Bank Secrecy and Mutual Assistance in Criminal Matters

A memorandum by the Commonwealth Secretariat

Background

As member countries make more use of formal and informal means of obtaining international assistance with the investigation and prosecution of offences questions increasingly arise as to whether, or when, the concept of what is now colloquially called *bank secrecy* should be invoked to refuse a request.

The Commercial Crime Unit of the Secretariat works with law enforcement and prosecution agencies in many Commonwealth countries both in relation to specific cases and, where appropriate, in the general area of policy and legislative development related to commercial and other serious crime. Over the past year many enquiries have been made of the CCU which have running through them the common thread of difficulties regularly being encountered with countries which refuse to facilitate access to bankers books or records which are needed to provide evidence of the commission of an offence.

Bank Secrecy in the International Arena

A. UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

Much, but certainly not all, of the impetus for the recent development of multilateral and bilateral mutual legal assistance arrangements comes from the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Article 7 of that Convention deals with Mutual Legal Assistance and paragraph 5 of that Article expressly provides:

A Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy.

A state party to the 1988 Drugs Convention which receives, from another state party, a request for assistance with the investigation, prosecution or other judicial proceeding relating to criminal offences outlined in Article 3 of the Convention, cannot invoke bank secrecy as a ground for refusing to comply with the request.

B. The Financial Action Task Force

Governments will be aware of the activities of the Financial Action Task Force which is working to combat money laundering. Governments will also be aware of the 40 Recommendations of the FATF which have been accepted by a number of Commonwealth Countries either as members of the Task Force or as participants in the Caribbean Financial Action Task Force.

There are various recommendations which relate directly or indirectly to bank secrecy. Among those are:

Recommendation 2 which states that:

Financial institutions secrecy laws should be conceived so as not to inhibit implementation of the recommendations of this group.

Recommendation 21 provides:

Financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply these recommendations ....

and

Recommendation 36 (dealing with MA on money laundering issues) which states that:

There should be procedures for mutual assistance in criminal matters regarding the use of compulsory measures including the production of records by financial institutions and other persons, the search of persons and premises, seizure and obtaining of evidence for use in money laundering investigations and prosecutions and in related actions in foreign jurisdictions

More and more countries are subscribing to the principles enunciated by the Financial Action Task Force as they recognise that adequate protection of their economies against the dangers of permitting (tacitly or actively) money laundering is essential. This being the case, it is clear that countries which fail to take adequate precautions to ensure that they are not havens for laundered funds will find themselves able to attract less and less legitimate banking business.

C. The Offshore Group of Banking Supervisors

The Offshore Group of Banking Supervisors was set up in 1980 and currently has 19 members (of which 14 are Commonwealth countries or dependencies). It is committed to the Financial Action Task Force's recommendations. In 1992 the Chairman of the Group asked members to provide a statement of their anti-money laundering measures and discussions have been held with the FATF over possible involvement of the Group in the work of the Task Force.

Bank Secrecy and the Law

A. At Common Law

The relationship between a banker and his customer is a contractual one and, at common law, an implied term of the contract is the duty of confidentiality owed by the banker to his customer.

The obligation not to disclose information is less than absolute and the leading case in the common law world is still *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461 which established that the bank has the right to disclose information for the purpose of protecting the bank, or persons interested, or the public against fraud or crime. There are four circumstances in which a bank may disclose information which are expressly outlined by the court in that case.

They are:

(a) where disclosure is under compulsion by law;

(b) where there is a duty to the public to disclose;

(c) where the interests of the bank require disclosure; and

(d) where the disclosure is made by the express or implied consent of the customer.

Clearly the "duty to the public to disclose" described by Bankes LJ falls within the what Atkins LJ described as a right to disclose for "the purpose of protecting... the public against fraud or crime".

B. Under Statute

As countries increasingly rely on statute rather than common law in an effort to meet the demands of a rapidly changing social and economic environment some will codify the laws relating to banking and in so doing will make statutory provision for the banker client relationship. The statutes will, in general, recognise the hitherto implied condition of confidentiality and, where they so do, it is important that they should also recognise the limits of the duty of confidentiality. In other words, codification of the law of banking can reasonably be expected to reflect all aspects of the common law which applied before statutes took over.

Two specific references are available to the Commonwealth Secretariat which demonstrate statutory intervention in the area of bank secrecy. The Minister of Law and Justice of India in a paper presented to the Christchurch Law Ministers Meeting outlined the approach of his country to bank secrecy which was to expressly recognise the exceptions outlined in Tournier's Case in Indian legislation with the result that "the law itself has conferred powers on courts and enforcement agencies to secure information about the customers' accounts in the public interest." The Government of New Zealand, in its memorandum prepared for the same meeting, stated that its legislature "has intruded whenever it considers it necessary to do so in the public interest."

The Public Interest

Intruding upon the confidential relationship between banker and client can be, both at common law and increasingly in statute law, justified *in the public interest*. Traditionally the public interest has been a domestic concept, tied to the nation and its special interests. It has been so construed by the courts of most common law countries for a long time. But is a parochial definition of public interest sufficient at a time when economies are inter-dependent, when crime is increasingly international and when money laundering is almost always international?

The answer lies in part in the statute books and treaty series of countries. Countries which have enacted laws on mutual assistance in criminal matters have, in effect, said that there is a public interest in assisting other countries combat crime. Similarly, extradition laws recognise the public interest in ensuring that those who break foreign laws can be brought to justice. Bilateral and multilateral conventions dealing with criminal conduct are entered into by governments recognising their countries' "public interest" in protecting themselves against the wrongs described in those conventions. That countries have a "public interest" in combating crime having an international perspective is accepted. What remains is for all countries to ensure that that public interest is taken into account when applications are made by foreign courts or law enforcement agencies for access to bank records which are needed for investigation or prosecution purposes.

There are at least two means of ensuring that foreign law enforcement and prosecution agencies and courts can rely on a country to assist in bringing criminals to justice in cases where bank records are needed to establish or prove a case.

The first is to provide by statute that disclosure must be made by a bank when a specified person or class of persons (perhaps Law Officers or Judges/Magistrates) certifies that it has received a bona fide request for assistance from a foreign country pursuant to a treaty, arrangement or in reliance upon the doctrine of comity and has determined that the assistance sought should be provided. The approach relies on the first qualification outlined by Lord Justice Bankes in Tournier's case.

The second is to define a ground of public interest to be the interest (as appropriately certified for domestic purposes) of a foreign country in investigating or prosecuting a crime against its own law. This approach finds its base in the second of Lord Justice Bankes qualifications.

A third, but at this stage less well developed, ground could be disclosure in the interest of the bank itself. A bank clearly has an interest in not breaking the law. If based in a country which has strong laws designed to counter money laundering (such as a requirement that its banks to report suspicious or even just large transactions, to report international transfers or simply to take reasonable care over the people it deals with) banks must take especial care not to facilitate money laundering and accordingly, particularly if laws were accompanied by sanctions for non-compliance, banks would be

very interested in disclosing to appropriate authorities any concerns they had over their clients' dealings.

Conclusion

It is possible, as has been demonstrated in a number of countries, to balance the interests of the banking community in maintaining good and confidential customer relations with proper regard for the enforcement of criminal laws and with assisting other countries enforce their laws.

Where countries enact banking secrecy laws all that is needed are gateways through which legitimate enquiries can be made and answered. An additional desirable feature of laws impinging on bank secrecy is protection of the banker when he releases information in accordance with law.

Where countries rely on the common law there are existing gateways which permit the disclosure of information for good and proper reason and those good and proper reasons include compulsion by law to release information. All that is needed in such countries is to ensure that mutual assistance laws state explicitly that banks can be compelled to release information when the executive authority of the country determines that a mutual assistance request is to be granted.

Possible Action by Law Ministers

A concerted effort by Commonwealth Countries to ensure that bank secrecy does not defeat legitimate activities by law enforcement and prosecution authorities to combat crime may commend itself to Law Ministers.

If Ministers accept

(a) that countries rely on each other for success in their efforts to quash drug trafficking, corruption and serious white collar crime and the laundering of the proceeds of these activities; and

(b) that there is a consequent need for each country to facilitate the justifiable investigative and prosecutorial activities of other countries seeking to bring criminals to justice

they may wish to express a view on the optimum level of access to bank records which should be available upon proper request from another country.

Law Ministers may also wish to consider putting on the record a statement which, while recognising that offshore banking centres can make a legitimate contribution to international commerce, also recognises that it is essential that the development of offshore financial industries be accompanied by the development or enhancement of measures which will ensure that the criminal elements cannot use such centres to further their corrupt or criminal enterprises.

Committment to the "gateways" listed in Tournier's Case and an acceptance that where the subject of bank secrecy is dealt with by statute there is a need to replicate those common law tests would be one way in which Ministers could state their acceptance of the principle that proper law enforcement and proper banking practices can operate together. Express recognition of the legitimate interests of other countries in gaining access to bank records when they can justify their inquiries by giving adequate information about the case being investigated or prosecuted may commend itself to Ministers.