The Anti-Money Laundering Regime: A Jersey Overview

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Glossary

Defined terms:
"FATF" Financial Action Task Force
"IMF" International Monetary Fund
"JFCU" States of Jersey Police and Customs Joint Financial Crimes Unit
"JFSC" Jersey Financial Services Commission
"MLCO" Money Laundering Compliance Officer
"MLRO" Money Laundering Reporting Officer
"PEP" Politically Exposed Person

Table of legislation referred to:
"DTO(J)L 1988" Drug Trafficking Offences (Jersey) Law 1988
"IF(J)L 1991" Investigation of Fraud (Jersey) Law 1991
"IT(J)L 1961" Income Tax (Jersey) Law 1961
"ML(J)O 2008" Money Laundering (Jersey) Order 2008
"PC(J)L 1999" Proceeds of Crime (Jersey) Law 1999
"PCL(SS)(J)R 2008" Proceeds of Crime (Substitution of Schedule 2) (Jersey) Regulations 2008
"T(J)L 2002" Terrorism (Jersey) Law 2002
"the 1999 Order" Money Laundering (Jersey) Order 1999
Jersey overview

Introduction

1. Jersey, the largest of the Channel Islands, is established as a leading international finance centre, with an enviable reputation for stability, integrity, quality of service, professionalism and high standards of regulation. Jersey is, however, exposed to the same risks faced by all financial centres: its reputation may be undermined and its financial services subverted by the activities of money launderers and organised crime generally.

2. The Jersey authorities believe strongly that it is vital for the future of Jersey as an international finance centre to meet the threat posed by money laundering, be recognised worldwide as a jurisdiction that is applying international standards of financial regulation and anti-money laundering measures, and be able and willing to co-operate in the pursuit of all those who engage in financial crime.

3. As part of the IMF’s ongoing Offshore Assessment Regime, it is going to assess Jersey’s financial services regulatory regime in late 2008. In preparation for that assessment visit, new legislation has been brought in, amendments have been made to existing legislation and new guidance has been issued by the Jersey Financial Services Commission (“JFSC”).

Constitutional position

4. Jersey is a British Crown Dependency. The UK is responsible for the Jersey’s defence and representation in relation to foreign affairs, but otherwise the Island is an independent jurisdiction, governed by its own “Parliament”, the States of Jersey, which legislates for all internal matters, including taxation. Generally, UK statutes do not apply to Jersey. Jersey has its own court system, although the final Court of Appeal is the Privy Council of England and Wales.

5. Jersey is not a member of the EU, but has a special relationship with the EU pursuant to the Act of Accession, Protocol 31 of the UK to the EU. Whilst being inside the EU’s common external tariff wall, Jersey is not required to adopt EU fiscal policies, nor is it required to implement EU directives on such matters as movement of capital, company law or rules regarding insurance, investment and banking business.

Jersey’s finance industry

6. Jersey is one of the most solidly established international financial centres, having been offering offshore banking and finance services for over 40 years. Jersey is well known for its banking services, fund management services, trust and company administration services and for securitisations and structured finance generally. The size of Jersey’s industry is illustrated in the most recent report, issued in March 2008, by Jersey Finance Limited, showing as at 31 December 2007 bank deposits in Jersey at some £212.3 billion and the value of funds under administration in the Island at some £246.1 billion.

Regulation

7. In recent years, there have been numerous ongoing international initiatives aimed at co-ordinating and improving standards of financial regulation, with particular emphasis on combating money laundering.

8. Jersey has actively participated in and co-operated with such international initiatives. For example, through its membership of the Offshore Group of Banking Supervisors, Jersey works with the Basle Committee on Banking Supervision and the Financial Action Task Force on Money Laundering (“FATF”). As part of the UN Global Programme Against Money Laundering, Jersey has committed itself to international standards on regulation and anti-money laundering measures.

9. The last decade has seen a substantial programme of regulatory improvements being put in place in Jersey and those improvements are still continuing. At the same time, to ensure that Jersey maintains its effective stance against money laundering, Jersey’s anti-money laundering legislation has been extended and has also been supplemented by detailed guidance in accordance with the standards of international best practice.

Evaluations

10. Independent endorsement of the standards of Jersey’s regulation and its anti-money laundering measures bear out the real desire of Jersey to maintain its valuable reputation as a leading, well-regulated international financial centre.

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footnote:

1 Act of Accession (1972): TS 17 (1979); Cmnd 7463
11. In 1998, an independent review of financial regulation commissioned by the UK Home Secretary (the Edwards Report) judged Jersey's anti-money laundering legislation and practice to be as good as, if not better than, many EU and FATF countries.

12. An evaluation team of experts from the US, France and Malta undertook a FATF style Mutual Evaluation in 1999 and concluded that Jersey was "close to complete adherence" with the FATF Forty Recommendations and that Jersey has a "robust arsenal of legislation, regulations and administrative practices to counter money laundering".

13. In June 2000, FATF concluded that Jersey should be regarded as co-operative in the fight against money laundering.

14. In November 2003, the IMF concluded that Jersey's financial regulatory system complied well with all the relevant international standards and that the legal framework for company and trust service providers was also consistent with the Offshore Group of Banking Supervisors' Statement of Best Practice. It went on to note that "Jersey demonstrates a high level of compliance with the FATF Forty plus eight recommendations particularly with respect to confiscation of the proceeds of criminal conduct; law enforcement and prosecution powers; customer identification; exchange of information; international cooperation and measures to combat terrorist financing".

Continuing development

15. Notwithstanding these and various other endorsements of Jersey's anti-money laundering regime, Jersey's determination to maintain international standards means that the development of Jersey's legislative and regulatory frameworks is a continuing process.

16. This is all the more so given that the IMF conducted an assessment visit in October 2008 as part of its Offshore Financial Centre Assessment Programme. A set of preliminary findings is expected to be released in 2009. In advance of the planned visit, Jersey conducted an in-depth review of its regulatory framework to identify any possible issues when compared to the continually-evolving international standards. Subsequently, existing legislation has been amended, new legislation has been brought in and codes of practice and guidance amended. In particular, Jersey's regulatory regime now, like that in Europe, goes beyond the finance world and encompasses lawyers, accountants, estate agents, dealers in high value goods and certain other money service type businesses.

Information resources

17. As an offshore jurisdiction, Jersey has been conscious of the need to make its law and regulations more accessible. The internet has provided an ideal opportunity for that and the following links may be useful:
   - Jersey law (the website of the Jersey Legal Information Board which provides an online resource of laws, judgments, articles): www.jerseylaw.je
   - JFSC: www.jerseyfsc.org
   - States of Jersey: www.gov.je
   - Jersey Finance Limited (a body representing the finance industry in Jersey): www.jerseyfinance.je

Legislative and regulatory structure

General structure

18. Jersey's legislative and regulatory response to the threat from money launderers has largely followed that of the UK, with the framework of the anti-money laundering regime consisting of a collection of primary legislation passed by the States of Jersey, secondary legislation, in the form of the Money Laundering (Jersey) Order 2008 ("ML(J)O 2008"), and extra-statutory guidance issued by the JFSC.

Primary legislation

19. The first legislation in Jersey dealing explicitly with money laundering was the Drug Trafficking Offences (Jersey) Law 1988 ("DTO(J)L 1988"). Since then, additional legislation has been introduced such that Jersey's legislation now covers the laundering of proceeds from drug trafficking, terrorism and serious crime in general.

20. The most recent developments in primary legislation relate to changes reflecting the new international standards laid down in the Third EU Directive on Money Laundering.2

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3 Directive 2005/60/EC
21. Accordingly, Jersey's main provisions against money laundering and terrorism financing (the prohibitory statutes), as considered in this chapter, are contained in the following Laws:
   (a) the DTO(J)L 1988;
   (b) the Proceeds of Crime (Jersey) Law 1999 ("PC(J)L 1999") (as amended, in particular by the Proceeds of Crime (Substitution of Schedule 2) (Jersey) Regulations 2008 ("PC(SS)(J)R 2008"); and
   (c) the Terrorism (Jersey) Law 2002 ("T(J)L 2002").

22. In addition to the primary prohibitory statutes, there are five additional statutes which are relevant to anti-money laundering investigations and the obtaining of evidence, namely:
   (a) Evidence (Proceedings in other Jurisdictions) (Jersey) Order 1983;
   (b) the Bankers' Books Evidence (Jersey) Law 1983;
   (c) the Investigation of Fraud (Jersey) Law 1991 ("IF(J)L 1991");
   (d) the Criminal Justice (International Co-operation) (Jersey) Law 2001 ("CJ(IC)(J) L 2001"); and
   (e) the Proceeds of Crime (Cash Seizures) (Jersey) Law 2008 ("PC(CS)(J)L 2008").

Secondary legislation
23. Secondary legislation, in the form of principally the ML(J)O 2008 has been introduced which is specifically targeted at financial services businesses and other designated, non-financial services businesses and professions listed in schedule 2 to the PC(J)L 1999 (as substituted by the PC(SS)(J)R 2008). The ML(J)O 2008 requires all businesses and professions to which it applies to establish risk-based procedures for the purpose of forestalling and preventing money laundering and combating the financing of terrorism, with failure to establish and maintain such procedures being an offence. Supervision of the relevant businesses and professions will be (at least until possibly the end of 2009) by the JFSC.

24. In addition, and notwithstanding the implementation of the T(J)L 2002, the Al-Qa'ida and Taliban (United Nations Measures) (Channel Islands) Order 2001 and the Terrorism (United Nations Measures) (Channel Islands) Order 2002 remain in force.

Guidance
25. The final part of Jersey's anti-money laundering regime will consist of guidance issued by the JFSC in the form of sector-specific "Handbooks for the Prevention and Detection of Money Laundering and the Financing of Terrorism". The JFSC initially provided guidance in the form of a "Handbook" for the prudentially regulated sector (i.e. the banking sector) and has subsequently proceeded to adapt this guidance for the different sectors, albeit whilst attempting to maintain a common approach and ethos. As at the date of writing, the JFSC has issued handbooks for the prudentially regulated sector, the accountancy sector, the legal sector, and estate agents and high value dealers. These "Handbooks" together with any future "Handbooks", herein after referred to collectively as the "Handbooks" will be updated continually and will be available publicly on the JFSC website.

26. The Handbooks are intended to provide a self-contained, practical interpretation of all of Jersey's anti-money laundering legislation aimed at specific business sectors. They are intended to set out what currently represents "best practice" and to assist businesses in complying with their obligations. The Handbooks do not have the force of law, but may be taken into account where a court has to determine whether a relevant business or profession has complied with the ML(J)O 2008. In addition, the JFSC has made it clear that it is prepared to use its regulatory powers to address failures to follow the Handbooks. Accordingly, for practical purposes, one may consider the Handbooks to be mandatory.

Primary legislation
Development of the primary legislation
27. The development of Jersey's primary legislation has tracked international developments and, in particular, the evolution of anti-money laundering legislation in the UK, with legislation being introduced first in relation to the proceeds of drug trafficking, then in relation to the proceeds of terrorist-related offences, and, in 1999, in relation to the proceeds of crime in general. Each of the statutes creates a number of, largely consistent, "money laundering" offences.

The basic money laundering offences
28. In overview, Jersey's primary legislation establishes five basic offences, which may be
summarised as follows:
(a) assisting another to retain the proceeds of crime;
(b) acquisition, possession or use of the proceeds of crime;
(c) failing to disclose knowledge or suspicion of money laundering;
(d) tipping off; and
(e) concealing or transferring the proceeds of crime to avoid prosecution or a confiscation order.

29. The first four basic offences are, in essence, common to each of DTO(J)L 1988, PC(J)L 1999 and T(J)L 2002. The fifth offence, concealing or transferring the proceeds of crime to avoid prosecution or a confiscation order, is common to DTO(J)L 1988 and PC(J)L 1999. The terms and effect of each of the above offences are set out below, principally in relation to PC(J)L 1999, but also in relation to DTO(J)L 1988 and T(J)L 2002.

Assisting another to retain the proceeds of crime
– The offence
30. PC(J)L 1999, article 32 provides that:

"(1) Subject to paragraph (3), if a person enters into or is otherwise concerned in an arrangement whereby—
(a) the retention or control by or on behalf of another (in this Article referred to as "A") of A's proceeds of criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or
(b) A's proceeds of criminal conduct—
(i) are used to secure that funds are placed at A's disposal; or
(ii) are used for A's benefit to acquire property by way of investment, knowing or suspecting that A is a person who is or has been engaged in criminal conduct or has benefited from criminal conduct, he is guilty of an offence."

31. "Criminal conduct" for the purposes of PC(J)L 1999 is defined as:
(a) conduct which constitutes an offence in Jersey for which a person is liable on conviction to imprisonment for a term of one or more years; or
(b) conduct which if it occurs or has occurred outside Jersey (whether or not the person is also liable to any other penalty) would have constituted an offence under (a) if occurring in Jersey.

32. Criminal conduct, as defined, does not include offences involving drug trafficking or terrorism, as such offences are dealt with under DTO(J)L 1988 and T(J)L 2002 respectively.

33. Offences for which a person is liable on conviction to imprisonment for a term of one or more years include all Jersey customary law offences and the more serious statutory offences.

34. In relation to conduct which takes place outside Jersey, whether such conduct constitutes an offence under the laws of the jurisdiction in which it took place is not relevant, there is no requirement for "dual criminality", rather, it is simply necessary to show that such conduct, if it had been committed in Jersey, could have resulted in a term of imprisonment of one year or more.

35. The question of whether fiscal offences constitute "criminal conduct" for the purposes of PC(J)L 1999 has received particular attention recently. There is no exception or "special category" for tax-related offences, the question is simply whether a fiscal offence constitutes an offence in Jersey for which a person is liable, on conviction, to imprisonment for a term of one or more years. The penalty under the Income Tax (Jersey) Law 1961 ("IT(J)L 1961") for fraudulently or negligently making incorrect statements in connection with a tax return is a fine, rather than imprisonment. However, a recent decision of the Court of Appeal has clarified the position. Although tax evasion is normally prosecuted under the IT(J)L 1961 which provides for financial penalties only, more serious conduct can also be prosecuted as customary law fraud (notwithstanding the views expressed by the House of Lords in R v Rimmington that because of the existence of a specific statutory offence, a common law offence could not be charged). As a customary law offence of fraud would have a minimum sentence of one year’s imprisonment, tax evasion whether in Jersey or elsewhere can

4 PC(J)L 1999, article 1(1) and PC(J)L 1999, First Schedule
5 Income Tax (Jersey) Law 1961, article 137
6 Michel and Gallichan v Attorney General [2006] JLR 287
7 As to which, see Foster v A–G 1992 JLR 6
8 R v Rimmington [2005] UKHL 63
constitute criminal conduct for the purposes of PC(J)L 1999.

36. Moreover, a tax-related offence may (and often will) involve other offences, such as forgery or false accounting, which can also lead to imprisonment for a term of one or more years. Accordingly, the commission of tax-related offences can constitute criminal conduct for the purposes of PC(J)L 1999, and the proceeds of a tax-related offence may be the subject of money laundering offences under that law.

37. In PC(J)L 1999, article 32, references to any person’s “proceeds of criminal conduct” include any property that in whole or in part, directly or indirectly, represented in his hands the proceeds of criminal conduct, that is property obtained by such person as a result of or in connection with criminal conduct. Where the criminal conduct comprises non-declaration of assets for taxation purposes, the actual proceeds of the criminal conduct will be the tax charge on the non-declared funds. However given the wide definition of “proceeds of criminal conduct” (to include property obtained “in connection with criminal conduct”), all the undeclared funds held in a Jersey bank account will constitute the proceeds of crime.

– Knowledge or suspicion?

38. PC(J)L 1999, article 32, requires a mens rea of knowledge or suspicion. Neither is defined in PC(J)L 1999 and, to date, the Jersey courts have not been required to comment on the precise meaning of such terms in this context, save to note that it is a question of fact for the tribunal in each case. Whilst actual knowledge may be relatively easy to identify, suspicion can create rather more difficulties. However, given the similarity of PC(J)L 1999 to the UK Criminal Justice Act 1988, the Jersey courts are likely to be influenced by the decisions of the English courts as to interpretation on this point. In the case of “suspicion”, the definition given in R v Da Silva⁹ and approved in K Limited¹⁰, would be applied.

– Penalties

39. This offence is punishable by up to 14 years’ imprisonment or a fine, or both.

– Defences

40. PC(J)L 1999, article 32 provides for certain defences. First, article 32(3) provides that:

"(3) Where a person discloses to a police officer a suspicion or belief that any property is derived from or used in connection with criminal conduct, or discloses to a police officer any matter on which such a suspicion or belief is based:

(a) the disclosure shall not be treated as a breach of any restriction upon disclosure imposed by any statute or contract or otherwise, and shall not involve the person making it in liability of any kind; and

(b) if he does any act in contravention of paragraph (1)¹¹ and the disclosure relates to the arrangement concerned, he does not commit an offence under this Article if:

(i) the disclosure is made before he does the act concerned and the act is done with the consent of a police officer; or

(ii) the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it."

41. Secondly, PC(J)L 1999, article 32(4) provides that:

"(4) In proceedings against a person for an offence under this Article, it is a defence to prove:

(a) that he did not know or suspect that the arrangement related to any person’s proceeds of criminal conduct; or

(b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of A of any property was facilitated or (as the case may be) that by the arrangement any property was used as mentioned in paragraph (1); or

(c) that:

(i) he intended to disclose to a police officer such a suspicion, belief or matter as is mentioned in paragraph (3) in relation to the arrangement; and

(ii) there is reasonable excuse for his failure to make the disclosure in accordance with sub-paragraph (b) of paragraph (3)."

42. The burden in establishing such a defence will of course be upon the defendant who must establish the same on a balance of probabilities.

43. In practice, all disclosures of suspicion are made to the States of Jersey Police and Customs

⁹ [2006] EWCA Crim 1654
¹⁰ K Ltd v National Westminster Bank Plc and others 2005/ 2189 A3
¹¹ See paragraph 30 above.
Joint Financial Crimes Unit ("JFCU"), a joint police and customs unit with responsibility for combating financial crime within Jersey. In the case of employees, these defences have effect in relation to disclosures, and intended disclosures, to the "appropriate person" within the organisation (namely, the Money Laundering Reporting Officer (MLRO)) in accordance with the procedures established by the employer for the making of such disclosures.

44. Thus disclosure to the police (or by an employee to the MLRO) and acting with the consent of, in practice, the JFCU, and, in certain circumstances, the fact that one intended to make such disclosure, may provide a defence to a charge under PC(J)L 1999, article 32(1).

45. A final point to note relates to the provision of PC(J)L 1999, article 32(3)(a), which ensures that any disclosure made will not be treated as a breach of any duty of confidentiality, and the person making it will not be liable for such breach. These provisions should not be regarded as providing a general immunity from criminal or civil actions in relation to any conduct of the person making the disclosure following the making of it, but rather should properly be regarded as providing specific protection from liability arising directly from the making of such disclosure. Further, in order to benefit from this protection from liability, the making of the report may well need to be reasonably justifiable.

46. Article 32 of the PC(J)L 1999 is widely drawn and there is no provision exempting lawyers, or information subject to legal privilege, from its ambit. This is not necessarily surprising. The Article is specifically concerned with arrangements which assist another to retain the benefit of criminal conduct. If a lawyer has been party to such an arrangement, none of the advice given can be subject to privilege on the basis of the crime/fraud exception. Difficulties may arise in practice where the lawyer’s involvement falls short of being a party to the arrangement. Further guidance will be given on this by the JFSC in the finalised Handbook for Lawyers.

– Drug trafficking and terrorism

47. In relation to drug trafficking, a similar offence on almost identical terms, but relating to the proceeds of drug trafficking, is contained in DTO(J)L 1988, article 37.

48. As for terrorism, entering into or becoming concerned in an arrangement which facilitates the retention or control by or on behalf of another person of terrorist funds (whether by concealment, removal from Jersey, transfer to nominees or in any other way) is an offence under T(J)L 2002, article 18, unless the accused can prove that they did not know and had no reasonable cause to suspect that the arrangement related to terrorist property.

49. In addition, T(J)L 2002, article 17 makes it an offence to enter into or become concerned in an arrangement as a result of which property is made available or is to be made available to another whilst knowing or having reasonable cause to suspect that it will or may be used for the purposes of terrorism.

Acquisition, possession or use of the proceeds of crime

– The offence

50. PC(J)L 1999, article 33 provides that:

"(1) A person is guilty of an offence if, knowing that any property is or in whole or in part directly or indirectly represents another person's proceeds of criminal conduct, he acquires or uses that property or has possession of it."

– Knowledge or suspicion?

51. This offence requires knowledge, rather than knowledge or suspicion.

– Penalties

52. This offence is punishable by up to 14 years' imprisonment or a fine, or both.

– Defences

53. Both the defences available under PC(J)L 1999, article 32(3) and (4) are, with minor amendments, repeated for the purposes of PC(J)L 1999, article 33. Thus, as with article 32, disclosure to the police and, in certain circumstances, the fact that one intended to make such disclosure, may provide a defence to a charge under article 33(1). Again, protection for those making disclosures is provided in identical terms to PC(J)L 1999, articles 32(3)(a).

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12 Yet to be published
13 See paragraph 40 above
14 See paragraph 45 above
54. In addition, it is also a defence to a charge of committing an offence under PC(J)L 1999, article 33(1) for the person charged to prove that he acquired or used the property or had possession of it for adequate consideration. Inadequate consideration is defined for the purposes of article 33 as being provided where the value of any payment made is "significantly less" than the value of the property acquired, used or possessed. Although not an entirely attractive position to be in, this would allow those providing legitimate services (such as lawyers) to be paid out of tainted funds.

55. Finally, PC(J)L 1999, article 33(10) provides that no person shall be guilty of an offence under article 33 in respect of anything done by them in the course of acting in connection with the enforcement, or intended enforcement, of any provision of PC(J)L 1999 or of any enactment relating to criminal conduct or the proceeds of such conduct. Thus law enforcement officers are given protection.

Drug trafficking and terrorism

56. In relation to drug trafficking, a similar offence on almost identical terms but relating to the proceeds of drug trafficking is contained in DTO(J)L 1988, article 38.

57. Similar offences also appear in T(J)L 2002. Under T(J)L 2002, article 16, a person commits an offence if they use property for the purposes of terrorism, or if they possess property intending that it should be used, or having reasonable cause to suspect that it may be used, for the purposes of terrorism.

58. T(J)L 2002, article 15 also makes it an offence to raise funds for terrorist purposes, either by inviting others to provide property, receiving it or providing it, whilst having an intention, knowledge or reasonable cause to suspect that it will or may be used for the purposes of terrorism.

Failure to disclose knowledge or suspicion of money laundering

The offence

59. The offence of failing to disclose knowledge or suspicion of money laundering (under PC(J)L 1999, article 34A to D) was brought in by an amendment to the PC(J)L 1999 in 2008 and provides as follows:

"(1) A person shall be guilty of an offence if:
   (a) the person knows or suspects that another person is engaged in money laundering;
   (b) the information, or other matter, on which that knowledge or suspicion is based comes to the person’s attention in the course of his or her trade, profession, business or employment; and
   (c) the person does not disclose the information or other matter to a police officer as soon as is reasonably practicable after it comes to his or her attention.

(2) It is not an offence under this Article for a professional legal adviser to fail to disclose any information or other matter that comes to him or her in circumstances of legal privilege.

(3) Where a person discloses to a police officer:
   (a) the person’s suspicion or belief that another person is engaged in money laundering; or
   (b) any information or other matter on which that suspicion or belief is based, the disclosure shall not be treated as a breach of any restriction imposed by statute, contract or otherwise."

60. This offence does not apply to professional legal advisers acting in circumstances of legal privilege or employers and/or employees who receive information in the course of carrying on a financial services business. In addition, the States of Jersey, has the power to make regulations excusing other categories of individuals from the ambit of the provision for regulatory, supervisory, investigative and registration purposes.

61. The offence is only committed if the information or other matter comes to the attention of the accused in the course of their trade, profession, business or employment and, beyond this, PC(J)L 1999, article 34A does not impose obligations upon the public at large.

62. Disclosure to a police officer means, in practice, disclosure to the JFCU. In addition, employees may satisfy their reporting obligation by disclosure to the appropriate person (the MLRO) in accordance with the procedures established by their employer for the making of financial services businesses are defined in article 36 of PC(J)L 1999 as those businesses described in schedule 2 to PC(J)L 1999 namely businesses regulated by the JFSC, lawyers, accountants, estate agents, dealers in high value goods, and providers of certain other defined services. See paragraph 105 for further details.
such disclosures, instead of to the JFCU.

63. As elsewhere, provisions of PC(J)L 1999, article 34A provide that any disclosure shall not be treated as a breach of any restriction imposed by statute, contract or otherwise, but the additional provision that such disclosure will not involve the person making it in liability of any kind (PC(J)L 1999, article 32(3) and elsewhere) is missing.

64. In the case of financial services businesses, the obligation is wider and applies to anyone who has "reasonable grounds for knowing or suspecting". Article 34D of the PC(J)L 1999 provides:

"(i) A person commits an offence if each of the following 3 conditions is satisfied:
(ii) The first condition is that the person:
   (a) knows or suspects; or
   (b) has reasonable grounds for knowing or suspecting,
      that another person is engaged in money laundering,
(iii) The second condition is that the information or other matter:
      (a) on which the person's knowledge or suspicion is based; or
      (b) that gives reasonable grounds for such knowledge or suspicion,
         comes to him or her in the course of the carrying on of a financial services business.
(iv) The third condition is that the person does not disclose the information or other matter
to a police officer or to a nominated officer as soon as is practicable after it comes to
him or her."

65. For the purposes of article 34D, a nominated officer is a person (such as the MLRO or his deputies) who has been nominated by the employer of the person making the disclosure to receive disclosures. The disclosure to the nominated officer must be in the course of the discloser’s employment and in accordance with procedures maintained by the employer.

66. The offence cannot be committed by professional legal advisers acting in circumstances where legal privilege applies.

67. Whereas disclosure under PC(J)L 1999 has historically given rise to a defence from prosecution, articles 34A to D of PC(J)L 1999 create a mandatory requirement to disclose to the police any suspicion of money laundering arising within a commercial setting.

Knowledge or suspicion?

68. The offence under article 34A of PC(J)L 1999 is a generally applicable offence that requires actual knowledge or suspicion and the test will be a subjective one. In relation to suspicion, the court is likely to apply the definition given in *R v Da Silva*16 and approved in *K Limited*17.

69. The offence under article 34D of PC(J)L 1999 applies only to those employed in financial services businesses and requires only reasonable grounds for knowledge or suspicion, importing an objective test into the elements of the offence.

Penalties

70. Under both article 34A and article 34D, the penalty is one of five years or a fine or both.

Defences

71. Under both offences, it is a defence that the person charged had a "reasonable excuse" for not disclosing the information or matter in question. There is no definition of "reasonable excuse" and this is likely to be a matter of fact for the tribunal to determine on the facts of each case.

72. Article 34B also provides a defence for an employee who discloses information to the appropriate person in accordance with the procedures established by the person’s employer for the making of such disclosures.

73. Article 34D contains an additional defence for persons who have not received training from their employer when they should have done provided that they neither know nor suspect that the other person is engaged in money laundering.

Drug trafficking

74. The offences under article 34A and 34D of PC(J)L 1999 are also contained within DTO(J)L 1988. Article 40 provides that:

"(1) A person shall be guilty of an offence if:
   (a) he knows, or suspects, that another person is engaged in drug money laundering;
   (b) the information, or other matter, on which that knowledge or suspicion is based

16 [2006] EWCA Crim 1654
17 K Ltd v National Westminster Bank Plc and others 2005/ 2189 A3
came to his attention in the course of his trade, profession, business or employment; and
(c) he does not disclose the information or other matter to a police officer as soon as is reasonably practicable after it comes to his attention."

75. DTO(J)L 1988, article 40A provides for an identical offence to that under PC(J)L 1999, article 40D in respect of drug money laundering.

76. Article 40B of DTO(J)L 1988 deals with the onward disclosure both within and without Jersey of any information disclosed. It is a criminal offence under article 40B to disclose information otherwise than in accordance with article 40C (disclosure for purposes within Jersey) or 40D (disclosure for purposes outside Jersey).

– Drug money laundering

77. This offence refers to "drug money laundering" which is defined as doing any act which constitutes an offence under DTO(J)L 1988, articles 30, 37 or 38 or, in the case of an act done outside Jersey, would constitute such an offence if done in Jersey; and for the purposes of this definition, having possession of any property shall be taken to be doing an act in relation to it.

– Penalties

78. The offences under articles 40 and 40A of DTO(J)L 1988 are punishable by up to five years' imprisonment or a fine, or both.

– Defences

79. Like PC(J)L 1999, DTO(J)L 1988 provides a defence of reasonable non-disclosure and makes special provision for a professional legal advisers acting in circumstances of legal privilege. It also contains similar provisions to the PC(J)L 1999 for those who disclose to their employer\(^{18}\) or who have not received appropriate training\(^{19}\).

– Terrorism

80. Similarly, T(J)L 2002, article 20 imposes a duty on a person who, in the course of their trade, profession, business or employment, receives information causing them to believe or suspect that an offence has been committed under any of T(J)L 2002, articles 15 to 18, to disclose the belief or suspicion and the information on which it is based to the police, with failure to disclose being an offence.

81. T(J)L 2002, article 20 does not apply to information received in the course of the business of a financial institution, for which separate provision is made in T(J)L 2002, article 23. Here, the duty to disclose arises if a person knows or suspects or has reasonable grounds for knowing or suspecting a person has committed an offence under any of T(J)L 2002, articles 15 to 18. As with both PC(J)L 1999 and DTO(J)L 1988, the duty differs from that in article 20 in that actual knowledge or suspicion is not essential. It is enough that the person ought to have known of or suspected the offence having regard to the information in their possession: an objective rather than a subjective test.

Tipping off

– The offence

82. PC(J)L 1999, article 35 provides that, broadly, a person will commit an offence if they disclose to any other person information or any other matter which is likely to prejudice any actual or proposed investigation into money laundering when they know or suspect that:

(a) a disclosure has been made to the police;
(b) an investigation into money laundering is being or is proposed to be conducted; or
(c) a disclosure has been made to the money laundering reporting officer at their place of employment.

83. The exact provisions of PC(J)L 1999, article 35 are as follows:

"(1) A person is guilty of an offence if:

(a) the person knows or suspects that the Attorney General or any police officer is acting or is proposing to act in connection with an investigation that is being or is about to be conducted into money laundering (other than drug money laundering, as defined in paragraph (7) of Article 40(7) of the Drug Trafficking Offences (Jersey)"

\(^{18}\) See paragraph 72
\(^{19}\) See paragraph 73
Law 1988); and

(b) the person discloses to any other person information or any other matter that is likely to prejudice that investigation or proposed investigation.

(2) A person is guilty of an offence if:

(a) the person knows or suspects that a disclosure ("the disclosure") has been made to a police officer under Article 32 or 33; and

(b) the person discloses to any other person information or any other matter that is likely to prejudice any investigation that might be conducted following the disclosure.

(3) A person is guilty of an offence if:

(a) the person knows or suspects that a disclosure of a kind mentioned in Article 32(5) or Article 33(8) ("the disclosure") has been made; and

(b) the person discloses to any person information or any other matter that is likely to prejudice any investigation that might be conducted following the disclosure."

84. PC(J)L 1999, article 35 can pose particular problems for financial services businesses. This is especially so in the context of civil proceedings, where a disclosure to the JFCU under articles 32 or 33 of PC(J)L 1999 may have resulted in an informal freeze\(^\text{20}\). Not only will the financial services businesses be facing particular difficulties caused by the tension between their duties to their customer and their obligations under the substantive provisions of the PC(J)L, but they may also face difficulties in explaining why they are unable to act given the provisions of article 35.

85. One way of resolving the apparent tension is provided by article 35(4) and 35(5) which state as follows:

"(4) Nothing in paragraph (1), (2) or (3) makes it an offence for a professional legal adviser to disclose any information or other matter:

(a) to or to a representative of a client of the legal adviser in connection with the giving by the adviser of legal advice to the client; or

(b) to any person:

(i) in contemplation of or in connection with legal proceedings, and

(ii) for the purpose of those proceedings.

(5) Paragraph (4) does not apply in relation to any information or other matter that is disclosed with a view to furthering a criminal purpose."

86. As was noted by Longmore LJ in \(K\) Ltd\(^\text{21}\), these provisions enable the financial services business with an appropriate method of informing the customer of its disclosure, namely by procuring its professional legal adviser to pass the information on (i.e. the fact that a report has been made) to a person in connection with legal proceedings (i.e. proceedings by the customer against the financial services business for breach of mandate).

"Money laundering"

87. This offence refers to "money laundering". This is defined as conduct that is an offence under PC(J)L 1999, articles 32, 33 or 34 (or the equivalent offences under the provisions of DTO(J)L 1988 andT(J)L 2002) or conduct outside Jersey which would be such an offence if carried on in Jersey.

Penalties

88. This offence is punishable by up to five years’ imprisonment or a fine, or both.

Defences

89. As noted in paragraph 85 above PC(J)L 1999, article 35(4) provides for an exception to the tipping off offence for professional legal advisers. It is not available where disclosure is with a view to furthering a criminal purpose.

90. In addition, PC(J)L 1999, article 35(6) provides that it is a defence for a person to prove that they did not know or suspect that the disclosure was likely to prejudice a money laundering investigation.

91. Finally, PC(J)L 1999, article 35(8) mirrors the protection given to law enforcement officers by PC(J)L 1999, article 33(10) in providing that no person shall be guilty of an offence under article 35 in respect of anything done by them in the course of acting in connection with the enforcement, or intended enforcement, of any provision of PC(J)L 1999, or of any other
enactment relating to offences constituting criminal conduct.

– Drug trafficking and terrorism
92. In relation to drug trafficking, a similar offence, on almost identical terms but relating to drug money laundering, is contained in DTO(J)L 1988, article 41. In a similar manner to the money laundering definition in PC(J)L 1999, drug money laundering is defined as doing any act which constitutes an offence under DTO(J)L 1988, articles 30, 37 or 38 or conduct outside Jersey which would be such an offence if done in Jersey.

93. In relation to terrorism, T(J)L 2002, article 35, creates the same offences in relation to disclosing to another anything which is likely to prejudice a terrorist investigation. Article 35 also creates offences of interfering with material which is likely to be relevant to a terrorist investigation where the person has knowledge or suspicion that an investigation was underway, or proposed or a disclosure of suspicion has been or will be made. Here, the offences relate to prejudicing “terrorist investigations”, which includes investigations into terrorist money laundering (whether such money laundering takes place in or outside of Jersey) but also investigations into “primary” terrorist activity, including the commission, preparation or instigation of acts of terrorism.

Concealing or transferring proceeds to avoid prosecution or a confiscation order
– The offences
94. PC(J)L 1999, article 34 provides for two separate, but related, offences, as follows:

“(1) A person is guilty of an offence if the person:
(a) conceals or disguises any property that is or in whole or in part represents the person’s proceeds of criminal conduct; or
(b) converts or transfers that property or removes it from the jurisdiction, for the purpose of avoiding prosecution for an offence specified in the First Schedule or the making or enforcement in his case of a confiscation order.

(2) A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is or in whole or in part directly or indirectly represents another’s proceeds of criminal conduct, the person:
(a) conceals or disguises that property; or
(b) converts or transfers that property or removes it from the jurisdiction, for the purpose of assisting any person to avoid prosecution for an offence specified in Schedule 1 or the making or enforcement in the person’s case of a confiscation order.

(3) In paragraphs (1) and (2), the references to concealing or disguising any property include references to concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it.”

95. Clearly, PC(J)L 1999, article 34(1) is aimed at the principal launderer of his or her own proceeds of criminal conduct, whereas article 34(2) is aimed at any person assisting them in that laundering process.

– Knowledge or suspicion?
96. It is a requirement under PC(J)L 1999, article 34(2), that the person knows or has “reasonable grounds” to suspect that the property represents the proceeds of another’s criminal conduct. This sets a more objective standard of suspicion than that within PC(J)L 1999, article 32 (which requires actual suspicion).

97. In addition, it is worth noting that for a conviction, it must be proved that the accused was acting for one of the two specified purposes:
(a) avoiding prosecution for an offence for which a person is liable on conviction to imprisonment for a term of one or more years (other than a drug trafficking or terrorism offence, which are dealt with under DTO(J)L 1988 and T(J)L 2002 respectively); or
(b) the making or enforcement of a confiscation order.

– Penalties
98. This offence is punishable by up to 14 years’ imprisonment or a fine, or both.

22 See paragraph 87 above
23 See article 4 of the T(J)L
24 See paragraph 38 above
Defences

There are no statutory defences to a charge under PC(J)L 1999, article 34.

Drug trafficking and terrorism

In relation to drug trafficking, a similar offence on almost identical terms but relating to the proceeds of drug trafficking is contained in DTO(J)L 1988, article 30.

In relation to terrorism, there is no direct equivalent of PC(J)L 1999, article 34, albeit that the provisions of T(J)L 2002, articles 15 to 18 mean that this is not a significant omission (if indeed, it be an omission, the T(J)L is of course, directed at preventing terrorism, not necessarily at the proceeds of terrorism).

Secondary legislation

The ML(J)O 2008

PC(J)L 1999, article 37 provides that the States of Jersey shall, by order, prescribe procedures designed to forestall and prevent money laundering. Consequently, at the same time as the introduction of PC(J)L 1999, the Money Laundering (Jersey) Order 1999 ("the 1999 Order") was introduced. The 1999 Order prescribed procedures to be followed by reference to codes of conduct. Following the promulgation of the EU Third Directive and in advance of a visit from the IMF, the 1999 Order has been replaced by the ML(J)O 2008. In broad terms, the ML(J)O 2008 brings in a risk-based approach to anti-money laundering and the combating of terrorist financing.

The definition of "money laundering" in PC(J)L 199925 applies to the ML(J)O 2008 and, as a consequence, the ML(J)O 2008 is relevant to all types of money laundering (whether the proceeds of terrorism, drug trafficking or serious crime generally), notwithstanding that it is made pursuant to PC(J)L 1999 and there is no provision within either DTO(J)L 1988 or T(J)L 2002 for such an order.

Since it was brought into effect in February 2008, the ML(J)O 2008 was amended three times in the following 9 months. Further amendments are likely.

Application

Although relevant to all types of money laundering, the ML(J)O 2008, unlike the primary legislation which is of general application, only applies to a person carrying on financial services business in or from within Jersey or either a Jersey body corporate, or a Jersey limited liability partnership carrying on a financial services business in any part of the world (called a "relevant person").

"Financial Services businesses"

The definition of "financial services businesses" to which the ML(J)O 2008 applies is set out in schedule 2 to the PC(J)L 1999. It includes in general terms, the following:

- banks;
- insurance companies;
- collective investment funds;
- investment business, trust company business, general insurance mediation business, money service business or fund services business;
- lawyers;
- accountants;
- estate agents;
- services provided by high value dealers;
- casinos (including internet casinos);
- unregulated funds business;
- other services providing any of the following services to third party not otherwise included in this schedule:
  - acceptance of deposits and other repayable funds from the public;
  - lending, including consumer credit, mortgage credit, factoring (with or without recourse), financing of commercial transactions (including forfeiting);
  - financial leasing;
  - money transmission services;
  - issuing and administering means of payment (such as credit and debit cards, cheques, travellers' cheques, money orders and bankers' drafts, and electronic money);

25 See paragraph 87
– guarantees and commitments;
– trading for the account of third parties in:
  – money market instruments (cheques, bills, certificates of deposit, derivatives etc.),
  – foreign exchange,
  – futures and options (financial and commodity),
  – exchange, interest rate and index instruments,
  – transferable securities;
– participation in securities issues and the provision of services related to such issues;
– advice to undertakings on capital structure, industrial strategy and related questions and
  advice as well as services relating to mergers and the purchase of undertakings;
– money broking;
– portfolio management and advice;
– safekeeping and administration of securities;
– safe custody services
  – otherwise investing, administering or managing funds or money on behalf of third parties;
and
– the business of forming and administering legal persons or arrangements.

107. As will be apparent, this definition extends far beyond what might ordinarily be described
  as "financial services businesses" and includes those businesses which are not subject to
  regulation by the JFSC.

Duty to comply with procedures

108. In terms of procedures, the ML(J)O 2008, requires a relevant person to appoint a Money
  Laundering Compliance Officer ("MLCO") to monitor compliance by the relevant person with
  anti-money laundering legislation. In addition, a relevant person must also appoint a MLRO
  whose function is to receive and to consider reports of money laundering offences from
  employees.

109. Article 11(1) of ML(J)O 2008 requires a relevant person to maintain "appropriate policies and
  procedures relating to:
  (a) customer due diligence measures;
  (b) reporting;
  (c) record-keeping;
  (d) screening of employees;
  (e) internal control;
  (f) risk assessment and management; and
  (g) the monitoring and management of compliance with, and the internal communication
  of, such policies and procedures,
  in respect of that person's financial services business in order to prevent and detect money
  laundering "

110. "Appropriate policies and procedures" are defined as "policies and procedures that are
  appropriate having regard to the degree of risk of money laundering taking into account the
  type of customers, business relationships, products or transactions with which the relevant
  person's business is concerned". In the ML(J)O 2008, the legislature has deliberately strayed
  away from imposing prescriptive standards (whether by way of secondary legislation and/or
  associated guidance) and has imposed a flexible standard informed by a financial services
  business' own assessment of the risk in its business of money laundering. Businesses are
  required to carry out a business risk assessment to determine their specific vulnerabilities to
  money laundering and then to build "appropriate policies and procedures" around that risk
  assessment. Those appropriate policies and procedures must include policies and
  procedures for:
  (a) the identification and scrutiny of:
     (i) complex or unusually large transactions,
     (ii) unusual patterns of transactions which have no apparent economic or visible
          lawful purpose, and
     (iii) any other activity which the relevant person regards as particularly likely by its
          nature to be related to the risk of money laundering;
  (b) the taking of additional measures, where appropriate, to prevent the use for money
      laundering of products and transactions which are susceptible to anonymity;

26 Article 11(3) of ML(J)O 2008
(c) determining whether:
   (i) a customer,  
   (ii) a beneficial owner or controller of a customer,  
   (iii) a third party for whom a customer is acting,  
   (iv) a beneficial owner or controller of a third party described in clause (iii),  
   (v) a person acting, or purporting to act, on behalf of a customer,  
      is a politically exposed person;

(d) determining whether a business relationship or transaction, or proposed business relationship or transaction, is with a person connected with a country or territory that does not apply, or insufficiently applies, the FATF recommendations;

(e) determining whether a business relationship or transaction, or proposed business relationship or transaction, is with a person connected with a country or territory that is subject to measures for purposes connected with the prevention and detection of money laundering, such measures being imposed by one or more countries or sanctioned by the European Union or the United Nations;

(f) assessing that in the case of a client for whom identification measures are delayed, there is little risk of money laundering occurring.

111. In order to ensure compliance with the primary legislation, a relevant person must also ensure that it takes appropriate measures from time to time to train staff.

112. The ML(J)O 2008 has extra-territorial effect in that a relevant person must maintain equivalent policies and procedures in each branch or subsidiary outside Jersey\textsuperscript{27}. Although this requirement does not apply “in relation to a branch or subsidiary outside Jersey to the extent that the law of the country or territory in which that branch or subsidiary is situated has the effect of prohibiting or preventing compliance”\textsuperscript{28}, the relevant person must notify the JFSC of the issue.

113. Article 13 of the ML(J)O 2008 provides that:

"(1) A relevant person must apply:
   (a) identification measures before the establishment of a business relationship or before carrying out a one-off transaction;
   (b) on-going monitoring during a business relationship;
   (c) identification measures where:
      (i) the relevant person suspects money laundering, or
      (ii) the relevant person has doubts about the veracity or adequacy of documents, data or information previously obtained under the customer due diligence measures."

114. A “business relationship” is defined as “a business, professional or commercial relationship between a relevant person and a customer, which is expected by the relevant person, at the time when contact is established, to have an element of duration”\textsuperscript{29}. This is to be contrasted to a “one-off transaction” which is defined in article 4 as follows:

"(1) For the purposes of this Order, a “one-off transaction” means:
   (a) a transaction (other than in respect of a money service business or operating a casino) amounting to not less than 15,000 euros;
   (b) or more transactions (other than in respect of a money service business or operating a casino):
      (i) here it appears at the outset to any person handling any of the transactions that the transactions are linked and that the total amount of those transactions is not less than 15,000 euros, or
      (ii) where at any later stage it comes to the attention of any person handling any of those transactions that clause (i) is satisfied;
   (c) a transaction carried out in the course of a money service business amounting to not less than 1,000 euros;
   (d) or more transactions carried out in the course of a money service business:
      (i) here it appears at the outset to any person handling any of the transactions that those transactions are linked and that the total amount of those transactions is not less than 1,000 euros, or
      (ii) here at any later stage it comes to the attention of any person handling any of those transactions that clause (i) is satisfied.

\textsuperscript{27} Article 10A of ML(J)O 2008
\textsuperscript{28} Article 10A(6) of ML(J)O 2008
\textsuperscript{29} Article 1(1) of ML(J)O 2008
(e) a transaction amounting to not less than 3,000 euros carried out in the course of operating a casino; or

(f) 2 or more transactions carried out in the course of operating a casino:
   (i) where it appears at the outset to any person handling any of the transactions that those transactions are linked and that the total amount of those transactions is not less than 3,000 euros, or
   (ii) where at any later stage it comes to the attention of any person handling any of those transactions that clause (i) is satisfied.

(2) In this Article:
(a) "transaction" means a transaction other than one carried out during a business relationship; and
(b) "money service business" has the same meaning as in Article 1(1) of the Financial Services (Jersey) Law 1998.

115. The key difference between a business relationship and a "one-off transaction" is the element of duration. Although the principal requirement is to "apply" identification measures before the establishment of a business relationship or before carrying out a one-off transaction, article 13(4) allows those procedures to be completed as soon as reasonably practicable after the establishment of a business relationship if "that is necessary not to interrupt the normal conduct of business and there is little risk of money laundering occurring as a result of completing such identification after the establishment of that relationship". There is a corresponding relaxation of the rule in respect of linked, one-off transactions where it later becomes clear that the aggregate value involved is not less than 15,000 euros, but not in the case of a single one-off transaction.

116. PC(J)L 1999, article 37 provides that if any person carrying on a financial services business contravenes or fails to comply with a requirement in the ML(J)O 2008 which applies to that business, it shall be an offence, punishable by up to two years' imprisonment or an unlimited fine, or both, irrespective of whether money laundering has taken place. However, this strict position is mitigated somewhat by the provisions of article 37(10), which provides that it is a defence for a person to prove that they took all reasonable steps and exercised due diligence to avoid committing the offence of breaching a requirement of the order.

117. Where an offence is committed by a body corporate, and is proved to have been committed with the consent or connivance of, or to be attributable to the neglect on the part of, a director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, that person, as well as the body corporate, shall be guilty of the offence and liable to be punished accordingly. Similar provisions apply in the case of a person with the management or control of an unincorporated association.

118. In deciding whether a person has complied with the requirement to maintain these procedures, the court may take into account any relevant guidelines issued or endorsed by the JFSC. In practice, the Anti-Money Laundering Handbooks issued by the JFSC.

119. The case of Bell and Caversham v AG30 in 2006 highlighted the importance of complying with both the legislation and the guidance, and provided the first example of how the court in Jersey, and possibly elsewhere, might deal with such matters. Caversham was a financial services provider subject to the requirements of the 1999 Order, Mr Bell was a director of Caversham and they were both charged with failing to comply with the 1999 Order on the grounds that they failed to identify a client. The obligation under the 1999 Order was to "maintain" certain listed procedures, including identification measures "for the purposes of forestalling and preventing money laundering".

120. A UK sole practitioner introduced a potential intermediary client to Caversham with a request that a trust be established for him. Information was sought on the client and the beneficiaries and five days later, before those enquiries had been completed, Caversham received in the sum of £850,000. Some two days later Caversham was asked to transfer £825,000 out to four accounts in UK banks, which was done by Mr Bell. Caversham was paid £2,600 for its work. It had no identification information on the recipients who were in any event, wholly different to those originally proposed as beneficiaries under the trust. Caversham's defence to the charges was that it had procedures to combat money laundering and to identify recipients of funds but that those procedures failed in this case. The court rejected this submission both at first instance and on appeal. There was no need for there to be any systemic failure for an offence to be committed, the obligation was to maintain procedures and as the judge at first instance held, "maintenance is an absolute duty and one..."
breach, if it is more than mere oversight, is in my view sufficient for the purposes of a criminal trial”. The Court of Appeal went further and held that maintenance required the procedures to be kept in proper working order and "met in respect of every relevant transaction, subject only to the defendants being excused where there are circumstances which are beyond their control". In the particular case, the court said that there were two options: either Caversham had no procedures or alternatively, it had them, but given that they failed to work, had not been kept in proper working order. Caversham were fined £65,000 and Mr Bell, £35,000, along with the costs of the prosecution.

121. Given the increased, international vigilance against money laundering and terrorist financing, courts may well deal with money laundering offences more seriously in the future. The key message to be learnt in the aftermath of the Caversham case is that a single failure can be a criminal offence.

The procedures set out in the ML(J)O 2008

122. In a substantive change to the 1999 Order, the ML(J)O 2008 sets out specific high-level principles which are then further clarified in the Handbooks issued by the JFSC. For example, the ML(J)O 2008 simply identifies that policies must be "appropriate" by reference to the "degree of risk of money laundering". It is the Handbooks which provide detailed guidance on what must be taken into account when considering what measures are or might be "appropriate". This detailed guidance is considered separately at paragraph 127 below.

123. However, in broad terms, appropriate procedures follow a five stage approach, namely:

(a) Collecting relevant due diligence information on the applicant for business, on any beneficial owners and controllers of the applicant for business, on any third parties on whose behalf the applicant acts (and beneficial owners and controllers of third parties) and on the relationship to be established. In particular, a financial services business must understand the nature of the business that the applicant expects to conduct and the rationale for the business relationship.

(b) Evaluating the information collated and deciding whether additional material should be collected.

(c) Determining and recording an initial risk assessment for the applicant on the basis of the information collected.

(d) Verifying (i.e. obtaining evidence of) the identity of the applicant and taking reasonable measures to verify the identity of any beneficial owners and controllers of the applicant and of any third parties on whose behalf the applicant acts (and beneficial owners and controllers of such third parties).

(e) Periodically updating relevant customer due diligence information and its risk assessment (including in the event of any change in beneficial ownership or control of the applicant or third party on whose behalf the applicant acts).

124. In practice, a financial services business now needs to collect a significant amount of information on its clients and to obtain evidence to corroborate certain pieces of that information (such as proof of address) before it can enter into a business relationship with the applicant. The amount and nature of the information to be collected and the extent of the corroborating evidence will depend upon the business” risk assessment of the applicant and the business that he wishes to conduct. If an applicant does not provide the requisite material, a financial services business must terminate its relationship and consider making a disclosure to the police.

125. In addition to the five stage process which needs to be incorporated into policies if they are to be "appropriate", the ML(J)O 2008 also contains certain high-level principles which go some way to reinforcing the fact that the regime brought in by the ML(J)O 2008 is a far more robust one than existed hitherto. In particular, the following Articles merit specific mention:

(a) Article 14: "Termination": where customer due diligence measures are not completed. This provides that if a relevant person is unable to apply the identification measures before the establishment of a business relationship or before the carrying out of a one-off transaction, that person shall not establish that business relationship or carry out that one-off transaction. If completion of identification measures has been delayed until after the establishment of the business relationship and they cannot be completed, the relationship must be terminated. Moreover, the relevant person must also consider whether or not a disclosure report should be filed with the JFCU. There are exemptions for lawyers and accountants who are in the course of ascertaining the

31 see paragraph 114 above and article 13(4) of the ML(J)O 2008
legal position for that person’s client or performing the task of defending or representing the client in, or concerning, legal proceedings, including advice on the institution or avoidance of proceedings.

(b) Article 15: "Enhanced due diligence": This must be applied where the customer or client has not been physically present for identification purposes, where the relevant person proposes to have a business relationship or to conduct a one-off transaction with a person connected with a country or territory that does not apply, or insufficiently applies, the FATF recommendations or a politically exposed person ("PEP") or in any situation which by its nature can present a higher risk of money laundering. A politically exposed person is defined as:

"(a) an individual who is or has been entrusted with a prominent public function in a country or territory outside Jersey or by an international organization outside Jersey, for example:
   (i) heads of state, heads of government, senior politicians,
   (ii) senior government, judicial or military officials,
   (iii) senior executives of state owned corporations,
   (iv) important political party officials;
(b) an immediate family member of a person mentioned in sub-paragraph (a), including any of the following:
   (i) a spouse,
   (ii) a partner, that is someone considered by his or her national law as equivalent or broadly equivalent to a spouse,
   (iii) children and their spouses or partners as defined in clause (iii),
   (iv) parents,
   (v) grandparents and grandchildren,
   (vi) siblings
(c) close associates of a person mentioned in sub-paragraph (a), including any person who is known to maintain a close business relationship with such a person, including a person who is in a position to conduct substantial financial transactions on his or her behalf."

(c) Article 16: "Reliance on introducers and intermediaries": Although a relevant person will remain liable for any failure to apply the necessary procedures, it may rely upon an intermediary or introducer to apply the necessary identification measures if that other person consents to being relied upon and certain conditions are met. In practice, reliance is achieved by the use of a standard Introducer’s Certificate. The requisite conditions are as follows:

"(a) the relevant person knows or has reasonable grounds for believing that the other person is:
   (i) a relevant person in respect of which the Commission discharges supervisory functions in respect of that other person’s financial services business, or
   (ii) a person who carries on equivalent business;
(b) the relevant person obtains adequate assurance in writing from the other person that:
   (i) the other person has applied the [necessary] identification measures,
   (ii) the other person is required to keep and does keep evidence of the identification... relating to each of the other person’s customers and a record of such evidence,
   (iii) the other person will keep the evidence described in clause (ii) and will provide a copy of that evidence without delay to the relevant person at the relevant person’s request;
(c) where the other person is an introducer, the relevant person obtains, in writing:
   (i) confirmation that each customer is an established customer of that other person, and
   (ii) sufficient information about each customer to enable the relevant person to...

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32 Per article 16(6) of the ML(J)O 2008, an intermediary is a person who has or seeks to establish a business relationship or to carry out a one-off transaction on behalf of that person’s customer with a relevant person so that the intermediary becomes a customer of the relevant person; an introducer is a person who has a business relationship with a customer and who introduces that customer to a relevant person with the intention that the customer will form a business relationship or conduct a one-off transaction with the relevant person so that the introducer’s customer also becomes a customer of the relevant person.
assess the risk of money laundering involving that customer; and

(d) where the other person is an intermediary, the relevant person obtains in writing sufficient information about the customers for whom the intermediary is acting to enable the relevant person to assess the risk of money laundering involving that customer."

(d) Article 17: "Reliance in certain circumstances where the intermediary is a regulated person": Where an intermediary (note not an introducer) is a regulated person33 (in essence, banks, funds, and financial institutions in Jersey and elsewhere) a relevant person need not apply any identification measures.

(e) Article 18: "Exceptions": Identification measures are not required where:

(i) The customer of the relevant person is a public authority, and is acting in that capacity.

(ii) The business relationship or one-off transaction relates to a pension, superannuation or similar scheme and where the contributions to the scheme are made by an employer or by way of deductions from wages and the rules of the scheme do not permit the assignment of an interest of a member of the scheme under the scheme.

(iii) In the case of insurance business consisting of a policy of insurance in connection with a pension scheme taken out by virtue of a person’s contract of employment or occupation:

(a) the policy contains no surrender clause; and

(b) it may not be used as collateral security for a loan.

(iv) In respect of insurance business, a premium is payable in one instalment of an amount not exceeding £1,750.

(v) In respect of insurance business, a periodic premium is payable and the total amount payable in respect of any calendar year does not exceed £750.

(vi) where the customer of a relevant person is a body corporate the securities of which are listed on a regulated market.

(vii) The customer is a regulated person or carries on equivalent business. Businesses are defined by article 5 of the ML(J)O 2008 as being equivalent if:

"(a) the other business is carried on in a country or territory other than Jersey;

(b) if carried on in Jersey, it would be financial services business of that category (whether or not it is called by the same name in Jersey);

(c) in that other country or territory, the business may only be carried on by a person registered or otherwise authorized for that purpose under the law of that country or territory;

(d) the conduct of the business is subject to requirements to forestall and prevent money laundering that are consistent with those in the FATF recommendations in respect of that business; and

(e) the conduct of the business is supervised, for compliance with the requirements to which paragraph (d) refers, by an overseas regulatory authority".

Supervision

126. The ML(J)O 2008 does not identify any supervisory bodies tasked with the obligation of ensuring compliance by businesses (listed in schedule 2 to the PC(J)L 1999) with the anti-money laundering and counter-terrorism legislation. However, those persons that are prudentially supervised by the JFSC (in the main, banks, insurance companies, investment businesses, fund functionaries, and trust companies) are also overseen by the JFSC for anti-money laundering and counter-terrorism compliance. The Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008 extended this regime to the other businesses listed in schedule 2 to the PC(J)L 1999. In respect of accountants and lawyers, this is initially intended to be for a period of eighteen months whilst alternatives, driven from and by the professions, are considered.

127. Persons conducting financial services businesses will be required to register with the JFSC and a failure to do so will constitute a criminal offence punishable by imprisonment for a term of seven years and a fine. Under the provisions of the Law, the JFSC can issue guidance

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33 This is defined as a person registered under Banking Business (Jersey) Law 1991 or who holds a permit under the Collective Investment Funds (Jersey) Law 1988 or is authorized by a permit under the Insurance Business (Jersey) Law 1996.
in the form of codes of practice, issue directions, seek injunctions, intervene in a relevant person’s business, or issue public statements. The JFSC also has collateral powers to supervise compliance by amongst other things, requiring the provision of information and documents, appointing investigators and entering onto and searching premises.

Guidance from the JFSC

General

128. The guidance issued by the JFSC will take the form of sector-specific Handbooks. As at the date of writing, the JFSC has produced a Handbook for the regulated sector and is working towards providing separate Handbooks for lawyers, accountants, trust companies and others.

129. The Handbooks outline the requirements of Jersey’s money laundering legislation, provide a practical interpretation of the ML(J)O 2008 and give examples of current “best practice”. As noted at paragraph 25 above, although the Handbooks do not have the force of law, they may be taken into account where a court has to determine whether a financial services business has complied with the ML(J)O 2008. The JFSC draws a distinction in the Handbooks between statutory requirements (failure to follow these is a criminal offence and may also attract regulatory sanction) and regulatory requirements (failure to follow these may attract regulatory sanction).

130. The JFSC is likely to regard failures to follow the Handbooks seriously and, as such, compliance with the Handbooks is effectively mandatory.

131. The Handbooks themselves are significant documents (running to in excess of 100 pages). The content of the Handbooks is summarised below under the following headings:

- Corporate governance
- Customer due diligence requirements
- Identification and verification of identity
- Monitoring activity and transactions
- Reporting money laundering and financing terrorism activity and transactions

Section 2: Corporate governance

132. The Handbooks place key responsibility on the board or equivalent for the following:

(a) To conduct and document a business risk assessment. In particular, the board must consider, on an ongoing basis, the extent of its exposure to risks by reference to its organisational structure, its customers, the jurisdictions with which its customers are connected, its products and services, and how it delivers those products and services. The board’s assessment must be kept up to date.

(b) On the basis of its business risk assessment, the board must establish a formal strategy to counter money laundering and financing of terrorism. For a Jersey business forming part of a group operating outside the Island, that strategy must protect both its global reputation and its Jersey business.

(c) Taking into account the conclusions of the business risk assessment and strategy, the board must organise and control its affairs effectively and be able to demonstrate the existence of adequate systems and controls (including policies and procedures) to counter money laundering and financing of terrorism.

(d) The board must document its systems and controls (including policies and procedures) and clearly apportion responsibilities for countering money laundering and financing of terrorism, and, in particular, responsibilities of the MLCO and MLRO.

(e) The board must assess both the effectiveness of, and compliance with, systems and controls and take prompt action necessary to address any deficiencies.

(f) The board must consider what barriers (including cultural barriers) exist to prevent the operation of effective systems and controls to counter money laundering and the financing of terrorism, and must take effective measures to address them.

(g) The board must notify the JFSC immediately in writing of any material failures to comply with the requirements of the ML(J)O 2008 or of the Handbooks.

133. The language used in the Handbooks leaves no room for doubt as to the intentions of the JFSC, or the seriousness with which the JFSC views the issue of money laundering. At the heart of the new requirements is the business risk assessment. The requires the board to analyse and document the risks presented by its own organisation and the different areas thereof, its customers, geographic factors, the particular business or businesses conducted,
and how it delivers its service. The risk assessment must be revisited from time to time as may be appropriate. Informed by that risk assessment, the board is obliged to implement and maintain appropriate systems and controls to prevent and detect money laundering and the financing of terrorism.

134. For the first time, a new role is mandated for relevant persons, namely that of MLCO\(^35\). The MLCO will be tasked with monitoring compliance with applicable legislation relating to money laundering and the financing of terrorism. This is a senior appointment, which must be notified to the JFSC, who should report directly to the board and have sufficient "seniority and authority within the business so that the board reacts to and acts upon any recommendations made\(^36\). In order to discharge his functions, the MLCO must have unfettered access to all business lines, support departments and information necessary to appropriately perform the function.

135. The role of MLCO is different to that of MLRO although in some cases, the same person will fulfil both roles. The MLRO is tasked with dealing with both internal disclosures of money laundering or suspicions of the same, along with external reports to the police. In addition, the MLRO must manage relationships effectively to avoid tipping off any third parties following a disclosure. The MLRO will also act as the liaison point with the JFSC and the JFCU and in any other third party enquiries in relation to money laundering or financing of terrorism.

Section 3: Customer due diligence requirements

136. Having identified the five stage approach\(^37\), the Handbooks go on to set out minimum customer due diligence requirements which involve a relevant person:

(a) Identifying an applicant for business and verifying the applicant’s identity using reliable, independent source documents, data or information.

(b) Identifying the beneficial ownership and control of the applicant and taking reasonable measures to verify the identity of the beneficial owners and controllers such that a relevant person is satisfied that it knows who the beneficial owners and controllers are.

(c) Identifying any third party (and owners and controllers) on whose behalf the applicant is acting.

(d) Obtaining information on the purpose and intended nature of the business relationship.

(e) Keeping the above information up to date, and monitoring activity and transactions undertaken throughout the course of a relationship to determine whether the activity or transaction being conducted is consistent with the relevant person’s knowledge of the customer.

137. Customer due diligence information comprises both identification information and relationship information, both of which are in large part prescribed by the Handbooks. For example, in relation to all types of customer, a relevant person is required to ascertain:

(a) Purpose and intended nature of relationship.

(b) Type, volume and value of activity expected.

(c) Source of funds, for example nature and details of occupation or employment.

(d) Details of any existing relationships with the relevant person.

(e) Reason for using overseas service provider (non-residents only).

138. Although none of this is unusual information (it is exactly the sort of information that a relevant person should, or would wish to, know about its customer or client in any event), the fact that the JFSC has mandated that this information be obtained, signals a change in the anti-money laundering regime to one that is far more proactive. Additional information is prescribed for trusts and legal bodies and these requirements increase with the relevant person’s risk rating of that particular applicant for business.

139. The relevant person is required to assess and evaluate that initial customer due diligence information to take into account amongst other things, country risk, product or service risk, delivery risk, customer risk to determine whether additional material should be collected whether on the basis of risk, veracity, authenticity or otherwise. If so, the relevant must collect that additional information before proceeding to the next stage which is the carrying out of and documenting of an initial risk assessment.

140. In the case of PEPs\(^38\), procedures should be implemented to ensure that the board or

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35 Article 7 of the ML(J)O 2008
36 Per Handbook
37 See paragraph 122 above
38 See paragraph 124(b) above
appropriate senior management approve the establishment of a relationship with a PEP or, for continuing a relationship, should a subsequent connection with a PEP be identified. In addition, there should be enhanced scrutiny and regular oversight of the relationship at board or appropriate senior management level.

141. Other higher risk customers also merit special treatment in the form of enhanced due diligence which may involve:
(a) obtaining further customer due diligence information (identification information and relationship information, including further information on the source of funds and source of wealth), from either the customer or independent sources (such as the internet and public or commercially available databases);
(b) taking additional steps to verify the customer due diligence information obtained;
(c) commissioning due diligence reports from independent experts to confirm the veracity of customer due diligence information held;
(d) requiring higher levels of management approval for new higher risk customers;
(e) requiring more frequent review of business relationships;
(f) requiring the review of business relationships to be undertaken by the compliance function, or other employees not directly involved in managing the customer; and
(g) setting lower monitoring thresholds for transactions connected with the business relationship.

Section 4: Identification and verification of identity
142. The Handbooks provide detailed guidance on the identification measures which are to be maintained by those conducting financial services business. The purpose of this requirement is to ensure firstly, that a person exists and secondly, that the applicant for business is that person.

143. As the Handbooks note, evidence of identity can take a number of forms. In respect of individuals, much weight is placed on identity documents and these are often the easiest way of providing evidence as to someone’s identity. It is, however, possible to be satisfied as to a customer’s identity by obtaining other forms of confirmation, including, in appropriate circumstances, written assurances from persons or organisations that have dealt with the customer for some time.

144. In addition to collecting information on identity, a relevant person must verify it and where a particular aspect of an individual’s identity subsequently changes (such as their name following a marriage, change of nationality, or change of address), a relevant person must take reasonable measures to re-verify that particular aspect of the identity of that individual. Verification involves collecting evidence to corroborate the information. That evidence can come from any number of sources (including passports, identity cards, driving licences, utility bills, government departments and independent data sources).

145. How much identification information to ask for, what to verify, and how to verify it in order to be satisfied as to a customer’s identity, will depend on the risk assessment for that customer. The table below sets out the requirements in the case of an individual both for collecting information and verifying it:

<table>
<thead>
<tr>
<th>Low Risk</th>
<th>Standard Risk</th>
<th>High Risk</th>
</tr>
</thead>
<tbody>
<tr>
<td>Information:</td>
<td>Additional information:</td>
<td>Additional Information:</td>
</tr>
<tr>
<td>– Legal name, any former names (such as maiden name) and any other names used.</td>
<td>– Place of birth.</td>
<td>– As for standard.</td>
</tr>
<tr>
<td>– Principal residential address.</td>
<td>– Nationality.</td>
<td></td>
</tr>
<tr>
<td>– Date of birth.</td>
<td>– Sex.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>– Government issued personal identification number, or other government issued unique identifier.</td>
<td></td>
</tr>
<tr>
<td>Verify:</td>
<td>Full name, and principal residential address</td>
<td>All components of identity</td>
</tr>
<tr>
<td></td>
<td></td>
<td>All components of identity</td>
</tr>
<tr>
<td>Reasonable measures for source of wealth</td>
<td>Consider whether appropriate to take measures to verify source of funds or wealth (including geographical area)</td>
<td></td>
</tr>
</tbody>
</table>

bedellcristin.com
or date of birth. other than government issued personal identification.

| Minimum Number | One identification method | Two identification methods |

146. The identification requirements apply equally to trusts and other legal bodies. A relevant person must collect information about the trust or legal body and then verify it in accordance with the risk assessment. Much of the information required is directed to determining the person or persons who ultimately stand behind and/or control the trust, company or other legal body.

147. As noted in paragraph 124(e) above, there are certain exemptions where the identification measures do not need to be applied.

148. In addition, in certain circumstances where the risk of money laundering and the financing of terrorism may be lower, such as where the intermediary (or introducer) itself is subject to legal requirements to combat money laundering and financing of terrorism equivalent to those in place in Jersey, and is supervised for compliance with those requirements, the ML(J)O 2008 permits reliance to be placed on the intermediary or introducer to conduct aspects of customer due diligence. There are two main circumstances where such reliance may be placed, namely where:

(a) the applicant for business is a certain type of regulated person or carries on an equivalent business to certain categories of regulated business (in which case, there is no need to collect any identification information or to verify the intermediary’s underlying customers); or

(b) the relationship involves either an intermediary or introducer that is a financial services business that is overseen for anti-money laundering and counter-terrorism compliance in Jersey, or a person who carries on equivalent business (in which case, identification evidence must be collected but there is no need to verify the intermediary or introducer’s underlying customers).

149. However, before placing reliance on a third party, the relevant person must first assess the risk involved in not applying the usual identification measures. As is expressly stated in the ML(J)O 2008, where a relevant person places reliance on another, the relevant person remains liable for any failure to apply the identification measures. The relevant person must therefore consider amongst other things, the stature and regulatory track record of the intermediary or introducer, the adequacy of the introducer or intermediary’s procedures, the jurisdiction where the intermediary or introducer is based, and the nature of the business conducted by the intermediary or introducer.

150. Certain lower risk products and services provided to intermediaries also enable a relevant person to avoid collecting and verifying identification information. Current examples include:

(a) Investment products controlled or administered by the intermediary which are closed-ended, where there is no liquid market for shares, units, or interests in the investment product, and where the funds for investment and the proceeds of the investment are received from and returned to the investor, and not third party.

(b) Employee benefit schemes (including pension schemes) controlled or administered by the intermediary, which are funded either by the sponsor or by deductions from employee remuneration, and which are for the benefit only of the sponsor’s employees, or the employees’ immediate family.

(c) The limited pooling of funds by an intermediary for certain specified purposes (such as payment of fees in advance).

Section 5: Monitoring activity and transactions

151. Sections 3 and 4 of the Handbooks dealt with above, address the capturing of sufficient information about a customer to allow a relevant person to develop a profile of expected activity, to provide a basis for recognizing unusual activity and transactions, and identify higher risk activity or transactions, which may indicate money laundering or financing of terrorism. Section 5 of the Handbooks requires a relevant person to monitor business relationships and to apply scrutiny to unusual and higher risk activity or transactions, and also to specific higher risk activity, so that money laundering or the financing of terrorism...
may be identified and, where possible, prevented. An effective monitoring system requires a relevant person to identify unusual and higher risk activity, to maintain up-to-date customer due diligence information, and to ask pertinent questions to determine whether there is a rational explanation for the activity or transactions identified. The scrutiny of activity and transactions may involve requesting additional customer due diligence information.

152. Monitoring can be real-time and/or historic, automated and/or manual. Where monitoring indicates possible money laundering or financing terrorism activity, the process of undertaking identification measures must be managed appropriately to ensure that the customer is not tipped off about the concerns.

Section 6: Reporting money laundering and financing terrorism activity and transactions

153. As noted in the Handbooks, there are three situations in which a relevant person, or one of its employees, will make a suspicious activity report:

(a) where the relevant person (or one of its employees) believes that the business may have, itself, committed a money laundering or financing of terrorism offence, for example by becoming concerned in an arrangement facilitating money laundering or terrorist financing;

(b) where legislation contains an offence of failure to make a suspicious activity report to JFCU that another person is connected with either money laundering or financing terrorism; and

(c) as a result of obligations under the ML(J)O 2008 for a relevant person to have procedures in place to disclose that another person is engaged in money laundering or financing terrorism.

154. The regulatory requirements set out in the Handbooks are clear. They provide as follows:

"A relevant person must provide that:
– Where an applicant for business or customer fails to supply adequate customer due diligence information, or adequate documentation verifying identity (including the identity of any beneficial owners and controllers), consideration is given to making a suspicious activity report.
– Internal reporting procedures encompass the reporting of attempted transactions and business that has been turned away.
– Staff make internal suspicious activity reports containing all relevant information to the MLRO (or a deputy MLRO) as soon as it is reasonably practicable after the information comes to their attention – in writing.
– Suspicious activity reports include as full a statement as possible of the information giving rise to knowledge, suspicion or reasonable grounds for knowledge or suspicion of money laundering or financing terrorism activity and full details of the applicant for business or customer.
– Reports are not filtered out by supervisory staff or managers such that they do not reach the MLRO (or deputy MLRO).
– Reports are acknowledged by the MLRO (or a deputy MLRO).

A relevant person must establish and maintain arrangements for disciplining any member of staff who fails, without reasonable excuse, to make an internal suspicious activity report where he or she has knowledge, suspicion or reasonable grounds for knowledge or suspicion of money laundering or financing terrorism."

155. The MLRO is tasked with evaluating the reports, determining whether to make any external report to the JFCU and if one be made, assisting in managing the customer relationship thereafter to avoid any tipping off issues. Once a report has been filed with the JFCU, the relevant person may find itself subject to an informal freeze 40.

Vetting, awareness and training of employees, record keeping and existing customers

156. Although no less important that the other sections in the Handbooks, sections 7, 8 and 9 deal with internal administrative matters, namely:

(a) vetting, awareness and training of employees (section 7);

(b) record keeping (section 8); and

(c) existing customers (as at 4 February 2008) (section 9).

157. It is a requirement that a relevant person has a "clear and well articulated policy for ensuring that staff whose duties relate to the provision of financial services are:

(a) competent and have probity;

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40 See paragraph 161 below
(b) aware of their obligations under the Proceeds of Crime Law, Drug Trafficking Offences Law, Terrorism Law, United Nations Measures and the Money Laundering Order (and by extension, also the Handbook); and

(c) trained in the identification of unusual or higher risk activities or transactions, which may indicate money laundering or financing terrorism activity, and in the business' customer due diligence, reporting and record keeping procedures."

158. Further, all employees need to have a basic understanding of money laundering and financing of terrorism and an awareness of internal reporting procedures (including the identity of the MLRO).

159. In terms of record keeping, a relevant person must:

(a) Make and retain orderly records of customer due diligence information for at least five years from the end of the relationship with the customer (or the completion of the transaction, for one-off transactions). This must include information and evidence of identity and any customer files and business correspondence relating to the relationship. The Handbooks go on to prescribe specific details that must be recorded.

(b) Record and store customer due diligence information in a way that facilitates periodic updating of the information.

(c) Make and retain records of:
   (i) compliance monitoring and procedures;
   (ii) suspicious activity reports;
   (iii) reviews of complex transactions, unusually large transactions; and unusual patterns of transactions, which have no apparent economic or visible lawful purpose; and
   (iv) training records.

160. The Handbooks provide guidance on when it is appropriate to carry out identification measures in relation to existing customers, namely when:

(a) a relevant person suspects money laundering or has doubts about the veracity or adequacy of documents, data or information previously obtained;

(b) in the case of a higher risk customer, as soon as is practicable after the risk has been assessed as "higher"; and

(c) in the case of standard and lower risk customers, when a transaction of significance takes place; and when a relevant person's customer documentation standards change substantially.

161. This particular piece of guidance will change and by 4 February 2009, relevant persons may well be required to have carried out appropriate identification measures in relation to all of their clients.

The informal freeze

162. Whilst the offences under the PC(J)L 1999 and other statutes, along with the mechanism for raising suspicions with the JFCU may be familiar to those in the UK and other jurisdictions, a crucial distinction between the Jersey legislation and that in other jurisdictions, is the absence of any time limits on the JFCU for responding to disclosures or indeed taking proceedings or any other steps. If a disclosure has been made to the JFCU, the relevant person making the report would clearly have the requisite knowledge or suspicion to found an offence under article 32 were it to continue without the consent of the JFCU. However, were the JFCU to refuse to consent, the relevant person could find itself in a difficulty.

163. For example, in the case of a bank which has made a disclosure on its customer, were that customer to request payments out of his account, the bank could not action the request in the absence of consent from the JFCU, nor could it simply ignore the customer's request, lest it be subject to proceedings for breach of mandate. However, the tipping off provisions might also prevent the bank from telling its customer about the difficulties it faces and the fact that it has made a disclosure.

164. Having initially followed the guidance in Amalgamated Metal Trading41, which involved the bank allowing, if not encouraging the customer, to bring proceedings against it, the Royal Court has now definitively determined the issue in the decision of Gichuru v Walbrook Trustees (Jersey) Limited and others42. If an institution has concerns, it should explore those concerns with its customer. If it is unable to allay its concerns it should then make a disclosure. If the JFCU refuses to provide the necessary consent, the institution is unlikely to

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41 [2003] 1 WLR 2711, as applied in Ani v Barclays Private Bank and Trust Limited and Attorney General [2004] JLR 165
42 [2008] JRC 068
act on the customer’s instructions and the customer then has the choice of either judicially reviewing the decision of the police (on the usual judicial review grounds) or of bringing a private action against the institution for breach of mandate. In such proceedings, the burden will be on the customer to establish, on a balance of probabilities, the legitimacy of the funds or assets. It is always possible that the court may, on the basis of the information before it, determine that the assets are legitimate, only for it to be discovered subsequently, that they are definitely not. If the institution wishes to rely upon the earlier judgment to protect itself from subsequent criminal proceedings, it will need to show that it took “such steps as are reasonable in all the circumstances to resist proceedings”.

**Enforcement**

**Enforcement agencies**

165. The enforcement of Jersey’s anti-money laundering regime involves the JFSC, the JFCU, and the Department of the Law Officers of the Crown.

**JFSC**

166. The JFSC is the regulator of Jersey’s finance industry and is responsible for monitoring Jersey financial services business’ compliance with all legislation and guidance related to money laundering. The JFSC’s compliance division undertakes a structured programme of compliance visits on all regulated financial institutions, which includes a detailed assessment of the institutions’ anti-money laundering and counter-terrorism procedures.

**JFCU**

167. The JFCU is responsible for receiving, disseminating and investigating reports of suspicions of money laundering made under the anti-money laundering legislation. The JFCU comprises both police and customs officers.

**The Law Officers’ Department**

168. The Law Officers’ Department, headed by Her Majesty’s Attorney General (“HMAG”) is responsible for the public prosecution of all criminal matters in Jersey. The Law Officers’ Department also acts as the gateway between Jersey’s and overseas authorities in relation to the investigation and prosecution of offences under the anti-money laundering legislation.

**Domestic enforcement**

– **Prosecutions**

169. In March 2006, following the *Caversham* case, the JFSC issued a Policy on Referrals to the Attorney General under the PC(J)L 1999 and the Money Laundering (Jersey) Order 1999. The policy was in the following terms:

> "The present policy of the Commission is that if it should come across an apparent breach of the Order in the course of its supervision, including as a result of an onsite examination, the Commission will refer it to the Attorney General if the breach is considered to be sufficiently serious. It should be stressed, however, that a decision on whether to prosecute a breach of the Order will be a matter solely for the Attorney General.

> The Commission will generally regard a breach of the Order as sufficiently serious to the extent that it poses a threat to clients or potential clients or to the reputation of the Island and/or where it casts doubt on the integrity, competence or financial standing of the person concerned. It will also be relevant if the breach was deliberate or premeditated rather than accidental, or if the person (individual or body corporate) has failed to report a material breach to the Commission.

> Failure, inability or refusal to cooperate with the Commission to rectify a breach, and a history of past breaches or poor regulatory compliance (which may give grounds to believe that the breach is likely to be repeated and/or is part of a systemic failure), will also be taken into account."

– **Obtaining information and evidence**


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43 As per Tomlinson J in Amalgamated Metal Trading at paragraph 32

44 See paragraph 118 above
Production orders
171. Pursuant to PC(J)L 1999, article 40, the police may, for the purposes of an investigation into whether any person has benefited from criminal conduct or into the extent or whereabouts of the proceeds of criminal conduct, apply to the Bailiff (the senior judge in Jersey) for a production order compelling a person who appears to be in possession of material likely to be of substantial value to the investigation to produce such material (for example, bank statements, correspondence etc). Application for a production order can be made ex parte to the Bailiff in chambers. Production orders will ordinarily require production of documents specified in them within seven days, but confer no right to items subject to legal privilege.

Search warrants
172. Pursuant to PC(J)L 1999, article 41, the police may, in certain circumstances, apply ex parte for a search warrant in relation to specified premises. A search warrant allows the police to enter and search premises and, subject to certain limitations, seize material held on the premises. This power is used where entry cannot otherwise be gained to the premises or, where the investigation might be seriously prejudiced unless the police can secure immediate entry to the premises.

Financial institutions
173. T(J)L 2002 also includes specific provisions relating to financial institutions, orders can be obtained requiring financial institutions to provide customer information to the police or for an account to be monitored for up to 90 days. Such orders are available where the tracing of terrorist property is desirable for the purposes of a terrorist investigation and the order will enhance the effectiveness of the investigation. Information must be provided pursuant to such orders notwithstanding any restriction on the disclosure of information, however imposed.

Seizure and confiscation of assets
174. The seizure and confiscation of assets is provided for pursuant to each of PC(J)L 1999, DTO(J)L 1988 and T(J)L 2002. The provisions are broadly similar and so, as above, these are considered in relation to PC(J)L 1999. An additional statute, the PC(CS)(J)L 2008, has also been enacted to assist in the search for and seizure, detention and forfeiture of tainted cash.

Seizure of assets
175. In circumstances where proceedings have been instituted in Jersey, or the court is satisfied that proceedings are to be instituted in Jersey, in relation to any criminal conduct committed in Jersey or where a confiscation order has been made by the Royal Court, the court may make an order, a saisie judiciaire, freezing a defendant’s assets (moveable or immovable/personalty or realty) situated in Jersey by vesting them in the Viscount (who is the executive officer of the Royal Court).

Confiscation
176. Once convicted of any criminal conduct committed in Jersey, the court, if satisfied to the civil standard that the defendant has benefited from any relevant criminal conduct, may make a confiscation order requiring the defendant to pay an amount considered by the court to be his or her proceeds from such conduct, in default of which payment a prison term may be ordered. Where property is held by the Viscount pursuant to a freezing order, the court may empower the Viscount to realise such assets and apply sums realised towards the satisfaction of any such confiscation order.

Civil forfeiture
177. PC(CS)(J)L 2008 contains additional powers of civil forfeiture in relation to tainted cash. The police can search for tainted cash (and have the associated powers to break open containers,

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45 T(J)L 2002, articles 32 and 33
46 “Tainted cash” is cash (a) used in, or intended to be used in, unlawful conduct; or (b) obtained in the course of, from the proceeds of, or in connection with, unlawful conduct.
47 PC(J)L 1999, article 15
48 PC(J)L 1999, article 3
49 PC(J)L 1999, article 17
and stop and search), to seize funds and then obtain a court order for forfeiture. No conviction is needed and the court would decide the matter on the balance of probabilities.

**International enforcement**

178. Money laundering is clearly an international activity, and efforts to combat money laundering require inter-jurisdictional co-operation. The Jersey authorities are committed to ensuring that money launderers, drug traffickers and other criminals should not be able to launder "dirty money" in Jersey, or to evade the consequences of their actions in other jurisdictions. The Jersey authorities have a range of powers enabling assistance to be given in combating international crime and money laundering, principally under the following statutes.

**Bankers’ Books Evidence (Jersey) Law 1986**

179. Whilst the Bankers’ Books Evidence (Jersey) Law 1986 appears to have been introduced largely with proceedings arising in Jersey in mind, an application may be made by a foreign court in connection with foreign proceedings for an order allowing inspection of, and copying of, entries in a bankers’ book for the purposes of such proceedings.

**Evidence (Proceedings In Other Jurisdictions) (Jersey) Order 1983**

180. Where overseas criminal proceedings have been instituted, requests for assistance can be made by the foreign magistrate, judge or similar for formal evidence to be obtained in Jersey for the purposes of those proceedings. Upon application, the Bailiff may order the production of documents, or for written statements to be made or for evidence to be given on oath which could later be adduced as evidence in the foreign court.

**Investigation Of Fraud (Jersey) Law 1991**

181. The Investigation of Fraud (Jersey) Law 1991 gives power to HMAG to require the production of documents and the provision of information for the purposes of assisting investigating authorities in matters of serious or complex fraud. Following a request from an overseas prosecuting authority, the HMAG may issue a notice to those thought to be in possession of relevant documentation or information requiring copies of documents, or requiring that answers are provided to questions relevant to the investigation.


182. The powers found in DTO(J)L 1988, PC(J)L 1999 and T(J)L 2002 (production orders, search warrants, freezing orders and confiscation/forfeiture orders) can be used to assist in a foreign authority’s investigations.

183. A production order under PC(J)L 1999, article 40, may be made in connection with an overseas investigation into whether any person has benefited from criminal conduct or into the extent or whereabouts of the proceeds of criminal conduct, and search warrants allowing the police to have immediate access to premises are available.

184. Similarly, freezing orders are available where an external confiscation order has been made, or where overseas proceedings have been instituted and it appears that a confiscation order may be made. Orders made by foreign courts for the confiscation of money or other assets can also be registered in the Royal Court of Jersey and enforced on the Island.

185. Pursuant to the Proceeds of Crime (Designated Countries and Territories) (Jersey) Regulations 1990 and the Drug Trafficking Offences (Designated Countries and Territories) (Jersey) Regulations 1997, some 46 countries and territories are designated to whom assistance can be offered.

186. The provisions for the freezing and confiscation of property found in T(J)L 2002, article 26 and PC(CS)(J)L 2008 can also be used to give international assistance.

**CJ(IC)(J)L 2001**

187. This part of Jersey’s statutory framework for international co-operation came into force on 6 November 2001.

188. The CJ(IC)(J)L 2001 provides for the service of overseas process in Jersey and for taking of formal evidence in Jersey for the purposes of overseas criminal proceedings or investigations (thus going further than the Evidence (Proceedings in Other Jurisdictions) (Jersey) Order 1983, which required that proceedings had been instituted).

189. The CJ(IC)(J)L 2001 also enables warrants to be issued for the search of premises and seizure
of evidence in connection with any serious offence. Whereas PC(J)L 1999, article 40 is limited to identifying and then tracing and recovering the proceeds of crime, the powers under the CJ(IC)(J)L 2001 enable information to be obtained for the purposes of investigating the original offence.

190. In addition, the CJ(IC)(J)L 2001 allows for the enforcement of overseas orders for the forfeiture and destruction (or other disposal) of anything used or intended for use in connection with a serious offence.

Civil law aspects

191. In addition to the criminal law provisions designed to combat money laundering that have been considered above, Jersey’s civil law is of assistance in tracing and recovering the proceeds of crime.

192. Whilst Jersey law has its roots in Norman customary law, in practice, English judicial decisions are regarded as persuasive in many areas, and Jersey’s civil law tends to follow the same principles as are found in English law. Accordingly, freezing orders, disclosure orders (including orders against a third party on the basis of the Norwich Pharmacal principles\(^{50}\)) and the tracing of assets on the principles of the Bankers Trust case\(^{51}\) are all available in Jersey (even when there may be no substantive cause of action within the island and the only link is the presence of money in an account). Claims may also be asserted based on unjust enrichment and/or liability as an accessory to a breach of trust.

193. There is insufficient space here to consider civil law aspects in any detail, other than to note that dealing with the matrix of obligations to the client, obligations arising under anti-money laundering legislation and obligations arising out of civil proceedings can present difficult issues for financial services businesses.

Conclusion

194. Jersey has an effective and robust anti-money laundering regime, bolstered in recent months by a raft of updated and new legislation. This regime is comprised of both modern legislation, comprehensive industry guidance and standards of best practice. The standards of best practice are actively monitored by the JFSC. In addition, Jersey’s provisions for inter-jurisdictional co-operation, mean that Jersey can play its part in the international efforts to combat money laundering.

195. Looking forward, Jersey’s support of international standards in the fight against money laundering will mean that as international standards develop, Jersey’s regime will develop too. As an offshore financial services centre it is imperative that Jersey remains at the forefront of the fight against money laundering and terrorist financing and is seen to be so. The objective is clear: that Jersey will continue to be recognised as a well-regulated international finance centre which maintains effective measures to combat money laundering and the financing of terrorism.

\(^{50}\) Norwich Pharmacal Co v Customs and Excise Comrs [1973] 2 All ER 943

\(^{51}\) Bankers Trust Co v Shapira [1980] 3 All ER 353, CA.
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