of major economic concern to the governments of today. Millions of dollars are lost each year through tax evasion and money laundering activities. This ability to hide the proceeds of crime allows criminal activities to flourish unchecked until it becomes a threat to the country. Criminal activities such as drug trafficking, fraud and tax evasion could only operate at a fraction of the current levels , and with far less flexibility in the absence of money laundering.

At present, money laundering is not an offence in New Zealand. New Zealand also does not have any specific regime against money laundering activities. However, New Zealand is a signatory of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[1] In addition, New Zealand is a member of the Financial Action Task Force on Money Laundering (an Organisation for Economic Cooperation and Development group).[2] The Task Force gave 40 recommendations which its members have to comply with. Under the 1988 Vienna Convention and the recommendations of the Task Force, New Zealand has "an obligation to develop a money laundering offence and be able to work with other countries under Mutual Assistance Treaties in force in their country and vise versa".[3] Various government bodies[4] are currently studying the possible types of anti-money laundering regime which could be implemented in New Zealand.[5]

As money laundering activities generally involve the use of financial institutions, any regime which seeks to curtail these activities would necessarily affect the activities of banks. Banks may be required to disclose information on certain transactions (suspected to be money laundering transactions) entered into by their customers to the relevant authorities. This requirement to disclose information would conflict with the banks' duty of confidentiality to its customers.

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1 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Signed on 19 December 1988. UN Doc. E/Conf. 82/15, Dec. 19, 1988.[Hereinafter the 1988 Vienna Convention].

2 Interview with Mr Kevin Marlow, Detective Senior Sergeant, Co-ordinator, Investigation Services, New Zealand Police on 15 September 1992.

3 Quote from Mr Kevin Marlow, above n 2.

4 Examples of some government bodies interested in the issue of money laundering are the New Zealand Police, the Ministry of Justice, the Customs Department, the Serious Fraud Office and the Bank Supervision Department of the Reserve Bank of New Zealand.

5 Interview with Mr Kevin Marlow,above n 2.

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This paper will discuss the significance of money laundering and the various regimes which could be used to combat it. Part I of this paper provides an overview of the money laundering problem and law enforcement officials' concerns about it. Part II discusses bank secrecy laws and the principles regarding the bank's duty of confidentiality. The intrusion of efforts to combat money laundering into the bank's duty of confidentiality is considered in part III. Part IV looks at the extraterritorial effects of money laundering . Finally, part V briefly outlines the various regimes currently in place to combat money laundering in other jurisdictions and considers a possible anti-money laundering regime for New Zealand.

I I THE MONEY LAUNDERING PROBLEM

A *Money Laundering in General*

Money laundering begins with dirty money. Money can get dirty in two ways. One way is through tax evasion, where people make money legally, but they earn more money than what they report to the government. The other way money gets dirty is through illegal generation, for example, bribery, drug sales, extortion, gambling, loansharking and prostitution. Money laundering is therefore an indispensable element of most criminal activity. Once money gets dirty, it must be 'laundered' or converted into an apparently legitimate form before it can be spent or invested. 'Money laundering' is "the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate."[6]

Laundering has several goals - the sanitising of money to avoid taxation and to convert the cash into a physically manageable and inconspicuous form, for example, a postal order or a cashier's cheque. The importance of converting cash into a physically manageable form is illustrated by the case of Anthony Castelbuono who somewhat conspicuously brought US$ 1,187,450 in small bills to a casino. The cash had an estimated volume of 5.75 cubic feet and weighed 280 pounds.[7] Whatever its goal, money laundering is harmful as it allows the underlying criminal activity

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6 President's Commission on Organised Crime, Interim Report to the President and the Attorney General, The Cash Connection: Organised Crime, Financial Institutions and Money Laundering (1984) p 7. [Hereinafter The Cash Connection] [quoted in Sarah N. Welling "Smurfs, Money Laundering, and the Federal Criminal Law: the Crime of Structuring Transactions" (1989) 41 Florida Law Review 287, 290-291].

7 Sarah N. Welling "Smurfs, Money Laundering, and the Federal Criminal Law: the Crime of Structuring Transactions" (1989) 41 Florida Law Review 287,, 291.

which generates the dirty money to thrive. Drug sales, gambling, or other crimes that generate cash are pointless if the cash cannot be invested or spent. Without laundering, the risk/reward ratio for the underlying crime is unattractive. Thus, the success of a criminal venture depends on efficient laundering which renders the underlying crime lucrative, and therefore perpetuates it.[8]

Money laundering is fast becoming a major concern in the world, particularly with the increase in worldwide drug trafficking activities in recent years. Laundering is only required for large amounts of money because small amounts can be absorbed inconspicuously into a criminal's lifestyle.[9] Huge amounts of cash require attention to disposal, and the drug trade currently generates such huge amounts.[10]

B *The Problem Money Laundering Poses to the Financial Sector*

Money laundering activities are especially worrying to the financial sector. The money launderer usually uses the banks, financial institutions, companies, insurance groups and even law firms to convert the dirty money into a legitimate form. To identify a money laundering operation, the funds involved or the person disposing of those funds must be associated with some particular criminal activity.[11] This may not be easy to achieve with the increased sophistication of money laundering techniques.

Actual money laundering techniques can be very simple or very complex. The simplest technique is to exchange the dirty money for a cashier's cheque. Another technique is to channel illegal cash profits through domestic cash businesses and reporting the illegal income as legal income derived from a legitimate business.

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8 "Without the means to launder money, thereby making cash generated by a criminal enterprise appear to come from a legitimate source, organised crime could not flourish as it now does." Above n 6, The Cash Connection, p 3 [quoted in Welling, above n 7, p 291, note 21].

9 For example a person legally earning and reporting an income of $ 75,000 a year could probably spent it in unlaundered cash on items such as cars, houses, clothes and travel without arousing suspicions. However, when large amounts of money are involved, it cannot be easily absorbed and spent as cash.

10 For example, in August 1988, five thousand pounds of cocaine with an estimated street value of US$355 million were seized in New York, U.S.A. Had the cocaine reached the streets, the money from its sales would have to be laundered before it could be put to use.

11 Laura M.L. Maroldy "Recordkeeping and Reporting in an Attempt to Stop the Money Laundering Cycle: Why Blanket Recording and Reporting of Wire and Electronic Funds Transfers is Not the Answer" (1991) 66 Notre Dame Law Review 863, p 866.

These businesses are well known and documented and include such businesses as banks, foreign exchange houses, savings and loans institutions, casinos, construction companies, small restaurants, auto repair shops and dress shops.[12] Money launderers usually employ financial transactions that are no different from transactions associated with legitimate commercial or personal financial activity. Examples of such financial transactions include purchasing cashier's cheques or traveller's cheques, or conducting wire transfers between ostensibly legitimate businesses that are actually 'fronts' for criminal organisations.

The most complex and sophisticated laundering scheme is the utilising of offshore bank secrecy havens to overcome the obstacles inherent in the domestic laundering of enormous sums of narcotics profits. There is a basic pattern to international laundering methods.[13] A trafficker first chooses an offshore bank in a secrecy haven.[14] Having selected a secrecy haven, the trafficker opens a bank account under the laws of the haven or form an 'exempt company'[15] and open an account in its name. Once an account is open, the trafficker must endeavour to smuggle the drug-related cash out of the country, without creating a 'paper-trail' that will link him/her to the dirty money or to the laundering process. To accomplish this, the trafficker must reduce the large accumulated volume of small denomination currency into larger bills or into cashier's cheques. The larger bills or cashier's cheques may then be physically and surreptitiously transported by courier into the secrecy haven for deposit. A more sophisticated method of moving the cash out of the country is to deliver the currency to a domestic bank, to be electronically transferred to the offshore account. Once the dirty money is deposited into the secret bank account, the same funds may later be taken out and moved back into the country

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12 Jeffrey I. Horowitz "Comment-Piercing offshore Bank Secrecy Laws Used to Launder Illegal Narcotics Profits: The Cayman Example" (1985) 20 Texas International Law Journal 133, 137, note 16.

13 For a full discussion on the use of offshore money laundering techniques and the methods used to combat it, see Horowitz (above n 12), and Andrea M Grilli "Preventing Billions from Being Washed Offshore: A Growing Approach to Stopping International Drug Trafficking" (1987) 14 Syracuse Journal of International Law and Commerce 65.

14 There are at least 29 secrecy havens recognised by the United States Internal Revenue Service. Among these are the Bahamas, Cayman Islands,Costa Rica, Hong Kong,Monaco, Singapore, and Switzerland. For a full list of secrecy havens, refer to Horowitz, above n 12, p 134, note 4.

15 Cayman Islands law provides for the formation of 'exempted companies' that may issue shares, forego annual shareholders meetings, hold directors meetings by proxy, and refrain from submitting financial information in their annual return filed with the government. The name of the shareholders and true owners of these exempt companies are protected under secrecy laws and are not on public record. See Horowitz, above n 12, pp 138-139.

of origin as legitimate investment (by the purchase of real estate) of as personal of business loans from the bank or exempt company.

Laundering typically consists of three distinct stages-placement, layering and integration.[16] Placement is the physical depositing of the dirty money into the bank account. Layering is the process of transferring these funds among various accounts through a complex series of financial transactions, intended to separate these funds from their illegal origin. Integration describes the process of shifting the laundered funds into legitimate organisations. The United States believe that the money laundering process is most vulnerable at the placement stage.[17] If a paper-trail can be created the moment the dirty money enters the banking system, a documentary connection between the three stages of money laundering will be formed. Hence, the source of the ostensibly legitimate money may be exposed and a money laundering operation identified.

However, to be effective in preventing money laundering, the paper-trail that is created must be reported to the relevant authorities. The paper-trail generally consists of the documentation of the activities of the money launderer with its bank. The enforcement of the reporting of paper-trails on the banks would directly affect the banks' duty of confidentiality to its customers. Moreover, in certain countries, the imposition of reporting requirements on banks, by either internal or extraterritorial means, may be against its bank secrecy laws.

The next part of the paper looks at the existence of bank secrecy laws and the principles behind the banks' duty of confidentiality to its customers. An insight will then be given on the intrusion of money laundering laws into bank confidentiality in New Zealand and in other jurisdictions.

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16 Peter E. Meltzer "Keeping Drug Money from Reaching the Wash Cycle: A Guide to the Bank Secrecy Act" (1991) 108 Banking Law Journal 230, pp 231-232.

17 This theory forms the foundation behind the United States' Bank Secrecy Act 1970, a commonly used name for the Financial Recordkeeping and Currency and Foreign Transactions Reporting Act of 1970, 31 U.S.C. s 5311.[Hereinafter Bank Secrecy Act 1970 (US)].

III BANK SECRECY AND THE BANKS' DUTY OF CONFIDENTIALITY

A *The Development of Bank Secrecy Laws*

Bank secrecy laws - laws that protect the confidentiality of the banker-client relationship - may be traced back to biblical times.[18] The modern legal prototype of a secrecy jurisdiction, however, was developed in Switzerland during the 1930's. Before the 1930's, Swiss bank secrecy was based on three distinct concepts: the Swiss concept of the right to personal privacy (Article 28 of the Swiss Civil Code); the contractual obligation on a bank to maintain the confidentiality of its client (Article 97 of the Swiss Code of Obligations); and criminal liability for the disclosure of confidential information protected by federal banking laws (Article 162 of the Swiss Penal Code).[19]

In the early 1930's, a serious threat to privacy and banking secrecy occurred for political reasons in Switzerland. Nazi German agents infiltrated Switzerland in an attempt to discover assets held by German Jews and other 'enemies of the state'. The agents used various tricks, such as trying to make deposits in a suspect's name and bribing lower bank officials, in attempting to discover if suspected German Jews had Swiss bank accounts.[20] These tricks served to undermine the customary privacy and stability of Swiss banking, challenged the Swiss Government's sovereignty and endangered the lives of countless German Jews.[21]

As a result, Article 47 of the Banking Law was enacted in 1934 which established criminal penalties for secrecy violations and prevented Swiss banks from disclosing information to German agents. Swiss bank secrecy therefore became recognised as an obligation of civil law. Article 47 (b) provides:

> Anyone who in his capacity as an officer or employee of a bank, or as an auditor or his employee, or as a member of the banking commission or an officer or employee of its bureau intentionally violates his duty to observe silence or his professional rule of

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18 Horowitz, above n 12, 134.

19 For a more detailed outline of the origins and scope of Swiss bank secrecy, see Elliot A. Stultz "Swiss Bank Secrecy and the United States Efforts to Obtain Information from Swiss Banks" (1988) 21 Vanderbilt Journal of International Law 63, pp 66-69.

20 "Note-The Effect of Swiss Bank Secrecy on the Enforcement of Insider Trading Regulations and the Memorandum of Understanding Between the United States and Switzerland" (1984) 7 B. C. International & Comp. L. Rev. 541, p 547.[cited in Stultz, above n 19, p 66-67, note 18.

21 German Jews who held assets could be sentenced to death for such holdings.

> secrecy or anyone who induces or attempts to induce a person to commit any such offence, shall be liable to a fine of up to 20,000 francs or imprisonment for up to six months, or both.[22]

Today, bank secrecy laws such as that found in Article 47(b) of the Swiss Banking Law exist throughout the world to protect the individuals' personal needs[23] and multinational businesses' needs for confidentiality.[24] The popularity of bank secrecy laws may be attributed to the growth of Eurobond financing in the 1960's, thereby resulting in the tremendous growth of offshore banking. The legitimate expansion of foreign bank secrecy jurisdictions have also been followed in recent years by the illegal use of such secrecy havens. Some characteristics of a secrecy haven are (1) little or no income tax, (2) the offering of banking or commercial secrecy, (3) legislation specifically designed to attract foreign deposits, (4) minimum banking regulations, (5) Few exchange control restrictions, (6) political stability and a government policy friendly to foreign investment, (7) efficient transportation and communication links with developed countries, (8) available local professional personnel with adequate legal, accounting and banking expertise, and (9) convenience of location to a major drug source, transit, or distributions areas.[25]

Although New Zealand is not a secrecy haven, it has a tradition of bank secrecy, as with most countries in the world.[26] Thus, New Zealand banks have a strong sense of duty to maintain the confidentiality of their clients. This was especially

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22 Translation of article 47(b) of the Swiss Banking Law (found in Stultz, above n 19, p 70).

23 Some justifications for individual use of bank secrecy jurisdiction are: (1) capital flight from political, religious, and racial persecution; (2) freedom from oppressive government, confiscatory taxes, and the risks of war; (3) protection from legal judgement; and (4) protection from domestic threats of robbery.

24 The reasons for the multinational corporations' use of bank secrecy jurisdictions are: (1) to avoid taxation; (2) to avoid regulation; (3) to profit from higher interest rates when lending and enjoy lower interest rates when borrowing; and (4) to enjoy the protection of confidentiality when engaged in activities which , if known to others in advance, might hazard business successes or profits margins.

25 Horowitz, above n 12, p 138.

26 For example, Switzerland has a tradition for bank secrecy which is perceived by many domestic and foreign bankers, to be vital to it's financial institution's prosperity. See William W. Park "Legal Policy Conflict in International Banking" 50 Ohio State Law Journal 1067, p 1095.

emphasised in the 1989 Review Committee Report on Banking Services[27] which stated:[28]

> The principle of confidentiality applied to a customer's private financial affairs is a tradition which should be respected and, when under threat, emphasized the more strongly, because its roots go deeper than the business of banking: it has to do with the society we live in.

B *The Bank's Duty of Confidentiality in New Zealand*

The banks' legal obligation to maintain confidentiality in their dealings with their clients is well established.[29] The leading case on bank confidentiality and its limitations is *Tournier* v *National Provincial & Union Bank of England.*[30] However, the duty of confidentiality has eroded over the years. Banks continually face the conflict between the duty to maintain the confidentiality of customer records and the duty to disclose such records whenever 'special circumstances' arise. An important example of a 'special circumstance' is the requirement in certain countries that banks must report suspected money laundering transactions to the proper authorities. This conflict is of great significance to banks as they may face civil and/or criminal proceedings for the failure to comply with these conflicting duties.

In the following sections, the principles of bank confidentiality and its limitations as established by *Tournier*[31] will be discussed.

1 *The banks' duty of confidentiality under Tournier*

(a) Implied duty of confidentiality

New Zealand follows the duty of confidentiality as established by the English case of *Tournier v National Provincial & Union Bank of England.*[32] The plaintiff was a customer of the defendant bank. The plaintiff's account was overdrawn. He agreed,

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27 Review Committee Report - Banking Services: Law and Practice (Feb 1989; Cm. 622).

28 Review Committee Report, above n 27, Chapter 5: the Banker's Duty of Confidentiality, p 34.

29 A. L. Tyree *New Zealand Banking Law* (Butterworths, Wellington, 1987), at p 84: Mark W. Russell *Introduction to New Zealand Banking Law* (2ed, The Law Book Co. Ltd., Sydney, 1991), at p 58.

30 [1924] 1 KB 461.[Hereinafter referred to as *Tournier*].

31 [1924] 1 KB 461.

32 [1924] 1 KB 461.

however, to pay off the overdraft by instalments, giving the name and address of his new employer. When the plaintiff defaulted on the payments, the bank manager telephoned the employer to obtain the plaintiff's address. During the conversation, the bank manager disclosed the plaintiff's default and also his suspicions that the plaintiff was a gambler. Due to this information, the plaintiff's employers refused to renew his employment. The plaintiff sued for the breach of an implied contract of confidentiality which was upheld by the Court of Appeal.

In the case, Lord Scrutton stated that:

> [t]he Court will only imply terms which must necessarily have been in the contemplation of the parties in making the contract. I have no doubt that it is an implied term of a banker's contract with his customer that the banker shall not disclose the account, or transactions relating thereto, of his customer except in certain circumstances.[33]

Hence, Lord Scrutton held that the duty of confidentiality is an implied contractual term of the banker-customer relationship.

An important United States case, *Peterson v Idaho First National Bank*[34] held that an implied duty of confidentiality existed between the banks and its customers. It also held that an agency relationship existed between the bank and its customer. Since an agent is not allowed to disclose confidential information given to it by its principal, the bank, as agent for the customer, has a duty not to reveal confidential information given to it by a depositor. Therefore, in addition to the implied contractual duty of confidence, the banks also possess a duty of secrecy imposed by its agency relationship with its depositors. This concept is in line with Article 97 of the Swiss Code of Obligations. Under Swiss contract law, it is an implied condition of the deposit contract that the banker maintain the confidentiality of all information learnt about the client. This implied obligation arises from the law of agency, under which a banker acts as an agent for his clients and owes them a duty of loyalty.[35]

Peterson [36] also held that it is implicit in the banker-customer contract that no information may be disclosed by the bank unless authorized by law. Parliament can therefore always reverse the duty of confidentiality and impose an obligation to disclose. Such an obligation may be imposed on the banks in the effort to curb money laundering activities. This may therefore give rise to the conflicting duties of

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33 [1924] 1 KB 461, 480.

34 83 Idaho 578, 367 P.2d 284 (1961) [Hereinafter known as the *Peterson* case].

35 Stultz, above n 19, p 68.

36 Above n 34, at 289. [see Roy Elbert Huhs, Jr. "To Disclose or Not To Disclose Customer Records" (1991) 108 Banking Law Journal 30, at p 32.].

maintaining confidentiality and of disclosure. However, there is as yet no such statutory obligations imposed on New Zealand banks to disclose suspected money laundering transactions to the relevant authorities. Hence, New Zealand banks have not yet been confronted with the dilemma of resolving two conflicting duties.

(b) Type of confidential information

Tournier clarified questions concerning the type of information that was confidential. The court (Lord Scrutton dissenting)[37] held that bank secrecy extended to all transactions going through the account and also to any securities taken by the banker, even after the period when the account ceases to be active or closed. Futhermore, the obligation extended to information derived from other sources than the customer's actual account, if it arose from the underlying banking relationship between banker and customer.[38] However, there would be no obligation for information obtained on the customer after the relationship ceased.

It is submitted that Lord Scrutton's view is too narrow. The banker should not be allowed to disclose the customer's financial affairs with impunity just because the customer has stopped dealing with the bank. Moreover, the source of the information should not limit the duty of confidentiality. The disclosure of information from other sources than the actual account may be just as damaging to the customer. The case of *Djowharzadeh* v *City National Bank & Trust Co* is an example of such a situation.[39]In the case, the court held that information about an investment opportunity given in a loan application was confidential as it was not given voluntarily but as a prerequisite for a loan. Since the banks were the repository of enormous public trust, the banks should not use their position to act to the detriment of their customer. Although the source of the information divulged was not from the actual accounts of the customer, it was still held to be damaging to the customer. Lord Scrutton's view would, therefore,not protect the customer from loses which were not of his making.

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37 Lord Scrutton stated on page 481 that:

> [T]he implied legal duty towards the customer to keep his affairs secret does not apply to knowledge which the bank acquires before the relation of banker and customer was in contemplation, or after it ceased; or to knowledge derived from other sources during the continuance of the relation.

38 [1924]1 KB 461, at p 485.

39 646 P.2d 616 (Okla. Ct. App. 1982). [in Roy Elbert Huhs Jr.'s article, above n 36, p 35]
In the case, details of an investment opportunity was revealed by the customer in a loan application. This information was divulged by the bank officer to third parties- thereby causing the customer to lose his investment opportunity.

Both Australia and the United States accept the *Tournier* view on the type of protected information. Switzerland, however, has a slightly different variation on this issue. The duty of confidentiality under Swiss banking law continues beyond the cessation of the banking relation between banker and customer for as long as the customer has a *reasonable interest in keeping the information secret.* (Article 47(3) of the Swiss Federal Banking Law).[40]

The type of information demanded from banks in conjunction with money laundering activities usually concern the identity and account number of the customer, and information regarding all transactions entered into by the customer during a specified period of time. Such information are protected under the banks' duty of confidentiality to their customers. Unless some exception to this duty arises in connection with these information, the relevant authorities will not succeed in obtaining the required information. The money laundering phenomenon in banks could then continue without any restrictions to its scope.

2 *Exceptions to the banks' duty of confidentiality*

(a) In Switzerland

Contrary to public opinion, bank secrecy laws are not absolute. Even in Switzerland, long considered as a country with absolute bank secrecy, the banks' duty of confidentiality is qualified.[41] There are two main exceptions to Swiss bank secrecy:[42]

(a) the consent of the customer; and

(b) the requirement of disclosure by certain Swiss authorities.

The consent of the customer relieves a bank from both civil and criminal liability for disclosure in Switzerland. Such consent must be evidenced by an affirmative act, like a written waiver, or the confidentiality of the customers'

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40 Francis Neate (ed) *Bank Confidentiality* (Butterworths & International Bar Association, London, 1990). See Chapter 15: Switzerland at p 196.

41 Switzerland was considered to possess absolute bank secrecy because of its practice of accepting numbered or anonymous banks accounts. However, the identity of such accounts holders are always known to the senior bank executives. Since there are no differences between these accounts and ordinary account, the numbered or anonymous accounts are also subject to similiar bank secrecy exceptions as are applicable to ordinary accounts. See Stultz, above n 18, p 72.

42 For a more detailed discussion on exceptions to Swiss bank secrecy, see Lutz Krauskopf "Regents' Lectures - Comments on Switzerland's Insider Trading, Money Laundering, and Banking Secrecy Laws"(1991) 9 International Tax & Business Law 277, pp 297-299; see also Stultz, above n 19, pp 72-81.

affairs will still be maintained and respected. However, it is highly unlikely that an individual would consent to the bank's disclosure of his/her personal information if he/she is under investigation for suspected money laundering activities. It is also arguable that customer consent only relieves the bank from criminal liability under Article 47 of the Swiss Banking Act and against private civil liability.[43] It may not relieve the obligation imposed on the banks by Article 273 of the Swiss Penal Code[44] the purpose of which is to protect the interests of the state in defending persons under its territorial sovereignty (in addition to protecting private interests).[45] Hence, it is unlikely that an individual would be able to consent to a waiver of the state's protected interests in addition to the waiver of his/her individual interests.

Swiss banks may also disclose information pursuant to an order by proper Swiss authorities. Article 47(4) subjects a bank's obligation to preserve secrets to "the provision of federal and cantonal law providing for the obligation to report to its authorities and give evidence in legal proceedings." Hence, a foreign court or agency may request evidence located in Switzerland by sending a request for mutual assistance in the form of 'letters rogatory' to the competent Swiss authority.[46] This is of assistance if New Zealand requires information from Switzerland regarding suspected money laundering activities by New Zealand residents. Moreover, banking secrecy is set aside in criminal proceedings. An obligation to disclose,however, only exists with respect to judges, prosecutors and attorneys.[47] Thus, the police will not be at liberty to request information from the banks with respect to their investigations on money laundering even though it is an offence under the Swiss Money Laundering Act.[48]

(b) In New Zealand

In contrast, New Zealand banks have a more relaxed duty of confidentiality. New Zealand follows the duty of confidentiality established in *Tournier* which did not impose an absolute duty of confidentiality on the banks. Although Lord Bankes in

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43 Krauskopf, above n 42, p 298.

44 Article 273, Swiss Penal Code, makes criminal the disclosure of secret business information to a foreign authority.

45 The purpose of article 273 was interpreted by the Swiss Federal Supreme Court in the *Blunier* case, judgement of July 3, 1959, Bundesgericht, Switz., 85 Entscheidungen des Schweizerischen Bundesgerichts [BGE] IV 139 (Highest Court, Criminal case).

46 Krauskopf, above n 42, p 298.

47 Krauskopf, above n 42, p 298.

48 The Swiss Money Laundering Act came into force in 1 August 1990 and includes two new articles of the Swiss Penal Code, Articles 305bis and 305ter, prohibiting money laundering.

Tournier[49] did not give an exhaustive definition of this duty, he did identify four main qualifications to the duty of confidentiality:

(i) disclosure under compulsion by law;

(ii) duty to the public to disclose;

(iii) the interests of the bank require disclosure; and

(iv) disclosure made by the express or implied consent of the customer.[50]

The *Tournier* limitations include two additional exceptions which are not part of Swiss banking secrecy law.

(i) Disclosure under compulsion by law

Not every demand for information by the authorities is justified by this exception. The exception only allows the exercise of proper authority by statute of Court order. According to Lord Diplock, a bank must disclose confidential information if there was such a duty, under statute or common law, to disclose such information in defined circumstances; for example, a banker may be asked to give evidence on the customers' accounts in the witness box in a Court of law.[51]

There are numerous statutes in New Zealand imposing an obligation on the banks to disclose information on the customers' account. Some examples of these statutes are:[52]

(a) Inland Revenue Department Act 1974 - Section 17.

(b) Banking Act 1982 - Sections 6 and 7.

(c) Companies Act 1955 - Section 262.

(d) Proceeds of Crimes Act 1991 - Part V.

(e) Mutual Assistance in Criminal Matters Bill - clause 61.

Although the banks must disclose information under these statutory provisions, they are obliged to take reasonable care to only divulge the requisite information and nothing more or they may be liable for a contractual breach of confidentiality. These provisions sometimes require the disclosure of information on the basis of "reasonable grounds for believing"[53] or just mere suspicions. These standards may cause the banks some difficulties, particularly if there are uncertainties about the precise nature of the obligation imposed by the law. The legislations listed above are an increasingly significant derogation of the principle of bank confidentiality.

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49 [1924]1 Kb 461.

50 [1924] 1 KB 461, at 471-473.

51 *Parry-Jones v Law Society* [1969] 1 Ch 1, 9. [see Tyree, above n 29, p 85-86].

52 New Zealand Law Society Seminar "Aspects of Banking Law" (May/June 1985).

53 Proceeds of Crimes Act 1991 - sections 68 (1) and 77(1).

This exception is very important in investigations about money laundering activities. A statutory exception to the banks' duty of confidentiality with regard to money laundering activities will allow banks to supply customer information required by the competent authorities. The banks could then assist in curbing money laundering transactions without fear of liability. At present, there is no such exception in place in New Zealand.

(ii) Duty to the public to disclose

This exception permits the banks to disclose information if it is in the public interest that such information be divulged. A public interest is an interest that is shared by the community as a whole.[54] There are no reported cases in New Zealand on the bank's duty to the public to disclose information. In *Tournier*, Lord Atkin suggested that this exception be used to protect the public against fraud or crime.[55] Walter and Erlich[56] suggested that *Lion Laboratories v Evans* [57] may serve as a guide in weighing the public interest to be shown in bank confidentiality issues. In the case, there was a weighing up of two competing public interests-confidence and disclosure- to determine which would prevail. Lord Stephenson held there are some confidential information which the public has a right to receive even if the information was obtained from a breach of confidentiality.

Walter and Erlich also proposed a suitable test for public interest. Various factors were considered: such as (1) whether in the circumstances, a reasonable banker believes it is in the public's interest to disclose information; and (2) whether there is a "clear, real and extensive danger" to the public.[58] It is submitted

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54 This is opposed to a private interest that is held only by the individual concerned. See James Elliot "The Freedom of Information Act 1982 and its Effects on Business Related Information and Confidential Information in the Possession of Commonwealth Agencies" (1988) 14 Monash University Law Review 180, p 188.

55 [1924] 1KB 461, 486.

56 J Mcl Walter and N Erlich "Confidences - Bankers and Customers: Powers of Banks to Maintain Secrecy and Confidentiality. (1989) 63 Australian Law Journal 404, p 416.

57 [1985] 1 QB 526, 536. The plaintiffs manufactured and marketed an electronic computerised device for use by police in measuring alcohol intoxication levels. The defendants, employed by the plaintiffs as technicians working on these devices, left their employment and took without authority confidentiality information on the accuracy of these devices. These information were published. The publishers' defence was that it was in the public interest to know about the doubtful accuracy of the devices.

58 Walter & Erlich, above n 56, p 416. Other factors include whether there is any lack of alternatives and whether there is any consequential harm from the disclosure.

that these factors may impose an obligation on the banks to gather additional information on the subject before the banks weigh the public interest. Moreover, phrases like 'clear, real and extensive danger to the public' are ambiguous and may cause the banks problems in defining it. It would be unfair to impose such an onerous burden on the banks. Other factors that can be considered when evaluating the public interest are: the importance of the issues considered, the need to preserve confidentiality, and "the need to consider the extent to which disclosure of the documents would be likely to impede or have an adverse effect upon the efficient administration of the agency concerned."[59]

The numerous legislations available to permit disclosure by banks in the public interest has limited the usage of this exception until it is almost nonexistent. The Jack Committee Report of 1989 (UK) has even recommended that this exception be deleted.[60] However, it is suggested that this exception be retained, albeit its alleged nonexistent value, in case an issue arises in the future which requires its usage before appropriate legislation can be drafted to cover the issue.

An example of such an issue is the existence of money laundering activities in the banks. Since there is no existing legislation permitting the disclosure of suspected money laundering transactions by the banks, it is arguable that the banks can disclose such information under the public interest exception. Money laundering activities results in economic loss to the country and reduces the tax revenue of a country as laundered money are not declared as income for tax purposes. For example, in the United States, organised crime netted an income in excess of US$67 billion in 1986-most of which must be laundered through the financial system. This income caused a US$17 billion reduction in gross national product, lost tax revenues of US$6 billion, a loss of 394,000 jobs, and a 0.3 per cent increase in consumer prices.[61] Although the scale of money laundering activities in New Zealand is smaller than in the United States, it can be seen that the country will suffer economic losses from money laundering activities. Since money laundering activities are a detriment to society and the country, it is submitted that the public interest in the disclosure of information on suspected money laundering transactions far outweigh the public

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59 *Re Lianos and Secretary to Department of Social Security* (1985) 7 A.L.D. 475, 497 per Deputy President Hall. [quoted in Elliot, above n 54, p 190].

60 Review Committee Report - Banking services: Law and Practice.(Feb 1989; Cm 622), p 37.

61 James D. Harmon, Jr. "United States Money Laundering Laws: International Implications" (1988) 9 New York Law School Journal of International & Comparative Law 1, p 2.

interest in maintaining the confidentiality of the banker-client relationship. The banks should be allowed to disclose suspected money laundering transactions under the public interest exception without fear of liability for breaching their duty of confidentiality.

(iii) The interests of the bank require disclosure

This exception is used when the bank is suing or being sued by its customer. The only reported case on this exception is *Sunderland v Barclays Bank*.[62] The court held that the bank was justified in disclosing the information since it was in the bank's interest to do so. This case has been criticised by scholars such as Professor Ellinger and A L Tyree. It is Professor Ellinger's opinion that the bank disclosed too much information to the husband in order to protect its interest. [63]Tyree disagrees with the view that the bank's interest in maintaining the goodwill of one customer (the husband) should allow it to breach its duty of confidentiality to another (the plaintiff).[64] These criticisms are the preferred view of the writer. It is suggested that this exception be narrowly interpreted in future to ensure that the banks exercise greater care in the disclosure of information.

Another possible use of this exception concerns the disclosure of information between parent and subsidiary banks. Such disclosure would increase the efficiency of banking transactions. However, this disclosure may result in a breach of the banks' duty of confidentiality, although the banks argue that such disclosure was made with the implied consent of the customer.[65] The courts have ruled that parent and subsidiary banks are to be treated as separate entities and that any information that passes between these banks require the consent of the customer before disclosure.[66]It is submitted that this imposes a heavy burden on the banks,

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62 (1938) 5 Legal Decisions Affecting Bankers 163, London Times, 25 Nov 1938. In the case, the plaintiff complained to her husband that the bank had dishonoured her cheques. He encouraged her to call the bank. During the conversation, she handed him the telephone whereupon he was informed that most of the cheques were in favour of bookmakers. The plaintiff sued the bank for breach of a duty of secrecy. Du Parcq LJ held that the disclosure was in the bank's interest as it had to satisfy the demand for information. Moreover, he held that the plaintiff had impliedly consented to the disclosure. [see Tyree, above n 29, p 89-90].

63 For example, the bank could have omitted to mention the fact that the cheques were made out to bookmakers. see Walter & Erlich, above n 56, p 416-417; EP Ellinger, *Modern Banking Law* (1987), p 104.

64 Tyree, above n 29, p 90. Tyree also argues that the plaintiff would not have impliedly consented to such a disclosure which was not in her own interest.

65 Review Committee Report, above n 27, p 31.

66 *Bank of Tokyo* v *Karoon* [1967] 1 AC 45. [cited in Walter & Erlich, above n 56, p 417; Neate, above n 40, Chapter 6: England, p 95].

particularly if the parent banks are required to pool information together for accounting or other purposes.

The possible disclosure of information between parent and subsidiary banks and between bank branches may play an important role in combating money laundering activities. The United States has used this exception to the banks' duty of confidentiality to demand information kept in bank branches outside its jurisdiction by serving a *subpoena duces tecum* on the United States-based banks.[67] It is in the banks' interests to comply with this *subpoena* as they face civil liability for the failure to produce the relevant documents. However, such an action has not been well received by other countries. They argue that the demand for banking documents or information is a breach of their bank secrecy laws and a violation their jurisdictional sovereignty. Hence, many countries have strengthen their nondisclosure laws against the United States. These nondisclosure laws consist of bank secrecy laws (to protect the privacy of bank customers) and blocking statutes[68] (representing the interests of the blocking nation and designed solely to prohibit disclosure to foreign sources and are not waivable by bank customers).[69] The banks are therefore placed in a very difficult position as they will be liable for either a breach of a foreign bank secrecy law or for nondisclosure of banking documents, whatever actions they take. This issue has largely been resolved by the use of Mutual Legal Assistance Treaties[70] between the parties involved to request for banking information.[71]

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67 A *subpoena duces tecum* may command the person to whom it is directed to produce the books, papers, documents or other objects specified in it. For a discussion on the enforcement of *subpoenas duces tecum*, see Jeffrey T. Bergin "Note-Piercing the Secret Bank Account for Criminal Prosecutions: An Evaluation of United States' Extraterritorial Discovery Techniques and the Mutual Assistance Treaty" (1990) 7 Arizona Journal of International & Comparative Law 325, pp 329-334.

68 There are generally two separate groups of blocking statutes: discovery blocking statutes-prohibiting compliance with requests or orders for the production of documents and judgement blocking statutes-stipulating that the enacting nation will not recognise certain decisions by foreign courts. Examples of countries with blocking statutes are Australia, Canada, France, New Zealand (Evidence Amendment Act,(No. 2)) 1980, South Africa, Switzerland and the United Kingdom.

69 For a fuller discussion of nondisclosure laws, see Mark Brodeur "Court Ordered Violation of Foreign Bank Secrecy and Blocking Laws: Solving the Extraterritorial Dilemma" [1988] 2 University of Illinois Law Review 563; Jeffrey A. Brown "Extraterritoriality: Current Policy of the United States" (1986) 12 Syracuse Journal of International Law & Commerce 493, pp 506-509; Harmon, above n 61, pp 29-30.

70 A mutual legal assistance treaty is "a treaty which creates a binding obligation on treaty partners to render assistance to each other in criminal investigations and proceedings" and typically provides for the direct exchange of information between two 'central authorities'-the Ministry of Justice and its foreign counterpart. See

(iv) Disclosure made by express or implied consent of the customer

The main issues in this exception surround the requirement of implied consent to the disclosure. Implied consent can only be inferred when the customer knows that the information is likely to be divulged and permits it.[72] It is generally used in two situations: when a bank requires information on the credit-worthiness of a customer of another bank and when corporations address inquiries on a person directly to his or her bank.[73] In these circumstances, the banks should ensure that the customer is or should be aware that such inquiries are being made. As for the case of bankers' reference, it has usually been justified on the basis of implied consent or of long-established usage. Whether there is actual implied consent to the bankers' reference is debatable. It is submitted that there will be implied consent if the banks clearly establish the possibility of giving bankers' reference when the customer opens an account with the bank and there is no opposition from the customer.

The United States has attempted to use this express or implied consent exception to bank confidentiality to demand the production of banking documents. Prosecutors investigating money laundering activities have attempted to compel the individuals under investigation to sign a 'consent directive'. A consent directive is "a written form which releases an individual's foreign bank records by asserting his consent to do so."[74] It essentially states that the individual consents to having his/her bank records divulged directly to the United States Department of Justice. The advantage of using a consent directive is to avoid possible conflict with foreign secrecy laws as the express consent of the bank customer is usually one of the exceptions to the banks' duty of confidentiality. However, consent directives are normally signed under protest. If the individual refuses to comply with a grand jury order to sign the consent directive, he/she may be held to be in contempt of court and

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James I. Knapp " Mutual Legal Assistance Treaties as a Way To Pierce Bank Secrecy" (1988) 20 Case Western Reserve Journal of International Law 405, p 405.

71 Countries with mutual legal assistance treaties with the United States are Switzerland, Turkey, the Netherlands and Italy. Some Commonwealth countries with similiar schemes are Australia, Canada, Malaysia, United Kingdom, and Zimbabwee. New Zealand has a Mutual Assistance in Criminal Matters Bill which has recently undergone a second reading and is due to come in force on 1 April 1993.

72 Tyree, above n 29, p 90.

73 Russell, above n 29, p 61.

74 Bergin, above n 67, p 334.

imprisoned. Thus, foreign courts have ruled that consent directives are invalid for purposes of bank secrecy exceptions.[75]

IV THE EFFECTS OF EFFORTS TO REDUCE MONEY LAUNDERING ON NEW ZEALAND BANKS' DUTY OF CONFIDENTIALITY

Money laundering is fast becoming a major concern around the world. This is due mainly to increase in illegal drug trafficking and sales, thereby generating a large amount of illegal profits which must be laundered .The United States leads the fight against money laundering with legislations restricting the laundering phenomenon in the banking system.[76] The statutes imposes heavy reporting requirements on the banks, thereby eroding the banks' duty of confidentiality to its customers.[77]

At present, money laundering is not an offence in New Zealand. New Zealand banks are therefore justified in not disclosing any information about suspected money laundering activities by their customers to the relevant authorities due to their duty of confidentiality. There is no statutory exception for such disclosure. If any government authority, such as the Police, requires information about banking transactions made by a customer of a bank in connection to a criminal offence, it will have to apply to the courts for a search warrant.[78] The police then need only produce the search warrant to the banks and the banks will disclose the required information. This process, although useful, does not reduce money laundering

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75 This is true in Switzerland and the Cayman Islands. See *In re* ABC Ltd., 1984 C.I.L.R. 130 where the Grand Court of the Cayman Islands held that a consent directive executed pursuant to a United States court order, under the threat of contempt, could not satisfy the consent exception to Cayman bank secrecy law.

76 The United States has enacted statutes such as the Bank Secrecy Act 1970, the Money Laundering Control Act 1986, the Anti-Drug Abuse Act 1988 and the Money Laundering Prosecution Improvements Act 1988 in an attempt to curb the laundering of profits from drug sales.

77 An example of the reporting requirements is the need to file Currency Transaction Reports (CTR) for currency transactions in excess of $10,000 during any one business day [see 31 C.F.R. 103.22 (A) (1)].See Peter E Meltzer "Keeping Drug Money from Reaching the Wash Cycle: a Guide to the Bank Secrecy Act" (1991) 108 Banking Law Journal 230, p 232.

78 See section 198, Summary Proceedings Act 1957. The police can approach any District Court Judge or Justice, or any Registrar, and present evidence showing that a criminal offence, punishable with more than three months imprisonment, has occurred; that they have a reasonable belief that the proceeds from that offence are in a bank customer's account, and that they need to have a look at the accounts of the particular bank customer.

activities in the banks significantly. If the authorities have no evidence of a link between the bank transactions and a criminal offence (such as a robbery), the banks cannot be ordered to produce any documents of banking transactions for inspection of money laundering activities. Thus, money laundering activities can proceed unchecked in the banks.

A *Statutory Efforts Currently Present to Reduce Money Laundering in New Zealand Banks*

However, New Zealand is a signatory of the 1988 Vienna Convention[79] which provided guidelines for the interception of illegal drugs at all stages of trafficking. One of the innovations in the convention are provisions to facilitate the *identification*, *tracing*, freezing, seizure, and forfeiture of illegal drug profits (emphasis added). To identify and trace drug profits, the authorities would require the assistance of banks as the illegal profits would have to be laundered through the banking system. Due to the perception that drug trafficking and other forms of organised crime are being conducted on an increasing scale, some countries have enacted legislation proving for the confiscation of proceeds of crime.

New Zealand recently enacted the Proceeds of Crime Act 1991.[80] The Act is aimed at:

> undermining the economic base of large-scale crime by minimising both the scope for illicit gain and the use of criminal profits to fund further criminal activity.[81]

The identification, tracing and confiscation of criminal profits can serve to minimise its use to fund further criminal activity. Offenders are now employing increasingly sophisticated techniques to disguise the source and distribution of criminal profits. As the assistance of banks greatly enhances the ability of the authorities to identify and trace these ill-gotten gains, part V of the Proceeds of Crime Act 1991 was

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79 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, above n 1. For a discussion of the Convention, see Victoria Kaufman "United Nations: International Conference on Drug Abuse and Illicit Trafficking" (1988) 29 Harvard. International Law Journal 581; Michael A. DeFeo " Depriving International Narcotics Traffickers and Other Organized Criminals of Illegal Proceeds and Combatting Money Laundering" (1990) 18 Denver Journal of International Law & Policy 405; D.W. Sproule & Paul St-Denis " The UN Drug Trafficking Convention: An Ambitious Step" [1989] Canadian Yearbook of International Law 263.

80 The Proceeds of Crimes Act 1991 comes into force in July 1992.

81 Department of Justice Report *Proceeds of Crime Bill - Part 1* (issued on 30 May 1991), p 2.

devoted solely to the information gathering powers of the authorities.[82] The use of these supplementary investigative powers is justifiable to uncover and follow the money trail. However, such powers to demand information are applicable only in relation to drug-dealing offences. Hence, information concerning other criminal activities which generate illegal profits cannot be obtained by the use of the Proceeds of Crime Act 1991. Such information must still be obtained by the use of search warrants under section 198 of the Summary Proceedings Act 1957.

Part V of the Proceeds of Crime Act 1991 allows for the application of production orders and monitoring orders. Such orders are available from a High Court Judge on application by a commissioned officer of the Police.[83] In each case, the purpose of the order is to obtain financial information relevant to an application for a forfeiture order or a pecuniary penalty order.[84] Hence, neither of these orders are directly related to reducing money laundering activities in the banks. However, because these orders concern financial information, they will generally be directed against a bank or financial institution.

1 *Production orders*

A production order is aimed at obtaining reliable and detailed documentary information which will assist an investigator in identifying 'tainted property'[85] or the property of the defendant and to unravel transactions designed to disguise both the source and the disposition of such property.[86] It may be sought only where a person has been convicted of a drug-dealing offence or where there are *reasonable grounds for believing* that such an offence has been committed (emphasis added).[87] It can be directed against any person who is believed to have "possession or control"of 'property-tracking' documents[88] and relates to specified documents or a class of documents.

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82 Part V of the Proceeds of Crime Act 1991 is given in appendix A.

83 Proceeds of Crime Act 1991, sections 68 and 77.

84 Department of Justice Report *Proceeds of Crime Bill - Part III* (issued on 16 July 1991), p 1.

85 Tainted property is defined as "property used to commit, or to facilitate the commission of, the offence; or proceeds of the offence". See section 2, Proceeds of Crime Act 1991.

86 Department of Justice Report *Proceeds of Crime Bill -Part III* (issued on 16 July 1991), p 3.

87 Proceeds of Crimes Act 1991, section 68(1).

88 See section 67, Proceeds of Crimes Act 1991. A 'property-tracking' document is defined as "a document relevant to identifying, locating, or quantifying property of a

The 'property-tracking' document may be the bank accounts of a person who committed a drug-dealing offence. In this case, the production order will be directed against the bank in which the person concerned is a customer. The bank is therefore compelled to disclose the information required under the production order. Since this disclosure was made pursuant to a statutory provision in the Proceeds of Crime Act 1991, it falls within the compulsion by law exception to the banks' duty of confidentiality in *Tournier.* In addition, section 72 of the Proceeds of Crime Act 1991 provides a statutory exception to the banks' duty of confidentiality for disclosure of information under a production order.[89] Hence, the banks will not be liable to their clients for any breach of confidentiality for the disclosure of financial information under the production order.

2 *Monitoring orders*

A monitoring order performs a specific and subsidiary function alongside the general powers to obtain documentary information by way of production orders. It is a special order directing a financial institution to supply information to the Commissioner of Police about a pattern of transactions conducted by a particular person through the institution.[90] This order may be granted if the Judge is satisfied that there are *reasonable grounds for believing* that the person has committed or is about to commit a drug-dealing offence, or is due to benefit from the commission of such an offence (emphasis added).[91] A monitoring order is effective for up to three months.and each monitoring order must give the name(s) of the account holder, the type and manner of information to be supplied, and the period the order is in force. [92] As with the production order, the financial institution will not be held liable for any civil or criminal proceedings brought against it for compliance with the monitoring order. Hence, the banks are also provided with both a common law and statutory exception to their duty of confidentiality when complying with monitoring orders.

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person who committed the offence" or "a document relevant to identifying, locating, or quantifying tainted property in relation to the offence."

89 Section 72 states that "any compliance with an order made under section 69 of this Act is not a breach of the relevant obligation of secrecy or non-disclosure or ... rule of law by which the obligation is imposed". [Section 69 concerns the making of production order].

90 Section 77(1), Proceeds of Crime Act 1991.

91 Section 77(2), Proceeds of Crime Act 1991.

92 See sections 77(3) and 77(4) of Proceeds of Crime Act 1991.

The monitoring order is made and enforced in secret and involves the continuing intrusion (for up to three months) into the financial affairs of a specified person, usually a bank customer.[93] According to the Ministry of Justice, a monitoring order may be effective at "the very early stage of an investigation where there is reason to believe that a suspected or imminent offence will leave a money trail."[94] This is because an analysis of the banking transactions may provide some indication of the laundering of the profit from drug sales through the banking system. Since the order is enforced in secret, the 'suspected launderer' would have no idea that he/she is under investigation. He would continue to bank in his/her profits from the drug sales without hesitation for laundering through the banking system. With the documentary information showing these suspected transactions, the police will be able to connect the bank customer to the drug-dealing offence and may be able to make an arrest.

3 *Analysis of production and monitoring orders*

It is submitted that under sections 68 and 77 of the Proceeds of Crime Act 1991, the compulsion by law exception to the duty of confidentiality will operate against both known and suspected money launderers. It is suggested that the Proceeds of Crime Act 1991 demolishes the loophole allowing suspected laundering offenders to escape justice. This, however, will depend on the court's definition of 'reasonable grounds for believing'. If the court sets a high standard of reasonableness, most suspects are likely to escape these orders to their banks for the production of their financial records.[95] Since the granting of production or monitoring orders relates to a possible offence by the suspected money launderer, the court may lower its standards for 'reasonable grounds for believing' and grant production and monitoring orders without requiring convincing evidence for its belief. This makes it easier for the authorities to demand the disclosure of information by the banks on their clients to find incriminating evidence on the suspects.

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93 See section 80, Proceeds of Crime Act 1991. The financial institution is bound not to disclose the existence or operation of the order, except to the Police, an officer of the financial institution, or a barrister or solicitor.

94 Ministry of Justice Report *Proceeds of Crime Bill - Part III* (issued on16 July 1991), p 2.

95 This is because a high standard of 'reasonable belief' will reduce the likelihood of the court acceding the the Police's request for a production order or a monitoring order.

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The production and monitoring orders specifies the type and manner of the information to be disclosed. The banks will therefore have no excuse for supplying insufficient or misleading information. In addition, the banks cannot use these production and monitoring orders to justify the supply of unnecessary information to the authorities as being in the banks' interest. Any additional information supplied by the bank will still make it liable for breach of an implied duty of confidentiality.

The permissible disclosure of financial information by the banks on their customers under the production and monitoring orders can also be justified as being in the interests of the public. Since these orders relate to drug-dealing offences, the interest of the State in reducing these offences should override the interest in protecting the banker-client confidentiality. Hence, the Proceeds of Crime Act 1991 is a further derogation of the banks' duty of confidentiality.

B *Practical Efforts by the Banks to Reduce Money Laundering*

1 *Efforts by the Reserve Bank of New Zealand*

The Reserve Bank of New Zealand (hereinafter the Reserve Bank) has been given wide investigative and supervisory powers to carry out its statutory duty to undertake the prudential supervision of all registered banks in New Zealand.[96] One of its purposes is promoting the maintenance of a sound and efficient financial system in New Zealand.[97] Consistent with its view that the misuse of the banking system for criminal activities does not promote financial system stability or efficiency, the Reserve Bank promotes domestic and international efforts to prevent such misuse.[98]

At present, the Reserve Bank does not have any specific policies on curbing money laundering activities to guide the individual banks. It is currently exploring the extent to which it will be getting involved in such supervisory policies as it does not condone the drug-dealing offences which give rise to money laundering activities.[99] However, it has formally requested all financial institutions under its supervision to comply with the 'Bank of International Settlements' Statement of Principles on Money Laundering' (hereinafter the Basle Statement of Principles) in

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96 Reserve Bank of New Zealand Act 1989, section 67.

97 Reserve Bank of New Zealand Act 1989, section 68.

98 See the submissions of the Reserve Bank of New Zealand to the Proceeds of Crime Bill, p1.

99 Interview with Mr. Kelly Beeman, Senior Advisor for Policy, Banking Supervision Department, Reserve Bank of New Zealand on 14 September 1992.

1989.[100] In the Reserve Banks' 'Guidelines on Carrying on Business in a Prudent Manner', it stated that the individual banks should already have procedures in place to enable compliance with the Basle Statement of Principles.[101] Moreover, the Reserve Bank expects all individual banks to be familiar with 'all relevant industry standards and best practice on the deterrence and detection of money laundering'[102] and to possess effective procedures for 'obtaining the identification of new customers' and the 'retaining of internal records of transactions'.

2 *Basle Statement of Principles*

The Basle Statement of Principles was prepared to develop guidance for banking supervisors on discouraging banks from inadvertently facilitating money laundering activities and to reduce the scope for money laundering through the banking system. It therefore provides some basic policies and practices which it has asked the bank supervisors to support. Banking supervisors are considered to possess a general role in encouraging "ethical standards of professional conduct among banks and other financial institutions."[103] This is because public confidence in banks may be undermined by the inadvertent association by banks with criminals. The Statement also recognises that not all banking supervisory authorities have the same roles and responsibilities in relation to the suppression of money laundering. The Reserve Bank has acknowledged that it does not have specific responsibilities for the suppression of money laundering activities in banks, although it is very supportive of its objectives.[104]

The Basle statement of Principles does not give any specific policies on the suppression of money laundering. Instead it just provides three general principles for implementation by banking supervisory authorities. These three basic principles are:

(a) customer identification;

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100 Bank of International Settlements' Committee on Banking Regulation and Supervisory Practices *Bank of International Settlements Statement of Principles on Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering* , issued in December 1988. See Appendix B.

101 Banking Supervision Department *Guidelines on Carrying on Business in a Prudent Manner: Accounting Systems and Internal Controls* (Reserve Bank of New Zealand, August 1992), p 17.

102 This could be found in New Zealand Bankers' Association "Money Laundering Procedures and Guidance Notes for Banks" (adopted in November 1991).

103 Basle statement of Principles, above n 100, p 2.

104 Interview with Mr Kelly Beeman, above n 99; see also the submissions of the Reserve Bank of New Zealand on the Proceeds of Crime Bill.

(b) compliance with both domestic and international financial transaction laws;

(c) Cooperation with law enforcement authorities.

Under the 'customer identification' principle, the banks are to implement effective procedures to determine the true identity of the institution's customers. This is to ensure that the financial system is not used to channel the funds of known criminals. The second principle requires banks to not actively assist in transactions in which they possess good reasons for believing are associated with criminal activities. The 'cooperation with law enforcement authorities' principle requires the banks to undertake appropriate measures when they become aware of facts which indicate the presence of money laundering activities. However, these measures must still take into account the laws relating to the banks' duty of confidentiality. There are two other additional principles propounded in the Basle Statement of Principles. These principles concern the establishment of a recordkeeping and audit system and the provision of staff training on detecting money laundering activities.

3 *Banking industry standards for the deterrence and detection of money laundering*

It has been acknowledged that the key stage for the early detection of money laundering operations is the point where the funds first enters the financial system.[105] This stage can be effectively monitored by the implementation of simple procedures by the banks. According to the Bankers' Association, the best method to combat money laundering is for the banks to cultivate a high level of awareness and vigilance regarding money laundering activities among its staff. In addition, the banks should implement a system for reporting and reviewing suspicious transactions for possible relay to law enforcement agencies.[106] The guidance notes issued by the Bankers' Association also emphasised key policies such as 'customer identification' using the 'know your customer rule', and 'staff education and training'.

The first step in implementing a system for the recognition and reporting of suspicious transactions is the recognition that the transaction or series of transactions is unusual. To ensure the early detection of suspicious transactions through the banking system, the banks must possess effective staff training

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105 New Zealand Bankers' Association *Money Laundering: Procedures and Guidance Notes for Banks* (adopted in November 1991); see also Meltzer, above n 77, p 231.

106 New Zealand Bankers' Association, above n 105, p 5.

procedures to educate their staff on their responsibilities for reducing money laundering activities. The recognition of suspicious transactions should then prompt further investigation into the source of the funds. If the suspicions of the banking officer responsible for money laundering deterrence procedures are justified on further investigation, this transaction or series of transactions would be reported to the relevant law enforcement authorities. The reporting of suspicious transactions are a possible breach of the banks' duty of confidentiality. However, since the combatting of money laundering activities may possibly restrict drug dealing offences (by preventing offenders from 'cleaning' their dirty money), such reporting of suspicious transactions may be justifiable under the public interest exception to the banks' duty of confidentiality.

The 'know your customer' rule for the verification of bank customer identity has been adopted in New Zealand as well as other jurisdictions.[107] The rule essentially requires the banks to have effective procedures in place to determine the true identity of the customer when the banker-client relationship is being established. In New Zealand, this rule is executed by the banks' request for positive identification by potential customers on the formation of the banking relationship.[108] Such positive identification is usually satisfied by the production of an Inland Revenue Department (IRD) number. As a result of this rule, it is now more difficult for bank customers to open anonymous bank accounts or open accounts under fictitious names. It is suggested that this may limit the ability of launderers to utilise the banking system to launder illegal profits as they are prevented from transferring the dirty money through fictitious accounts.

The 'know your customer' rule also serves several other purposes.[109] It may deter potential customers who would use the bank for illicit purposes due to their reluctance to reveal information about themselves. Moreover, the investigation of potential customers may reveal matters questioning the legitimacy of the customer. It will also provide the banks with a database for the evaluation of the customers' transactions to determine if they are consistent with the customers' legitimate activities or the customary conduct of lawful domestic businesses similiar to that of the customers. Note however that this rule is not a derogation of the banks' duty of

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107 Other jurisdictions which have the 'know your customer' rule are Australia [sections 18, 20 and 21, Cash Transaction Reports Act 1988(Aust)] and the United States.

108 Interview with Mr Kelly Beeman, above n 99.

109 Meltzer, above n 77, p 239.

confidentiality as the banks are not required to disclose any information obtained by them under this rule to any authority.

To summarise, the practical efforts undertaken by the banks to deter money laundering activities are as yet not a significant derogation of the banks' duty of confidentiality. The Reserve bank requires the banks under its supervision to comply with the Basle Statement of Principles which provides three general guidelines on preventing money laundering. The Bankers' Association has also produced a guideline for the banks on money laundering. A key aspect of these guidance notes is the request that banks implement a system for the verification of customer identity and for reporting suspicious transactions to law enforcement agencies. It is only this informal reporting requirement that derogates the bank's duty of confidentiality.

In addition, efforts to combat money laundering can be extended extraterritorially. These extraterritorial efforts to reduce the occurrence of money laundering activities in foreign jurisdictions will usually be blocked by foreign bank secrecy laws. Hence, the banks' duty of confidentiality may also be derogated by foreign means.

V THE EXTRATERRITORIAL EFFECTS OF MONEY LAUNDERING ACTIVITIES ON THE BANKS' DUTY OF CONFIDENTIALITY[110]

Money laundering activities can operate both domestically and internationally as money is easily transferable from one country to another. It is an offence in most countries and can easily cause cross-border disputes and extraterritorial problems. For example, money laundering activities can be committed by individuals in countries outside the authorities jurisdiction. However, judicial activities on foreign soil, if conducted without the consent of the foreign state, would amount to a violation of the State's territorial sovereignty. In such circumstances, it is not surprising that foreign jurisdictions would like New Zealand banks to disclose financial

110 For some writings on the extraterritorial effects of money laundering, see EP Ellinger "Extraterritorial Aspects of Bank Secrecy" 1985 Journal of Business Law 439; EP Ellinger "Banks and Extraterritorial Orders" (1989) Lloyd's Maritime and Commercial Law Quarterly 363; Frederick J. Knecht "Extraterritorial Jurisdiction and the Federal Money Laundering Offence" (1986) 22 Stanford Journal of International Law 389; Ross Cranston "International Banking in a Fragmented World : Compliance with Domestic Laws and Extraterritoriality of Foreign Legislation" 4 Banking & Finance Law Review 177; Bergin, above n 67; Brodeur, above n 69; Brown, above n 69; and Harmon, above n 61.

information on suspected money launderers and vise versa under the traditional methods of discovery. It must be noted that such efforts to obtain financial information found in foreign jurisdictions to curb money laundering activities, are usually restricted by foreign bank secrecy laws.

A *Traditional Methods of Discovery*

There are four methods of discovery which may be used to obtain information from a foreign jurisdiction. These methods are: (1) Direct Discovery - the Subpoena Duces Tecum (employed by the United States); (2) Consent Directives; (3) Letters Rogatory; and (4) Mutual Legal Assistance Treaties. As mentioned earlier in the paper, consent directives employed by the United States are generally held to be invalid as the consent of the bank customers are seldom given voluntarily.[111] They are therefore not an exception to the bank secrecy laws applicable in most countries. Hence, consent directives are usually ineffective as a method for demanding financial information from foreign jurisdictions.

1 *Letters rogatory*

Letters rogatory are the requests for assistance submitted, via diplomatic channels, by a justice ministry of one country to the justice ministry of another to perform a specific task."[112] The task may be ordering a witness to testify, issuing a search warrant or compelling the production of documents. When received, it is evaluated by the proper authorities in the foreign state to determine whether it is consistent with that nation's laws and policies.

This method of discovery is not particularly favoured as the processing of a request is often time-consuming and frustrating. The request goes through diplomatic channels and requires formal judicial action, which might take months to complete. Moreover, it must be in the form that is consistent with foreign legal requirements. In addition, judicial assistance may not be available for a particular offence[113] or for investigative purposes.

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111 See the discussion on the express or implied consent exception to the banks' duty of confidentiality, to be found on pP18-19.

112 Knapp, above n 70, p 409.

113 For example, money laundering is not an offence in New Zealand. Hence the letters rogatory may not be used to compel the production of financial information in New Zealand for the prosecution of money laundering offences in other jurisdictions.

Discovery can also be denied under the letter rogatory if there is a threat to the country's sovereignty or bank secrecy laws.[114] The foreign jurisdiction possesses a high degree of control over discovery as it controls the release of information. Hence, they are generally reluctant to comply with disclosure requests in a letter rogatory particularly if it conflicts with domestic bank secrecy laws.[115] The banks' duty of confidentiality are therefore not significantly affected by the use of letters rogatory to compel the production of financial records.

2 *Subpoenas duces tecum*

A *subpoena duces tecum* (hereinafter *subpoena*) commands the person to whom it is directed to produce the documents specified in it. Its use is greatly favoured by the United States. However, the *subpoena* is not well received by other countries which claim that it is a violation of their bank secrecy laws. The leading case on the effect of the *subpoena* on a bank's duty of confidentiality is *X AG* v *A Bank.*[116] The judge in that case, Leggatt J, applied the conflicts of law analysis and held that the proper law which applied to the bank account was English law as the accounts were maintained in England. Hence, the bank's duty of confidentiality as propounded in *Tournier* governed the banking relationship. Disclosure of the banking records would only be possible under the public interest exception. Leggatt J weighed the public interest in maintaining bank confidentiality against the possible liability of the American bank for contempt for non-compliance with the *subpoena*. He concluded that under the United States doctrine of foreign government compulsion, the American bank could not be held liable for complying with the order of an English court to not comply with the *subpoena*.[117]

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114 Bergin, above n 67, p 338.

115 The leading case in England on letters rogatory is *Re Westinghouse Uranium Contract* [1978] A.C. 547. In the case, the House of Lords suggested that a foreign request for information would be denied if the order were to involve an infringement of a privilege recognised in English law. One commentator, Ellinger, suggests that a banks' right and duty to maintain customer confidentiality would also form one of the recognised privileges. [See Ellinger "Extraterritorial Aspects of Bank Secrecy" 1985 Journal of Business Law 439, p 442].

116 [1983] 2 All ER 464. In the case, a group of companies, engaged in the oil business, maintained their accounts with the London branch of an American bank. Only one company in that group dealt in the United States market. The American Department of Justice wanted information concerning all members of the group in respect of an investigation into conspiracy and tax evasion. A *subpoena* was served on the bank's head office for the production in the United States of records concerning the financial affairs of the group held in the London bank branch. An injunction was granted restraining the bank from disclosing the records in compliance with the *subpoena*.

117 Above n 116, 480.

Other than case law restricting the use of *subpoenas duces tecum* to compel the disclosure of financial records, most countries have strengthened their bank secrecy laws and enacted blocking legislations to prevent compliance with the *subpoenas*.[118] With these restrictions on its use, the banks' duty of confidentiality is also not significantly derogated by the *subpoena duces tecum.*

Due to the limitations on the use of consent directives, letters rogatory and subpoenas duces tecum and the importance of combatting money laundering activities, the foreign government's assistance in allowing the disclosure of financial information becomes indispensable. The ability of a foreign government to formally request the disclosure of financial information held in another jurisdiction will facilitate the world wide restraint of money laundering activities. Hence, most countries have formalised the procedures used for requesting the legal assistance of a foreign state into a legislative form generally known as the Mutual Legal Assistance in Criminal Matters treaties or schemes.

B *Mutual Legal Assistance Schemes or Treaties*

A mutual legal assistance treaty creates a binding obligation on the treaty partners to provide specific categories of assistance to each other in designated types of criminal investigations and prosecutions, as well as some related civil and administrative proceedings.[119] The United States has adopted bilateral mutual legal assistance treaties with at least four countries and interim treaties with a few other countries.

On the other hand, the Commonwealth countries have chosen to forego the use of treaties and instead adopted the mechanism of 'schemes'.[120] A Mutual Assistance in Criminal Matters scheme is a set of agreed recommendations endorsed and recommended as a guide to Commonwealth governments for adoption to regulate their relations with other member countries[121]. It is based on the Harare Scheme on

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118 For examples of countries with blocking laws, see footnote 68.

119 Knapp, above n 70, p 406.

120 Countries with legislation based on the Commonwealth Scheme are Australia, Botswana, Canada, Nigeria, United Kingdom Vanuatu and Zimbabwee. Cyprus, Jamaica, New Zealand and Swaziland are currently preparing legislations on Mutual Assistance schemes. Commonwealth countries with legislation relating to drug offending only are the Bahamas, Guyana, Hong Kong, Jersey, Malaysia and Zambia.

121 Department of Justice Report *Mutual Assistance in Criminal Matters Bill* (issued on 23 June 1992), p 2.

Mutual Assistance in Criminal Matters which does not require uniformity of legislation. However, the Harare Scheme does lay the basis for appropriate national legislative provisions. Thus, if the national legislations conform substantially to the Harare Scheme, a high degree of cooperation can be achieved between the Commonwealth countries because of the similarity in legislations. It should be noted that the Mutual Assistance in Criminal Matters regimes have no precedent value. They are based on the premise that existing procedures available to the prosecution authorities of the requested country should be available to the corresponding authorities of the country requesting assistance.

Whichever system is adopted, these treaties or schemes facilitate international cooperation among law enforcement agencies.[122] Among other things, the Mutual Assistance schemes facilitate the service of documents, the taking of evidence and the request for financial information from foreign banks of a customer's banking transactions. In this way, it provides a statutory exception to the banks' duty of confidentiality to their customers. Banks are now permitted to disclose information upon the request of foreign authorities provided the proper procedures are observed.

Currently, New Zealand does not have any formal legislation on mutual assistance between states. However, the Mutual Assistance in Criminal Matters Bill was recently drafted to provide an international dimension to the Proceeds of Crime Act 1991.[123] When passed, the Mutual Assistance in Criminal Matters Act 1992 will facilitate the extraterritorial jurisdiction of New Zealand, and the provision and obtaining, by New Zealand, of international assistance in criminal matters. At present, the Mutual Assistance Bill provides for requests by New Zealand for documentary information relating to serious offences held in foreign jurisdictions[124] and vise versa. This Bill may therefore provide foreign law enforcement authorities with a statutory exception to the bank's duty of confidentiality. Similarly, New Zealand can request for the disclosure of documentary evidence information from other jurisdictions without fear of being held liable for breach of foreign bank secrecy laws.[125]

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122 The paper will refer to the Mutual Assistance Schemes or Treaties collectively as Mutual Assistance schemes.

123 The Mutual Assistance in Criminal Matters Bill recently undergone its second reading. It is scheduled to come into force on 1st April 1993. [Hereinafter Mutual Assistance Bill].

124 See clause 30, Mutual Assistance Bill.

125 See clause 10 of the Mutual Assistance Bill.

The Mutual Assistance Bill allows a foreign country to request the Attorney-General for both a production order (clause 60) and a monitoring order (clause 61). These orders will be granted under sections 76A and 81A of the Proceeds of Crime Act 1991 respectively.[126] The orders are granted only in respect of drug dealing offences. Since the majority of money laundering activities concern the proceeds of drug sales, the limitation of production and monitoring orders to drug dealing offences will still help combat money laundering activities. As the relevant statutory exceptions to the banks' duty of confidentiality are preserved under sections 76A and 81A, the banks are permitted to disclose the required information without being liable for breach of confidentiality to their clients. Hence, money laundering activities conducted by foreign residents in New Zealand banks results in a further derogation of the banks' duty of confidentiality as the banks are required to disclose information to a wider range of authorities.

Both the Mutual Assistance Bill and the Proceeds of Crime Act 1991 have only a slight effect on money laundering activities in the banks. The use of production and monitoring orders allow for an analysis of financial transactions for drug-dealing offences only. The authorities cannot just request for the disclosure of a bank customer's financial records to determine whether he/she is laundering funds through the banking system as money laundering is not an offence in New Zealand.

However, as a signatory of the 1988 Vienna Convention[127], New Zealand has an obligation to develop a money laundering offence. This paper will outline the various anti-money laundering regimes currently in place before considering the issue of a suitable anti-money laundering scheme for New Zealand.

VI A SUITABLE ANTI-MONEY LAUNDERING REGIME FOR NEW ZEALAND?

A *A Brief Outline of Various Anti-Money Laundering Regimes*

There are various anti-money laundering regimes that can found in the world today. Some countries, such as Australia and the United States provide for detailed and specific requirements to restrict money laundering activities in the banking

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126 Sections 76A and 81A of the Proceeds of Crime Act 1991 are provided for in clauses 74 and 75 of the Mutual Assistance Bill respectively.

127 Above n 1.

system. This is done through the implementation of a cash transaction reporting scheme. However, other European countries, like Switzerland and the United Kingdom, have avoided giving specifics and settled on general policies to combat money laundering. The Basle Committee supports this type of regime by providing only general guidelines for the banks on money laundering issues.[128]

1 *The United States and Australia*

The United States has very detailed statutory provisions regarding money laundering offences. The first attack on money laundering activities in the United States was the enactment of the Currency and Foreign Transactions Reporting Act 1970 (more commonly known as the Bank Secrecy Act 1970).[129] Its purpose was to stifle the flow of money from illegal activities. Hence, it provided for the filing of Cash Transactions Reports (CTR) for transactions of $10,000 or more.[130] The failure to report such transactions could result in the banks facing civil[131] and criminal[132] penalties. Since only transactions of $10,000 or more need be reported, bank customers could avoid the reporting requirement by manipulating their transactions to fall below the $10,000 limit (commonly known as structuring). Hence, the Money Laundering Control Act[133] was passed in 1986 to strengthen the Bank Secrecy Act 1970. Under the 1986 Act, transactions structured to avoid the filing requirements of the Bank Secrecy Act 1970 were made criminal.

Similarly, Australia has very detailed provisions on the reporting of cash transactions in its Financial Transaction Reports Act of 1988.[134] The Australian FTRA applies to financial institutions and all individual and corporate entities who

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128 Basle Statement of Principles, above n 100.

129 Pub.L. No. 91-508, 84 Stat. 1114 (1970). [codified as amended at 31 U.S.C.A. ss 5311-5323 (west 1983)].

130 31 C. F. R. s103.22(a)(1) (1988). The statute provides that:
"Each financial institution ... shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more that $10,000"

131 31 C.F.R. s 103.47(f) (1988). The civil penalty for wilful violation is "not more than the greater of the amount (not to exceed $100,000) involved in the transaction or $25,000."

132 31 U.S.C. s5322(a) (Supp. IV 1986). The penalty is limited to a fine of $250,000 or five years in prison or both.

133 Pub. l. No. 99-570, ss 1351-1367, 1986 U.S. Code. Cong. & Admin. News (100 Stat.) [codified at 18 U.S.C. ss 981, 1956, 1957; 31 U.S.C. s 5324].

134 Financial Transactions Reports Act 1988, No. 64(Aust.)[Hereinafter the Australian FTRA].

deal with money transactions (with the exception of lawyers).[135] Any cash transaction involving the transfer of currency of not less than $10,000 must be reported to the Director of the Australian Transactions Reports and Analysis Centre (AUSTRAC), an autonomous government body.[136] The Australian FTRA also provides procedures for customer identification[137] in line with the Basle Statement of Principles.[138]

Money laundering was made into an offence in Australia under section 81 of the Proceeds of Crimes Act 1987 (Aust). A person is defined to be engaged in money laundering activities if he/she directly or indirectly engages in a transaction that involves money, or other property that is the proceeds of a crime. To be liable for laundering, the person must know or ought reasonably to know that the money is related to some form of unlawful activity.[139] Without this knowledge, the person cannot be held liable for money laundering activities even though it can be proven that the money is the proceeds of a crime. Under section 16 of the Australian FTRA, a financial institution which has reasonable grounds to suspect that a transaction could be of assistance in the enforcement of money laundering activities must report its suspicions to the Director of the AUSTRAC. Financial institutions which report suspected money laundering transactions under section 16 are protected from liability for breach of confidentiality.[140]

2 *Switzerland*[141] *and the United Kingdom*[142]

The Swiss Money Laundering Act came into force on 1 August 1990 and included two new articles, articles 305 bis and 305 ter, in the Swiss Penal Code prohibiting money laundering activities. The Act provides that a money launderer is "any person who acts with the intent to avoid the seizure or discovery of money or other assets

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135 Interview with Mr Kelly Beeman, above n 99.

136 See section 7, Financial Transaction Reports Act 1988 (Aust).

137 See section 18, Financial Transaction Reports Act 1988 (Aust).

138 Above n 100.[See also Appendix B].

139 Section 81(3), Financial Transaction Reports Act 1988 (Aust).

140 See section 17, Financial Transaction Reports Act 1988 (Aust).

141 For writings on money laundering in Switzerland, see Krauskopf, above n 42; Rebecca G. Peters "Money Laundering and Its Current Status In Switzerland: New Incentives For Financial Tourism" (1990) 11 Northwestern Journal of International Law & Business 104.

142 For writings on money laundering in the United Kingdom, see Anne Dickson "Taking Dealers to the Cleaners" 141 New Law Journal 1068, 2 August 1991 and 141 New Law Journal 1120, 9 August 1991.

that are the product of a crime."[143] The Act is therefore directed at the crime of receiving stolen property. Any attempt to conceal the proceeds of a crime is prohibited under the Act and punishable by penal servitude of up to five years or a prison sentence. Switzerland also incorporates a gross negligence standard in its money laundering laws in Article 305 ter of the Swiss Penal Code. The article provides that whoever accepts, deposits, or transfers the assets of a third party on a professional basis without verifying the owner of the asset with reasonable diligence will be punishable with imprisonment or a fine.

In the United Kingdom, the money laundering offence relates only to drug trafficking offences. Money laundering was made into an offence under section 24 of the Drug Trafficking Offences Act 1986 (UK). However, the section studiously avoided the use of the term 'money laundering' and instead created the offence of "assisting another to retain the benefit of drug trafficking". In other words, it is an offence for any person to assist another in disguising the true identity of drug trafficking profits. The activities which equates to assistance (thereby constituting the money laundering offence) and is of importance to the banks are those enabling a drug trafficker to retain or exercise control over the proceeds of drug trafficking, by concealing them, removing them from the jurisdiction or transferring them to nominees.[144] A person who is convicted of money laundering may be imprisoned for up to 14 years or fined or both. Section 24(3) promote the assistance that banks officials may give the authorities by disclosing their suspicions that the monies that their clients have been dealing with have been derived from drug trafficking. In effect, any such disclosures made are held to be exempted from the banks' duty of confidentiality. Hence, the banks who disclose information on suspected money laundering transactions are protected from any civil suit.

In view of the different anti-money laundering regimes that are in place in the world, it is difficult to decide on a suitable anti-money laundering regime for New Zealand. The many considerations that should be taken in account when developing a suitable regime for New Zealand will examined next.

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143 Article 305 bis, Swiss Penal Code; see Krauskopf, above n 42, pp 287-288.

144 Section 21(1)(a), Drug Trafficking Offences Act 1986 (UK).

B *What Scheme Should New Zealand Implement?*

1 *Detailed transaction reporting scheme or general guidelines*

As yet New Zealand does not have any formal legislation in place to combat money laundering in the banks. However, a number of interested parties are currently looking into this issue.[145] There are many considerations that must be taken into account when deciding on a suitable scheme for New Zealand. Chief among these considerations is whether New Zealand should implement specific and detailed provisions to reduce money laundering in the banks (as in the reporting requirements found in the United States and Australia) or provide a general regime (like those found in Switzerland or the United Kingdom).

A detailed reporting regime to curb money laundering has certain advantages. It may give rise to significant revenue earning potentials for the government. According to Mr Kevin Marlow, the Australian government has obtained millions of dollars in additional revenue just by auditing about one percent of the cash transaction reports.[146] Moreover, bank reporting laws alert the government to the money laundering process at its earliest stage, the initial cash transactions. As the laundering process continues, the transactions become more byzantine and more difficult to trace. The initial cash transactions are therefore the most vulnerable point of the money laundering process because the large amounts of cash are difficult to conceal. The cash transactions are also an attractive target because they occur early in the laundering process and are conspicuous.

A further advantage of the reporting laws is that it is the most effective tool available to determine the movements of large amounts of money in the financial system. With ready access to bank records, the authorities can analyse the particular banking transactions of suspected money launderers just by calling for any cash transactions reports filed by the banks on their behalf.

One other advantage of the reporting regime is the fact that it implements the 'know your customer' rule in a statutory form. Detailed provisions concerning the information that must be presented when opening a bank account allows the bank to monitor its customers' activities at all times. Thus, if a bank customer should

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145 Examples of parties interested in the question of money laundering are the Police, the Reserve Bank of New Zealand,and the Customs Department.

146 Above n 2.

suddenly receive a large amount of funds for no particular reason, the bank would then be alerted to the possibility that the customer may be involved in illicit activities. Thus, money laundering activities may be detected at an early stage if a detailed reporting scheme is implemented in New Zealand.

On the other hand, one of the main disadvantages of a detailed reporting scheme is the possible promotion of the act of 'structuring' as experienced in the United States. It would be useless for New Zealand to implement a specific reporting scheme for transactions over $10,000[147] if bank customers could manipulate their transactions so as to fall under the minimum limit. Nevertheless, the fact that a person is noticed to be engaging in several transactions of less than $10,000 within a few day should still alert the bank to the possibility of illegal activities by the bank customer. The implementation of a more general regime for money laundering offences would not encounter this disadvantage as there is little or no restriction on the banking transactions. The exception is that the transaction should not involve funds connected to criminal activities.

The other disadvantage of a detailed scheme is the possible generation of an enormous amount of useless transaction reports. The bulk of these transaction reports would generally relate to legitimate financial transactions. To isolate the few suspicious transactions from these largely legitimate activities will be like looking for a needle in the haystack. Moreover, the sheer volume of these reports would make it impractical to analyse all of them. This problem has largely been solved in Australia by the use of computers to store and cross-reference the reports. Hence, this disadvantage to implementing a detailed reporting scheme is not insurmountable.

A major concern with the detailed reporting scheme is the supervision of the reporting requirements. Which agency should be charged with supervising the enforcement of these reporting requirements? Should it be the Reserve Bank (because of its banking supervision powers) or the Police (because a crime would usually be involved)? What about the Customs Department or the Ministry of Justice? It has been suggested that, like Australia, New Zealand should establish an autonomous government agency to monitor the enforcement of the reporting laws.[148] This will prevent any interested parties, such as the banks and the police from

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147 The $10,000 minimum limit to trigger the the reporting laws in both Australia and the United States seem to be an internationally accepted figure.

148 This is the personal opinion of both Mr Kelly Beeman and Mr Kevin Marlow and is also the view favoured by the writer.

gaining a monopoly over the information that is made available under the reporting regime.

It must be also be remembered that such reporting requirements are a breach of the banks' common law duty of confidentiality to their clients. The banks are provided with a statutory protection against liability for breach of confidentiality only because the public interest in preventing money laundering far outweighs the public interest in maintaining banker-customer confidentiality. This statutory protection does not disguise the fact that reporting laws are a derogation of the duty of confidentiality owed by the banks to their customers.

It is submitted that the most likely anti-money laundering scheme for implementation in New Zealand is the detailed cash transaction reporting scheme. This is because the advantages of using such a scheme would outweigh the disadvantages inherent in it (such as the possible structuring of transactions to avoid the reporting requirements). Implementation such a scheme would also bring New Zealand money laundering policies in line with the Australian system.

2 *How efficient would any scheme be in reducing money laundering?*

The rise in money laundering activities is directly related to the increase in drug-trafficking. The nations of the world are anxious to reduce the occurrence of money laundering activities because of this direct correlation between the two illegal activities. It is believed that the reduction in money laundering activities and the confiscation of the proceeds of drug sales would deter the traffickers as they would not be able to profit from such activities.

It is submitted that it is unlikely that any anti-money laundering scheme would be able to reduce such activities significantly or reduce the amount of of drug trafficking occurring in the world. Since the profits of drug sales are enormous, the occasional detection of a money laundering activity by law enforcement agents would be unlikely to stop the drug traffickers. Moreover, although the United States has had a money laundering offence since 1970, there has yet been no noticeable reduction in the traffic of illegal drugs in that country. Thus implementing an anti-money laundering regime in New Zealand may be unlikely to affect the current trade in illicit drugs in the country.

3 *The Serious Fraud Office*

The Serious Fraud Office may also play a role in combatting money laundering offences.in New Zealand. One of the objectives of the Serious Fraud Office is to investigate fraud or 'white collar crimes' by individuals or corporations. Money laundering is now an increasingly sophisticated tool for defrauding the government of its rightful revenues (as it is generally used for tax evasion purposes) or for the fraudulent passing off of illicit gains as legitimate money. The Serious Fraud Office possesses very wide statutory powers to demand the production of documents and information from any individual, corporation or institution. Hence, it could be a very effective tool in controlling money laundering activities by suspected entities . If an individual or entity is suspected of money laundering activities, the Serious Fraud Office can demand from the banks the individual's banking transaction records for investigative purposes.

VII CONCLUSION

The rapid growth in drug trafficking activities worldwide has lead to a corresponding growth in money laundering activities in the financial system. Anti-money laundering schemes are now in place in most nations to curb this growing menace. Most governments hope that the detection and confiscation of the proceeds of criminal activities through the help of the banking system would deter people from crime (especially in the drug trade) as they would not be able to enjoy the profits of their labours.

The implementation of any measure to combat money laundering (whether a detailed scheme or general guidelines) is a derogation of the banks' duty of confidentiality to their clients. This derogation, however, has usually been excused on the grounds that money laundering activities are an economic threat to the country. It is thus in the best interests of any country that measures be adopted to curb its spreading evil. The public interest in reducing money laundering activities in the banking system (and the hope that this will lead to a corresponding decrease in drug trafficking) is held to override any public interest in maintaining the banker-customer duty of confidentiality.

In New Zealand, money laundering activities have threatened the banks' duty of confidentiality as established by *Tournier.* The disclosure by banks of the

information required by the authorities in their efforts to fight money laundering can arguably be exempted from liability under all four exceptions to the duty of confidentiality. Although money laundering is not yet an offence in New Zealand, the efforts to combat its growing menace has already affected the banks' duty of confidentiality. The implementation of a suitable anti-money laundering scheme in the near future may result in a further derogation of this duty of confidentiality. It is hoped that New Zealand would learn from the mistakes of other countries when it considers the type of regime suitable for implementation in this country.

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UN Doc. E/Conf. 82/15, Dec. 19, 1988

(e) If a Court makes a confiscation order in reliance on the person's conviction of the offence or a related serious offence, and the confiscation order is satisfied or otherwise ceases to be in force, the restraining order shall cease to be in force when that order is satisfied or otherwise ceases to be in force, unless, at that time,—

(i) An application for another confiscation order in respect of the person's conviction of the offence or a related serious offence awaits determination; or

(ii) Another confiscation order in respect of the person's conviction of the offence or a related serious offence is in force:

(f) If a Court refuses an application for a confiscation order made in reliance on the person's conviction of the offence or a related serious offence, the restraining order ceases to be in force when the Court refuses the application unless, at that time,—

(i) An application for another confiscation order in respect of the person's conviction of the offence or a related serious offence awaits determination; or

(ii) Another confiscation order in respect of the person's conviction of the offence or a related serious offence is in force:

(g) If, before the restraining order would otherwise expire under subsection (1) of this section, an application is made to the High Court under section 66 of this Act for an order extending the period of operation of the restraining order, and the application is granted, the restraining order shall cease to be in force at such time as is specified in the Court's order under that section.

Cf. Proceeds of Crime Act 1987 (Aust.), s. 57 (1), (2)

66. Extension of operation of restraining order—(1) Where the High Court has made a restraining order against a person's property, the Solicitor-General may, before that order expires under section 65 (1) or section 65 (3) (g) of this Act, apply to that Court for an extension, or a further extension, of the period of operation of the restraining order.

(2) Where an application is made under subsection (1) of this section, and the restraining order is still in force, the Court may, by order, extend the operation of the restraining order for a period not exceeding 6 months if the Court is satisfied that there are reasonable grounds for believing—

APPENDIX A.

(a) That a forfeiture order will still be made in respect of the property or part of the property; or

(b) That a pecuniary penalty order will still be made against the person in respect of whose conviction or alleged commission of a serious offence the restraining order was made.

(3) On making any order under subsection (2) of this section, the Court may give any additional directions it considers appropriate in relation to the operation of the restraining order, including a direction specifying whether all or part of the property is to remain subject to the restraining order during the extended period of operation.

(4) An applicant for an order under subsection (2) of this section shall serve notice of the application on any person whose property is the subject of the application, and that person shall be entitled to appear and to adduce evidence at the hearing of the application.

Cf. Proceeds of Crime Act 1987 (Aust.), s. 57 (3), (4)

PART V
INFORMATION GATHERING POWERS

Interpretation

67. Interpretation—In this Part of this Act, unless the context otherwise requires,—

"Bankers' books" means any accounting records used in the ordinary course of banking:

"Property-tracking document", in relation to a drug-dealing offence, means—

(a) A document relevant to identifying, locating, or quantifying property of a person who committed the offence; or

(b) A document relevant to identifying, locating, or quantifying tainted property in relation to the offence.

Production Orders

68. Application for production order—(1) A commissioned officer of the Police may apply to a Judge of the High Court for a production order under section 69 of this Act in any case where—

(a) Either—

(i) A person has been convicted of a drug-dealing offence; or

(ii) The officer has reasonable grounds for believing that a person has committed a drug-dealing offence; and

(b) The officer has reasonable grounds for believing that a person has possession or control of one or more property-tracking documents in relation to the offence.

(2) Every application under this section shall be made in writing and on oath, and shall contain the following particulars:

(a) The grounds on which the application is made:

(b) A description of the document or documents production of which is sought:

(c) A description of the property or type of property to which the document or documents are believed to relate:

(d) The reasons why it is considered necessary to obtain a production order in relation to the identification, location, or quantification of that property.

Cf. Proceeds of Crime Act 1987 (Aust.), s. 66 (1)

69. Court may make production order—(1) Where an application is made under section 68 of this Act to a Judge of the High Court for a production order against a person, the Judge may, subject to subsection (4) of this section and to sections 73 and 74 of this Act, make an order that the person—

(a) Produce to a member of the Police any specified document or class of documents of the kind referred to in section 69 (1) (b) of this Act that are in the person's possession or control; or

(b) Make available to a member of the Police, for inspection, any specified document or class of documents of that kind that are in the person's possession or control—

if the Judge is satisfied that there are reasonable grounds for making the order.

(2) A Judge shall not make an order under subsection (1) of this section unless the application contains, or the applicant otherwise supplies to the Judge, such information as the Judge requires concerning the grounds on which the application is sought.

(3) Where, on an application under section 68 of this Act for a production order in respect of an offence, the Judge is satisfied that there are reasonable grounds to believe that—

(a) The person who was convicted of the offence, or who is believed to have committed the offence, derived a benefit, directly or indirectly, from the commission of the offence; and

(b) Property specified in the application is subject to the effective control of that person,—

the Judge may, having regard to the matters referred to in section 29 (2) of this Act, treat any document relevant to identifying, locating, or quantifying that property as a property-tracking document in relation to the offence for the purposes of this section.

(4) An order under subsection (1) (a) of this section shall not be made in respect of bankers' books.

Cf. Proceeds of Crime Act 1987 (Aust.), s. 66 (2)-(6)

70. Time and place of production—A production order requiring a person to produce or make available any document to a member of the Police—

(a) Shall specify when the document is to be produced or made available:

(b) May specify—

(i) The place where the document is to be produced or made available:

(ii) The member of the Police to whom the document is to be produced or made available.

Cf. Proceeds of Crime Act 1987 (Aust.), s. 66 (7), (8)

71. Powers and duties of police officers under production order—(1) A member of the Police to whom a document is produced or made available for inspection in accordance with a production order under section 69 of this Act may do one or more of the following:

(a) Inspect the document:

(b) Take extracts from the document:

(c) Make copies of the document:

(d) In the case of an order under subsection (1) (a) of that section, retain the document for as long as is reasonably necessary for the purposes of this Act.

(2) Where a member of the Police retains a document pursuant to a production order, the member of the Police shall, on request by the person to whom the order was addressed,—

(a) Give the person a copy of the document certified by the member of the Police, in writing, to be a true copy of the document; or

(b) Permit the person to inspect, take extracts from, and make copies of, the document.

Cf. Proceeds of Crime Act 1987 (Aust.), s. 66 (9)-(11)

72. Production order to operate notwithstanding any other enactment or rule of law—(1) Subject to sections 73 and 74 of this Act, section 69 of this Act applies notwithstanding any enactment, or any rule of law, that obliges any person to maintain secrecy in relation to, or not to disclose, any matter, and any compliance with an order made under section 69 of this Act is not a breach of the relevant obligation of secrecy or non-disclosure or of the enactment or rule of law by which the obligation is imposed.

(2) Subject to sections 73 and 74 of this Act, no person shall be excused from producing or making available any document, when required to do so by a production order,—

(a) On the ground that the production of that document could or would tend to incriminate that person or subject that person to any penalty or forfeiture; or

(b) On the ground of any other privilege that could otherwise be claimed by that person in relation to the production of the document in any proceedings in a Court.

(3) Where a person produces or makes available a document pursuant to a production order, neither the production or making available of the document, nor any information, document, or thing obtained as a consequence of the production or making available of the document, is admissible against that person in any criminal proceedings except for an offence against section 76 of this Act.

(4) For the purposes of subsection (3) of this section, proceedings on an application for a restraining order, a forfeiture order, or a pecuniary penalty order are not criminal proceedings.

Cf. Proceeds of Crime Act 1987 (Aust.), s. 66 (12)-(14)

73. Production order not to override certain enactments—Nothing in section 69 or section 72 of this Act overrides—

(a) Sections 13 to 15 of the Inland Revenue Department Act 1974; or

(b) Section 37 of the Statistics Act 1975; or

(c) Section 105 of the Reserve Bank of New Zealand Act 1989.

74. Legal professional privilege—(1) Nothing in section 69 or section 72 of this Act shall require any legal practitioner to disclose any privileged communication.

(2) For the purposes of this section, a communication is a privileged communication only if—

(a) It is a confidential communication, whether oral or written, passing between—

(i) A legal practitioner in his or her professional capacity and another legal practitioner in such capacity; or

(ii) A legal practitioner in his or her professional capacity and his or her client,—

whether made directly or indirectly through an agent of either; and

(b) It is made or brought into existence for the purpose of obtaining or giving legal advice or assistance; and

(c) It is not made or brought into existence for the purpose of committing or furthering the commission of some illegal or wrongful act.

(3) Where the information or document consists wholly of payments, income, expenditure, or financial transactions of a specified person (whether a legal practitioner, his or her client, or any other person), it shall not be a privileged communication if it is contained in, or comprises the whole or part of, any book, account, statement, or other record prepared or kept by the legal practitioner in connection with a trust account of the legal practitioner within the meaning of section 2 of the Law Practitioners Act 1982.

(4) Where any person refuses to disclose any information or document on the ground that it is a privileged communication under this section, the Commissioner of Police or that person may apply to a Judge of the High Court for an order determining whether or not the claim of privilege is valid; and, for the purposes of determining any such application, the Judge may require the information or document to be produced to him or her.

(5) For the purposes of this section the term "legal practitioner" means a barrister or solicitor of the High Court, and references to a legal practitioner include a firm in which he or she is a partner or is held out to be a partner.

Cf. 1990, No. 51, s. 24

75. Variation of production orders—(1) Where a Judge of the High Court makes an order under section 69 (1) (a) of this Act, the person against whom the order is made may apply to the Judge or to another Judge of the High Court for variation of the order.

(2) Where, on hearing any application made under subsection (1) of this section by any person in respect of any document, the Judge is satisfied that the document is essential to the business activities of the person, the Judge may vary the production order in respect of that document so that the order requires the document to be made available for inspection in accordance with section 69 (1) (b) of this Act.

Cf. Proceeds of Crime Act 1987 (Aust.), s. 67

76. Failure to comply with production order—(1) Every person commits an offence against this section who, being a person against whom a production order is made,—

(a) Fails, without reasonable excuse, to comply with the order; or

(b) In purported compliance with the order, produces or makes available to a member of the Police a document which the person knows is false or misleading in a material particular, where that person fails to indicate to the member of the Police the respect in which the document is false or misleading.

(2) Every person who commits an offence against this section is liable on summary conviction,—

(a) In the case of an individual, to imprisonment for a term not exceeding 6 months or a fine not exceeding $5,000:

(b) In the case of a body corporate, to a fine not exceeding $20,000.

Cf. Proceeds of Crime Act 1987 (Aust.), s. 68

Monitoring Orders

77. Monitoring orders—(1) A Judge of the High Court may, on the application of a commissioned officer of the Police, make an order directing a financial institution to supply to the Commissioner of Police information obtained by the institution about transactions conducted through an account held by a particular person with the institution.

(2) A Judge may make a monitoring order only if the Judge is satisfied that there are reasonable grounds for believing that the person in respect of whom the order is sought—

(a) Has committed, or is about to commit, a drug-dealing offence; or

(b) Has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of a drug-dealing offence.

(3) Every monitoring order shall specify—

(a) The name or names in which the account is believed to be held; and

(b) The class of information that the institution is required to supply; and

(c) The manner in which the information is to be supplied; and

(d) The period for which the order is to be in force.

(4) A monitoring order shall apply in relation to transactions conducted during the period specified in the order (being a period commencing not earlier than the day on which notice of the order is given to the financial institution and ending not later than 3 months after the day of the order).

(5) A reference in this section to a transaction conducted through an account includes a transaction through the facility of a safety deposit box.

Cf. Proceeds of Crime Act 1987 (Aust.), s. 73 (1)-(6), (8)

78. Failure to comply with monitoring order—Every financial institution commits an offence and is liable on summary conviction to a fine not exceeding $20,000 if, where that financial institution has been given notice of a monitoring order, that financial institution—

(a) Fails, without reasonable excuse, to comply with the order; or

(b) Knowingly supplies information that is false or misleading in purported compliance with the order.

Cf. Proceeds of Crime Act 1987 (Aust.), s. 73 (7)

79. Compliance with monitoring order not actionable—(1) No proceedings, civil or criminal, shall lie against any financial institution or any other person by reason of that financial institution's or that person's compliance with a monitoring order.

(2) Nothing in subsection (1) of this section applies in respect of proceedings for an offence against section 78 of this Act.

80. Monitoring order not to be disclosed—(1) A financial institution that is, or has been, subject to a monitoring order shall not disclose the existence or the operation of the order to any person except—

(a) The Commissioner of Police or a member of the Police who is authorised by the Commissioner to receive the information; or

(b) An officer or agent of the institution, for the purpose of ensuring compliance with the order; or

(c) A barrister or solicitor, for the purpose of obtaining legal advice or representation in relation to the order.

(2) No person referred to in paragraph (a) of subsection (1) of this section to whom disclosure of the existence or operation of a monitoring order has been made shall disclose the existence or operation of the order except to another person of the kind referred to in that subsection, for the purpose of the performance of the first-mentioned person's duties.

(3) No person referred to in paragraph (b) of subsection (1) of this section to whom disclosure of the existence or operation of a monitoring order has been made shall disclose the existence or operation of the order except to another person of the kind referred to in that subsection, for the purpose of ensuring that the order is complied with or obtaining legal advice or representation in relation to the order.

(4) No person referred to in paragraph (c) of subsection (1) of this section to whom disclosure of the existence or operation of a monitoring order has been made shall disclose the existence or operation of the order except to a person of the kind referred to in that subsection for the purpose of giving legal advice or making representations in relation to the order.

(5) Nothing in subsections (1) to (4) of this section shall prevent the disclosure of the existence or operation of a monitoring order in connection with, or in the course of, proceedings before a Court.

Cf. Proceeds of Crime Act 1987 (Aust.), s. 74 (1)-(4)

81. Offence to disclose existence or operation of monitoring order—Every person who knowingly contravenes any of subsections (1) to (4) of section 80 of this Act commits an offence and is liable on summary conviction,—

(a) In the case of an individual, to imprisonment for a term not exceeding 6 months or a fine not exceeding $5,000:

(b) In the case of a body corporate, to a fine not exceeding $20,000.

PART VI

Miscellaneous Provisions

Appeals

82. Appeals—(1) In this section, "relevant conviction", in relation to a forfeiture order, a pecuniary penalty order, or an order under section 29 (3) of this Act, means the conviction of a serious offence which was relied on to support the order.

(2) A person who has an interest in property against which a forfeiture order is made may appeal against that order as if the order were a sentence imposed on the person in respect of the relevant conviction.

(3) A person against whom a pecuniary penalty order is made may appeal against that order as if the order were a sentence imposed on the person in respect of the relevant conviction.

(4) Where a Court makes a pecuniary penalty order and makes an order under section 29 (3) of this Act declaring that certain property is available to satisfy the order, a person who has an interest in that property may appeal against the order under section 29 (3) of this Act as if the order were a sentence imposed on the person in respect of the relevant conviction.

(5) The Solicitor-General may appeal against a forfeiture order, a pecuniary penalty order, or an order under section 29 (3) of this Act, or against the refusal of a Court to make any such order, as if the order or refusal were a sentence imposed in respect of the relevant conviction.

(6) Where an application is made to a Court for an order under section 18 of this Act, the applicant or the Solicitor-General may appeal against the whole or any part of the decision of the Court on that application as if the decision were a sentence imposed,—

(a) In the case of an appeal by the applicant, on the applicant in respect of the conviction in respect of which a forfeiture order is sought or has been made:

(b) In the case of an appeal by the Solicitor-General, in respect of the conviction in respect of which a forfeiture order is sought or has been made.

Cf. Proceeds of Crime Act 1987 (Aust.), s. 100

83. Procedure on appeal—(1) An appeal under section 82 of this Act shall be made to the Court of Appeal, and the provisions of Part XIII of the Crimes Act 1961 shall, with all necessary modifications, apply as if the appeal were an appeal under section 383 of that Act.

(2) On any appeal under section 82 of this Act, the Court of Appeal may confirm the decision or order or refusal appealed against, or vary it, or set it aside and make such other order or decision as the Court of Appeal thinks ought to have been made in the first place.

APPENDIX B.

Committee on Banking Regulations
and
Supervisory Practices

Prevention of criminal use of the banking system for the purpose of money-laundering

Preamble

1. Banks and other financial institutions may be unwittingly used as intermediaries for the transfer or deposit of funds derived from criminal activity. Criminals and their associates use the financial system to make payments and transfers of funds from one account to another; to hide the source and beneficial ownership of money; and to provide storage for bank-notes through a safe-deposit facility. These activities are commonly referred to as money-laundering.

2. Efforts undertaken hitherto with the objective of preventing the banking system from being used in this way have largely been undertaken by judicial and regulatory agencies at national level. However, the increasing international dimension of organised criminal activity, notably in relation to the narcotics trade, has prompted collaborative initiatives at the international level. One of the earliest such initiatives was undertaken by the Committee of Ministers of the Council of Europe in June 1980. In its report[1] the Committee of Ministers concluded that "... the banking system can play a highly effective preventive role while the co-operation of the

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1 Measures against the transfer and safeguarding of funds of criminal origin. Recommendation No. R(80)10 adopted by the Committee of Ministers of the Council of Europe on 27th June 1980.

banks also assists in the repression of such criminal acts by the judicial authorities and the police". In recent years the issue of how to prevent criminals laundering the proceeds of crime through the financial system has attracted increasing attention from legislative authorities, law enforcement agencies and banking supervisors in a number of countries.

3. The various national banking supervisory authorities represented on the Basle Committee on Banking Regulations and Supervisory Practices[2] do not have the same roles and responsibilities in relation to the suppression of money-laundering. In some countries supervisors have a specific responsibility in this field; in others they may have no direct responsibility. This reflects the role of banking supervision, the primary function of which is to maintain the overall financial stability and soundness of banks rather than to ensure that individual transactions conducted by bank customers are legitimate. Nevertheless, despite the limits in some countries on their specific responsibility, all members of the Committee firmly believe that supervisors cannot be indifferent to the use made of banks by criminals.

4. Public confidence in banks, and hence their stability, can be undermined by adverse publicity as a result of inadvertent association by banks with criminals. In addition, banks may lay themselves open to direct losses from fraud, either through negligence in screening undesirable customers or where the integrity of their own officers has been undermined through association with criminals. For these reasons the members of the Basle Committee consider that banking supervisors have a general role to encourage ethical standards of professional conduct among banks and other financial institutions.

5. The Committee believes that one way to promote this objective, consistent with differences in national supervisory practice, is to obtain international agreement to a Statement of Principles to which financial institutions should be expected to adhere.

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2 The Committee comprises representatives of the central banks and supervisory authorities of the Group of Ten countries (Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, United Kingdom, United States) and Luxembourg.

6. The attached Statement is a general statement of ethical principles which encourages banks' management to put in place effective procedures to ensure that all persons conducting business with their institutions are properly identified; that transactions that do not appear legitimate are discouraged; and that co-operation with law enforcement agencies is achieved. The Statement is not a legal document and its implementation will depend on national practice and law. In particular, it should be noted that in some countries banks may be subject to additional more stringent legal regulations in this field and the Statement is not intended to replace or diminish those requirements. Whatever the legal position in different countries, the Committee considers that the first and most important safeguard against money-laundering is the integrity of banks' own managements and their vigilant determination to prevent their institutions becoming associated with criminals or being used as a channel for money-laundering. The Statement is intended to reinforce those standards of conduct.

7. The supervisory authorities represented on the Committee support the principles set out in the Statement. To the extent that these matters fall within the competence of supervisory authorities in different member countries, the authorities will recommend and encourage all banks to adopt policies and practices consistent with the Statement. With a view to its acceptance worldwide, the Committee would also commend the Statement to supervisory authorities in other countries.

Basle, December 1988

Statement of Principles

I. Purpose

Banks and other financial institutions may unwittingly be used as intermediaries for the transfer or deposit of money derived from criminal activity. The intention behind such transactions is often to hide the beneficial ownership of funds. The use of the financial system in this way is of direct concern to police and other law enforcement agencies; it is also a matter of concern to banking supervisors and banks' managements, since public confidence in banks may be undermined through their association with criminals.

This Statement of Principles is intended to outline some basic policies and procedures that banks' managements should ensure are in place within their institutions with a view to assisting in the suppression of money-laundering through the banking system, national and international. The Statement thus sets out to reinforce existing best practices among banks and, specifically, to encourage vigilance against criminal use of the payments system, implementation by banks of effective preventive safeguards, and co-operation with law enforcement agencies.

II. Customer identification

With a view to ensuring that the financial system is not used as a channel for criminal funds, banks should make reasonable efforts to determine the true identity of all customers requesting the institution's services. Particular care should be taken to identify the ownership of all accounts and those using safe-custody facilities. All banks should institute effective procedures for obtaining identification from new customers. It should be an explicit policy that significant business transactions will not be conducted with customers who fail to provide evidence of their identity.

III. Compliance with laws

Banks' management should ensure that business is conducted in conformity with high ethical standards and that laws and regulations

pertaining to financial transactions are adhered to. As regards transactions executed on behalf of customers, it is accepted that banks may have no means of knowing whether the transaction stems from or forms part of criminal activity. Similarly, in an international context it may be difficult to ensure that cross-border transactions on behalf of customers are in compliance with the regulations of another country. Nevertheless, banks should not set out to offer services or provide active assistance in transactions which they have good reason to suppose are associated with money-laundering activities.

IV. Co-operation with law enforcement authorities

Banks should co-operate fully with national law enforcement authorities to the extent permitted by specific local regulations relating to customer confidentiality. Care should be taken to avoid providing support or assistance to customers seeking to deceive law enforcement agencies through the provision of altered, incomplete or misleading information. Where banks become aware of facts which lead to the reasonable presumption that money held on deposit derives from criminal activity or that transactions entered into are themselves criminal in purpose, appropriate measures, consistent with the law, should be taken, for example, to deny assistance, sever relations with the customer and close or freeze accounts.

V. Adherence to the Statement

All banks should formally adopt policies consistent with the principles set out in this Statement and should ensure that all members of their staff concerned, wherever located, are informed of the bank's policy in this regard. Attention should be given to staff training in matters covered by the Statement. To promote adherence to these principles, banks should implement specific procedures for customer identification and for retaining internal records of transactions. Arrangements for internal audit may need to be extended in order to establish an effective means of testing for general compliance with the Statement.

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