**August 2009.**

**Select Committee Submissions – Anti-Money Laundering and Countering Financing of Terrorism Bill**

## Introduction

Transparency International (New Zealand) Inc. (TINZ) is the New Zealand national chapter of the global Transparency International (TI) movement. The global movement has its Secretariat based in Berlin, Germany and the TINZ office is in Wellington.

TI advocates that accountability, transparency and good governance lies at the heart of good government and the responsible use of state power. TINZ is a not-for-profit, member-based and strictly non-partisan organisation.

### *General Support for the Bill*

Transparency International (New Zealand) fully supports the purpose of this Bill, "..to enhance New Zealand's anti-money laundering and countering the financing of terrorism (AML/CFT) framework, and in doing so, progress compliance with the Financial Action Task Force's (FATF) AML/CFT Recommendations and assure the robustness of New Zealand's financial system" .

Transparency International (New Zealand) also acknowledges that the Bill is a further step in New Zealand's efforts to ratify the United Nations Convention Against Corruption (UNCAC).

## Our Submission

The following submission reflects our concern to ensure maximum transparency in banking transactions, with particular emphasis on transactions which may be related to corrupt practices within the public or the private sectors. We have three recommendations under two broad headings which we would like the Select Committee to consider.

1. **The Bill does not offer practical steps for stopping the movement of the proceeds of crime, including corruption.**

   For the Bill to be effective it should be structured in a way which allows authorities to act quickly and effectively when advised of suspicious behaviour. It is our view that the Bill in its present form does not provide a practical means by which the Commissioner of Police can respond to a reported suspicious transaction in a manner which will stop the flow of the proceeds of crime, including funds acquired from corrupt practices.

   We have two recommendations to address this. First, we recommend that institutions be granted the power to freeze an account which they file a suspicious transaction report in relation to, for a period of seven days, to allow the Commissioner of Police to investigate and then direct the institution as to what to do. Second we recommend that the Commissioner of Police be granted the power to direct an account to be frozen either where a suspicious transaction report is filed, or of his/her own volition.

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**Recommendation One**

It is our submission that the Bill should allow for an institution which files a suspicious transaction report to immediately freeze the account which the report relates to, and seek guidance from the Commissioner of Police as to whether it may continue with the transaction.

We consider that it is reasonable to leave whether to do this in the hands of the institution, as they are the ones under a risk based regime best placed to assess whether or not the risks behind a transaction warrant such steps, and they are the ones who risk prosecution should they facilitate an illegal transfer. It would be unrealistic to expect accounts to be frozen on every occasion a suspicious transaction report is filed.

Where an institution chooses to suspend an account the account should remain frozen for the lesser of 7 days or until the reporting entity is advised by the Commissioner of Police that the account can continue to operate. If the 7 day period of time passes without the Commissioner of Police advising the institution of his/her view as to further transactions on the account, then the institution should be free to transact on the account, and should not be liable to prosecution for doing so unless they have actual knowledge that the transaction involves the proceeds of crime, or is supporting terrorism.

This proposal has some precedence in the legislation of both the United Kingdom and Switzerland.

*United Kingdom*

In the UK, a protected disclosure occurs under the *Proceeds of Crimes Act 2002* where under section 337, the person satisfies a three pronged test. Firstly the information or other matter came to the person making the disclosure in the course of their trade, profession, business or employment. Secondly, the information or other matter causes the disclosure to know or suspect, or give them reasonably grounds to know or suspect that the other person is engaging in money laundering. Lastly, the disclosure is made to a constable, a customs officer or a nominated officer as soon as practicable after the information or other matter comes to the discloser.

Similar provisions exist under the UK *Terrorism Act 2000* in respect of terrorist property.

Under the *Money Laundering Regulation 2007* in the UK, where a relevant person is unable to apply customer due diligence measures in accordance with the Regulations, the person must not carry out the transaction with or for the customer through the bank account, must not establish a business relationship and must terminate any existing relationship and must consider whether to make a disclosure under Part 7 of the *Proceeds of Crime Act 2002* (POCA) or Part III of the *Terrorism Act 2000*.

Further, under the POCA individual persons and businesses in the regulated sector are required not only to report before the event suspicious transactions or activity that they become aware of, but to desist from completing these transactions until a specific consent is received. This is the 'consent regime' in section 335 of the POCA. Reporting may occur to any constable or officer of revenue and customs. Current practice is to report to the Serious Organised Crime Agency (SOCA). Whether made to a constable or office of revenue and customs, they must be forwarded to the SOCA as soon as practicable. The purpose of these provisions is to offer law enforcement agencies an opportunity to gather intelligence or intervene in advance of potentially suspicious activity taking place, and they allow individuals and institutions who make reports seeking to consent to proceed with a 'prohibited act' the opportunity to avoid liability in relation to the principal money laundering offences in the POCA.

*Switzerland*

In Switzerland, the obligation to immediately report to the relevant authority is incumbent on any financial intermediary who knows or has a well-founded suspicion, ie on reasonable grounds to suspect that the assets implicated in a transaction or a business relationship originate from money laundering, are the proceeds of a serious crime in accordance with the national criminal code, or that a criminal organisation has a power of disposition over the monies. Concurrently, with the filing of the report the financial intermediary must freeze the assets under its control that are in connection with the report and this until it receives a freezing order from the

competent judicial authority. If no such order is received, the freezing of the assets ends after a period of 5 working days. During this period, the 'no tipping off" rule applies (ie the financial intermediary may inform neither those affected nor any third parties of the report).

The financial intermediary who made the report and froze the assets may not be prosecuted for violation of official, professional or commercial secrecy, nor made liable for breach of contract if it acted with due care in the circumstances.

**Recommendation Two**

Reporting entities, in setting their risk management plans, can only determine risk based on their known transaction patterns and information known to them. However, the Commissioner of Police, as part of wider criminal investigation, may have knowledge or information to identify the potential for a suspicious transaction. This knowledge or information may not readily form part of the information know to the reporting entity, nor may it come to light during the reporting entity's monitoring and due diligence process.

It is our submission that the risk management of reporting entities should be supplemented by the addition of clauses which allow the Commissioner of Police, to direct a financial institution to freeze an account for up to 7 days, or such earlier time as the Commissioner determines when he/she has reasonable cause to believe the account has been used, or is going to be used, to facilitate the transfer of proceeds of crime, or a transaction otherwise in breach of the Act, or related legislation. This power should be able to be exercised by the Commissioner of Police either upon receipt of a suspicious transaction report, or on his/her own volition.

We appreciate that this power would be a considerable change to the current regime, but consider that this would be an important part of an overall change to the AML/CFT regime whereby the Commissioner of Police would become more actively involved with institutions. For example, in recommendation 1 above we suggest that the Commissioner of Police should play a role in advising institutions whether or not they are entitled to continue to transact an account. We see this duality of the Commissioner of Police taking the responsibility under recommendation 1 as going hand in hand with new powers to direct freezing of accounts under recommendation 2.

## 2. The Bill's definition of Politically Exposed Persons is too narrow

It is our submission that the definition of Politically Exposed Persons (PEPs) is too narrow and we submit that any person who is in a senior public position where their decision could be influenced by financial enticement should be added to the definition.

We submit that the current definition is not broad enough to effectively act as a preventative or detection measure for the transfer of proceeds of crime, especially corruption. Transparency International (New Zealand) believes that to be consistent with the intent of clauses 5 and 6 of section 52 of *UN Convention Against Corruption* the definition of Politically Exposed Persons should include all individuals who are entrusted with prominent public functions.

**Recommendation Three**

It is our submission that the definition of Politically Exposed Persons for persons holding prominent public position in New Zealand should include;

a. All Members of Parliament.

b. The chief executive officer and chief financial officer of government departments, state owned enterprises, crown research institutes, crown entity companies and statutory entities.

c. Judges.

d. Ambassadors or high commissioners

e. Elected representatives of local bodies.

f. The chief executive officer and the chief financial officer of local bodies and any body in which a local body is the principal shareholder.

This proposal has precedence in the legislation applicable in Canada.

## 3. Oral Presentation

If the opportunity is available we would like to reinforce our submission through an oral presentation to the Select Committee.

Thank you for the opportunity of making our submission.

**Trevor Roberts**

Director, Transparency International (New Zealand) Inc