



Law Society
of Scotland

Written Evidence

Criminal Finances Bill – Legislative Consent Memorandum

10 January 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

This paper is in response to the Justice Committee's call for written evidence¹ on the Legislative Consent Memorandum (LCM) for the Criminal Finances Bill.

By way of background, in June 2016 the Society responded to the consultation issued by Home Office/HM Treasury on the "Action Plan for anti-money laundering and counter-terrorist finance"². At that time the Society liaised with the Law Society of England and Wales (LSEW), and the Law Society of Northern Ireland regarding the commissioning of the Counsel Opinion which underpinned the consultation response produced by the LSEW³. The Society endorsed the LSEW response and provided some additional comments contained in a supplemental paper. We have also responded to the recent government consultation on the 4th Money Laundering Directive.

In July 2016, the Society responded to the HMRC consultation on "Tackling Tax Evasion: Legislation and Guidance for a Corporate Offence of Failure to Prevent the Criminal Facilitation of Tax Evasion"⁴.

As the Criminal Finances Bill is proceeding through the Parliamentary process in Westminster, the Society has provided a briefing document for MPs⁵. We will be updating this document in advance of the Report Stage of the Bill in the House of Commons (no date for Report Stage has yet been set).

¹ [Justice Committee Call for Written Evidence - Criminal Finances Bill Legislative Consent Memorandum](#)

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517993/6-2118-Action_Plan_for_Anti-Money_Laundering_print_.pdf

³ <http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/home-office-and-hm-treasury-consultation-on-the-action-plan-for-aml-and-cft-legislative-proposals/>

⁴ <http://www.lawscot.org.uk/media/876339/crim-tackling-tax-evasion-consultation-response.pdf>

⁵ <http://www.lawscot.org.uk/media/964957/crim-criminal-finances-bill-report-stage-briefing-law-society-of-scotland-submitted.pdf>

Areas requiring Consent of the Scottish Parliament

The areas of the Bill which require the consent of the Scottish Parliament are set out below: -

1. Part 1 – Proceeds of Crime
2. Part 2 – Terrorist Property
3. Part 4 – General Provisions making and conferring power to make minor and consequential amendments, making financial provision, and provision in relation to extent and commencement.

The Society notes that Legislative consent is not sought in respect of Clauses 9, 11, 31⁶ (now Clause 33 following amendment at Public Bill Stage) which conferred power upon the Scottish Ministers in respect of certain reserved matters on the basis that those functions are exercised by a procurator fiscal rather than the Scottish Ministers and an amendment to the Bill would be sought. We note that following the Public Bill Stage in the Commons the references to “the Scottish Ministers” have been deleted from those clauses within the Bill⁷.

Society’s comments

Part 1 – Proceeds of Crime

Clauses 4 to 6: Unexplained Wealth Orders (UWO)

The Bill introduces UWO which will require individuals to explain the origin of assets where there are reasonable grounds to suspect that the persons know lawful income would have been insufficient to obtain that property. The Bill enables the Scottish Ministers to apply to the Court of Session for an UWO (and/or an interim freezing order, if required) in respect of property of value greater than £100,000 and thought to be held by: -

- A person where there are reasonable grounds to suspect they have been involved (or are connected with someone) involved in serious crime; or
- A Politically Exposed Person (PEP) (or a family member or close associate). There is no requirement for enforcement agencies to demonstrate reasonable grounds to suspect PEP involvement in serious crime.

This is a civil law process with an application made to the Court of Session. UWO are likely to make it easier for to the Scottish Ministers to obtain property via civil recovery proceedings. An UWO requires the individual to explain the nature and extent of their interest in the property and how they funded the

⁶ [Memorandum from the Scottish Government on the Legislative Consent Memorandum lodged in respect of the Criminal Finances Bill on 22 November 2016 at paragraph 5 on page 1.](#)

⁷ [Criminal Finances Bill - as amended following Public Bill Stage on 23 November 2016](#)

property. Failure to provide an adequate explanation of the origins of the property in question, or failure to comply with an UWO, without a reasonable excuse, will give rise to a rebuttable presumption that the property is recoverable in civil recovery proceedings.

In addition, failure to comply with an UWO could leave the individual open to Contempt of Court proceedings. It is an offence if, in purported compliance with the UWO an individual knowingly or recklessly makes a material statement that is false or misleading.

The Scottish Ministers (in practice the Civil Recovery Unit, on behalf of the Scottish Ministers) can make an application to the Court of Session for an interim freezing order⁸ at the same time as a UWO to preserve assets.

Clause 13: Civil Recovery of Listed Assets in Summary proceedings

Clause 13 extends the types of moveable property or personal assets that can be seized or forfeited that are part of the proceeds of unlawful conduct or intended for use in unlawful conduct. There already exist powers to seize, detain and forfeit cash sums⁹.

Code of Practice: Scotland (inserting new section 303H of the Proceeds of Crime Act 2002)

We note that the current draft Clause 13 requires the the Scottish Ministers to produce code of practice in connection with the exercise by constables in Scotland of the powers of search in the civil recovery of the proceeds of unlawful conduct. Where the Scottish Ministers propose to issue a code of practice, they must publish a draft; consider any representations made about the draft, and if they think it appropriate, modify the draft in the light of any such representations. The Scottish Ministers must lay a draft of the code before the Scottish Parliament. We note that the equivalent provisions are made for the Secretary of State as regards police constables in England and Wales, HMRC and SFO officers and the Department of Justice in Northern Ireland. These provisions mirror those already in existence for cash amounts¹⁰. The Scottish Ministers have produced a Code of Practice¹¹ for seizure of cash sums under section 293 of the Proceeds of Crime Act 2002.

Clause 25: Seized Money

Clause 25 provides for the High Court of Justiciary or the sheriff (as the case may be) to order any realisable property in the form of money held in a bank or building society account to be paid in satisfaction of a confiscation order. The Scottish Ministers may, by regulations, amend this provision so that it applies to money held by other financial institutions or other realisable cash or cash-like instruments or products,

⁸ Clause 5 Criminal Finances Bill

⁹ See Sections 289-303A of the Proceeds of Crime Act 2002

¹⁰ Sections 292-294 of the Proceeds of Crime Act 2002

¹¹ [Code of Practice section 293 of the Proceeds of Crime Act 2002](#)

and may make provision for any such financial instrument or product to be realised into cash. Any such regulations will be subject to the affirmative procedure¹².

The UK Government Delegated Powers memorandum for the Criminal Finances Bill stated: “*Given the wide range of potential financial institutions and, more particularly, of products provided by the financial services industry, together with the constantly evolving nature of such products, it is considered that these are matters more appropriately left to secondary legislation.*”¹³ Clause 25 provides the Scottish Ministers with Henry VIII powers to amend primary legislation with subordinate legislation.

As currently drafted the clause does not require the Scottish Ministers to consult on the draft regulations prior to introduction in the Scottish Parliament. A legislative requirement providing for pre-legislative scrutiny of draft regulations made under clause 25 (e.g. a requirement to publish draft regulations, consider any representations and, if appropriate, modify the draft regulations in light of any representations) would provide an additional layer of scrutiny in an area where the power to realise property in the form of money could be expanded to money held by other financial institutions or other realisable cash or cash-like instruments or products, and may make provision for any such financial instrument or product to be realised into cash.

Part 3 – Corporate Offences of Failure to Prevent Facilitation of Tax Evasion

In July 2016, the Society responded to the HMRC consultation on “Tackling Tax Evasion: Legislation and Guidance for a Corporate Offence of Failure to Prevent the Criminal Facilitation of Tax Evasion”¹⁴.

We noted that the proposed offence has three stages: firstly, an individual taxpayer is shown to have evaded tax, capable of being prosecuted under the existing criminal law; secondly, this evasion is shown to be criminally facilitated by a person acting on behalf of the company; thirdly, the company fails to show that it has taken reasonable preventative steps.

The draft legislation envisages the first two stages being proved by the Crown; the third stage is a defence which can be pled by the company. The defence is that the company (at the time the principal offence was committed) ‘had in place such prevention procedures as it was reasonable in all the circumstances to expect [it] to have in place, or that in all the circumstances, it was not reasonable to expect [it] to have any prevention procedures in place’. It is likely that there will be uncertainty over what procedures are ‘reasonable’. Parallels can be drawn with the provisions of the Bribery Act, with its similarly ill-defined requirement for ‘adequate’ procedures.

¹² [Memorandum from the Scottish Government on the Legislative Consent Memorandum lodged in respect of the Criminal Finances Bill on 22 November 2016, at Annex, paragraph 17-21 at page 9](#)

¹³ [UK Government Delegated Powers Memorandum for the Criminal Finances Bill dated 12 October 2016 - paragraph 44 at page 15](#)

¹⁴ <http://www.lawsco.org.uk/media/876339/crim-tackling-tax-evasion-consultation-response.pdf>

Part 4 – General Provisions making and conferring power to make minor and consequential amendments, making financial provision, and provision in relation to extent and commencement

Clause 49: Power to make Consequential provision

Clause 49 enables the Scottish Ministers to make regulations to make provision in consequence of any provision made by or under Part 1 or 2 that extends to Scotland only; this includes Henry VIII powers to amend primary legislation with subordinate legislation. Clause 50 enables the Scottish Ministers to make regulations to commence confiscation-related provisions, after consulting the Secretary of State. However as currently drafted, there is no requirement to consult any wider prior to introduction in the Scottish Parliament.

A legislative requirement providing for pre-legislative scrutiny on draft regulations made under clause 49 (e.g. a requirement to publish draft regulations, consider any representations and if appropriate, modify the draft regulations in light of any representations) would provide an additional layer of scrutiny.



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