



Law Society  
of Scotland

# Second Reading Briefing

## Criminal Finances Bill - Second Reading Briefing

8 February 2017



## Introduction

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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.

As the Treasury-designated AML supervisory authority for solicitors in Scotland, our engagement with the topics of anti-money laundering and counter terrorist financing serves the public interest by assessing compliance with requirements and encouraging continuous improvement within the profession. Our activities include:

- Our regulatory regime requires all firms holding client money to certify compliance with the money laundering regulations on a six monthly basis. The accuracy of these certifications is subsequently verified through our extensive inspection programme which covers 25% of firms annually.
- We also undertake proactive, intelligence-led inspections of specific firms where suspicious activity has been detected
- Working with firms to promote improved AML compliance where necessary and dealing with non-compliance.
- We perform AML risk assessment of large member firms, who will be subject to AML audit starting in 2017
- Holding educational events featuring contributions from cross-sectoral AML subject matter experts.
- Providing helpline services for solicitors in practice, including AML queries.
- Active membership of the Anti-Money Laundering Supervisors Forum and Legal Affinity Group.
- Regular engagement with the UK government to contribute to AML/CTF developments.

This is an updated briefing provided in advance of the Report Stage of the Criminal Finances Bill. We have commented on specific parts of the Bill where we feel we can usefully contribute.

## Summary

In respect of anti-money laundering, the Society has made significant efforts to ensure that Scottish solicitors fully comply with their Anti-Money Laundering obligations under the Money Laundering Regulations 2007, Proceeds of Crime Act 2002 and Terrorism Act 2000. These requirements are now embedded within the Scottish profession but subject to continuous monitoring.

By way of background, in June 2016 the Society responded to the consultation issued by Home Office/HM Treasury: Action Plan for anti-money laundering and counter-terrorist finance<sup>1</sup>. 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 LSEW<sup>2</sup>. The Society endorsed the LSEW response and provided some additional comments contained in a supplemental paper. We have also provided a full response to the recent government consultation on the 4<sup>th</sup> 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”<sup>3</sup>.

In January 2017, the Society provided written evidence<sup>4</sup> to the Scottish Parliament’s Justice Committee<sup>5</sup> as part of their consideration of the Scottish Government’s Legislative Consent Memorandum (LCM) for the Criminal Finances Bill.

The Society is currently considering the Review of Limited Liability Partnership law issued by the Department for Business Energy & Industrial Strategy. We expect to respond to the Department by

## Criminal Finances Bill

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### Clauses 4 to 6: Unexplained Wealth Orders (UWO): Scotland

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

<sup>1</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/517993/6-2118-Action\\_Plan\\_for\\_Anti-Money\\_Laundering\\_print\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517993/6-2118-Action_Plan_for_Anti-Money_Laundering_print_.pdf)

<sup>2</sup> <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/>

<sup>3</sup> <http://www.lawscot.org.uk/media/876339/crim-tackling-tax-evasion-consultation-response.pdf>

<sup>4</sup> <http://www.lawscot.org.uk/media/1000535/crim-lcm-criminal-finances-bill-lss-written-evidence-january-2017.pdf>

<sup>5</sup> [Justice Committee Call for Written Evidence - Criminal Finances Bill Legislative Consent Memorandum](#)

- 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 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 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 order<sup>6</sup> at the same time as a UWO to preserve assets.

## **Clause 10: Sharing of Information within the regulated sector**

The Society is supportive of measures which allow better information sharing between persons undertaking regulated undertakings within the regulated sector. If a framework is intended to be voluntary, we would be supportive of measures which do not seek to impose any additional compulsory reporting obligations upon solicitors.

Clause 10 (inserts new section 339ZB to the Proceeds of Crime Act 2002) allows disclosure within the regulated sector provided that Conditions 1 to 4 are met. Conditions 1 to 4 are cumulative and each of the Conditions must be satisfied before the disclosure can be made. A disclosure can be either requested by the National Crime Agency (NCA), or requested by another person carrying out a regulated undertaking within the regulated sector. In both of those circumstances, a disclosure may only take place after a notification has been made to the NCA<sup>7</sup>.

<sup>6</sup> Clause 5 Criminal Finances Bill

<sup>7</sup> Clause 10 of the Criminal Finances Bill, insert new section 339ZB to the Proceeds of Crime Act 2002 at section 339ZB(4).

Law enforcement should consider an increased role in alerting the private sector in response to information it receives. This would minimise any remaining risks arising from increased data sharing within the private sector such as those of data protection breaches, defamation and risks to the personal safety of reporters.

In addition, matters relating to legal professional privilege will need to be considered. Legal professional privilege typically arises in connection with information obtained by a professional legal adviser, otherwise than for the purposes of committing a crime, from a client in connection with the provision of legal advice by the adviser to that person.

### Obligation to Report Serious Organised Crime: Section 31 of the Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”)

In Scotland the obligation to report to the NCA through the Suspicious Activity Report (SAR) regime exists alongside the obligation under the 2010 Act for solicitors (and a wide array of other persons) to report knowledge or suspicion that another person is involved in serious organised crime. Under the 2010 Act, the offence of involvement in serious organised crime is committed where a person knows suspects or ought reasonably have known or suspected that an action would enable or further the commission of serious organised crime.

Reports under the 2010 Act are not made to the NCA, but to a “constable”, and in certain circumstances (e.g. where a Scottish solicitor knows or suspects the laundering of the proceeds of crime), Scottish solicitors would be required to make two separate disclosures: one to the NCA under the SAR regime and one to a “constable” as required under the 2010 Act. However section 31 of the 2010 Act does not apply where the information is received by the solicitor in “privileged circumstances” such as when legal advice is being given to a client.

The Society is committed to aiding efforts to reduce money laundering and serious organised crime. However, given the dual reporting requirement in Scotland, the Society would be supportive of any amendment to the SAR regime which clarifies the obligations placed on Scottish solicitors while not undermining efforts to tackle money laundering and terrorist financing.

### **Part 3 - Clauses 41 to 49: Corporate Offences for Failing 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”<sup>8</sup>.

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 bill 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 2010, with its similarly ill-defined requirement for ‘adequate’ procedures.

<sup>8</sup> <http://www.lawscot.org.uk/media/876339/crim-tackling-tax-evasion-consultation-response.pdf>