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Katy Clark MP and Philip Davies MP
Co-Chairs
Public Bill Committee
Serious Crime Bill
House of Commons
London
SW1A 0AA

8 January 2015

Dear Katy and Philip,

Serious Crime Bill: Commons Committee stage – Government amendments

I am writing to let the members of the Public Bill Committee have details of the Government amendments to the Bill which I have tabled today.

Proceeds of crime – giving statutory effect to the Supreme Court's judgment in the case of *Waya* (amendments to clause 77 and Schedule 4)

In our response to the report on the Bill by the Joint Committee on Human Rights (JCHR), we undertook to consider further the Committee's recommendation that the Supreme Court's judgment in the case of *Waya* should be given statutory effect. In *Waya* the Court ruled that the duty on the Crown Court to make a confiscation order for the recoverable amount (that is, a sum of money equal to the defendant's benefit from the relevant criminal conduct allowing for the change in the value of money) should be qualified so that it did not apply where such an order would be disproportionate under Article 1, Protocol 1 of the ECHR (right to peaceful enjoyment of property). In such a case the court must make an order requiring the defendant to pay whatever lesser amount (if any) it thinks would be proportionate. We agree that, on balance, giving statutory force to *Waya* would strengthen legal certainty about the regime for the making of confiscation orders. The amendments to Schedule 4 in turn make the appropriate amendments to sections 6, 92 and 156 of the Proceeds of Crime Act 2002 (POCA) which apply to England and Wales, Scotland and Northern Ireland respectively.

Protection from civil liability of those making suspicious activity reports in good faith (new clause "*Exemption from civil liability for money-laundering disclosures*")

Part 7 of POCA obliges an individual to report to the National Crime Agency (NCA) where there are reasonable grounds to know or suspect that a person is engaged in money laundering. Although this requirement to submit "Suspicious Activity Reports" (SARs) applies to any individual, SARs are mostly made by businesses in the "regulated sector" such as banks, other financial institutions and lawyers.

The submission of a SAR removes the risk of prosecution for an offence in relation to money laundering. A reporter can also remove the risk to them of committing a money-laundering offence by seeking the consent of the NCA, under section 335 of POCA, to conduct a transaction or activity about which they have suspicions. The NCA has seven days to respond.

Whilst the reporter awaits the NCA's decision on consent, the activity or transaction must not proceed. Furthermore, the reporter cannot disclose to the customer the fact that a SAR has been submitted, or any other information that may prejudice the NCA's investigation into the reported activity or transaction, as doing so would constitute a 'tipping off' offence under section 333A of POCA. This can place the reporter in a difficult position in not informing the customer of the reasons for suspension of their requested activity or transaction, and could result in the collapse of a financial or commercial deal.

Failing to carry out a customer's instructions whilst waiting for authorisation can therefore expose financial institutions and others to the risk of civil litigation. The courts (see *Shah and others v HSBC Private Bank (UK) Ltd* [2010] EWCA Civ 3) have, however, held that whilst customers can require such institutions to prove that the suspicion that gave rise to the SAR was reasonable, provided the suspicion is so proved, the institution cannot be held liable for loss suffered by the customer as a consequence of the institution's failure to carry out promptly the customer's instructions.

New clause "*Exemption from civil liability for money-laundering disclosures*" makes express statutory provision in relation to our obligation under the third EU Anti-Money Laundering Directive (Directive 2005/60/EC) to ensure that persons who make disclosures to relevant authorities in good faith must be protected from civil liability for doing so. In doing so, the new clause will strengthen the UK's compliance with the Directive and help increase the trust and confidence in the SARs regime of those who report under the system.

New offence of domestic abuse: coercive or controlling behaviour (new clauses *"Controlling or coercive behaviour in an intimate or family relationship"* and *"Guidance"* and amendments to clauses 75 and 76 and to the long title)

Domestic abuse is a serious crime that shatters the lives of victims, trapping them in cycles of abuse that too often end in tragic and untimely deaths. Her Majesty's Inspectorate of Constabulary report that over one million calls were made to the police regarding domestic abuse incidents in the 12 month period to 31 August 2013. These calls range from people seeking advice for themselves, or on another's behalf, to directly reporting abuse. Crown Prosecution Service figures indicate that in

2013/14 78,000 prosecutions were brought. This is the highest number of prosecutions ever recorded, yet it shows there is still work to be done.

In September 2013 the Home Secretary commissioned Her Majesty's Inspectorate of Constabulary to review the police response to domestic abuse because she was concerned that it was not as good as it should be. Sadly, when HMIC reported their findings in March, our concerns were realised. The Government is clear that there must be an immediate and lasting change in the police response to domestic abuse. This means a change in culture: from senior officers in charge to those on the frontline. The Home Secretary is chairing a National Oversight Group to make sure this happens. This work remains a priority, however we are also keen to ensure the police and other frontline agencies have the powers they need to respond to domestic abuse.

The Home Office ran a consultation last summer seeking views on whether the law on domestic abuse needs to be strengthened. 85% of respondents agreed that the law in this area is inadequate, and 55% agreed that it should be strengthened with a new offence to close the gap in the law relating to coercive and controlling behaviour in intimate relationships. The consultation response is available at: https://www.gov.uk/government/consultations/strengthening-the-law-on-domestic-abuse.

On 18 December the Home Secretary announced in a written ministerial statement that we would be tabling amendments to the Bill to strengthen the protection afforded to the victims of domestic abuse. New clause "*Controlling or coercive behaviour in an intimate or family relationship*" accordingly provides for a new domestic abuse offence. The new offence will provide an additional charging option where there is continuous or repeated coercive or controlling conduct, the cumulative impact of which can be no less traumatic for the victim than physical violence. The new offence carries a maximum penalty of five years' imprisonment and would extend to England and Wales.

The new offence would not apply where the behaviour in question is perpetrated by a parent, or a person who has parental responsibility, against a child under 16 (see subsection (3)). This is because the criminal law, in particular the child cruelty offence in section 1 of the Children and Young Persons Act 1933 as amended by clause 65 of the Bill, already covers such behaviour.

Subsections (8) to (10) of the new clause provides for a limited defence where the accused believes he or she was acting in the best interests of the victim and can show that in the particular circumstances their behaviour was objectively reasonable. The defence will not be available where a victim has been caused to fear violence (as opposed to being seriously alarmed or distressed). This defence is intended to cover, for example, circumstances where a husband was a carer for a mentally ill wife (or vice versa), and by virtue of her medical condition, she had to be kept in her home or compelled to take medication, for her own protection or in her own best interests. In this context, the husband's behaviour might be considered controlling, but would be reasonable under the circumstances.

New clause "*Guidance*" confers a power on the Home Secretary to issue guidance about the investigation of the new offence.

An impact assessment is available on the Bill page of the Government website.

New offence of sexual communication with a child (new clause "*Sexual communication with a child*" and amendments to clauses 75 and 76, Schedule 4 and the long title)

At Lords Third Reading, Lord Bates undertook to consider further an amendment tabled by Lord Harris of Haringey which sought to enhance the protection of children by creating a new offence to criminalise adults who communicate sexually with children (Hansard, 5 November 2014, columns 1621-1633). Lord Harris's amendment was prompted by the National Society for the Prevention of Cruelty to Children (NSPCC) which has argued that a new offence is needed to capture those who communicate sexually with a child or who invite a child to communicate sexually with them.

The sexual abuse and exploitation of children is a very real danger in today's society. We already have a robust body of criminal law in England and Wales to tackle predatory sexual behaviour by adults against vulnerable children. This law, together with the work carried out by enforcement agencies including the police and Crown Prosecution Service and those in the voluntary sector, ensures that we have an effective response to this dreadful offending.

However, the Government is receptive to calls to strengthen the law further where this is shown to be needed. Following further discussions with the NSPCC, the Police and CPS we agree that it is appropriate to create a specific sexual offence to ensure that the criminal law deals effectively with the type of behaviours identified. Accordingly, at the 'WeProtect' Summit on 11 December, the Prime Minister announced that we would be bringing forward an amendment to this Bill to provide for a new offence of sexual communication with a child.

The offence would broadly speaking criminalise communication by an adult with a child under 16 (which could be in the form of an e-mail, text message, written note or orally) where the communication is sexual in some way or where it asks a child to communicate sexually with the adult. To commit the offence the adult must act for sexual gratification. Scenarios likely to be covered by the offence include talking sexually to a child via a chatroom or sending sexually explicit text messages to a child as well as inviting a child to communicate sexually (irrespective of whether the invitation is itself sexual). The new offence has been so constructed as to ensure that we do not criminalise, for example, ordinary social or educational interactions between children and adults or communications between young people themselves.

The offence will be triable either way and will be punishable, on conviction on indictment, by imprisonment for a term not exceeding two years. The offence would automatically attract the notification requirements for registered sex offenders under the Sexual Offences Act 2003.

The offence will extend to England and Wales. I understand the Northern Ireland Department of Justice will seek to provide for a similar new offence in legislation before the Northern Ireland Assembly. In Scotland there are already offences of communicating indecently with a child (in sections 24 and 34 of the Sexual Offences (Scotland) Act 2009).

FGM Protection Orders – legal aid (amendments to Schedule 4)

Clause 70 of the Bill provides for FGM protection orders. The Government agrees that legal aid should be made available in relation to applications for FGM protection orders (including variations, discharges and appeals) and the enforcement of any breaches. These amendments to Schedule 4 in turn make the necessary amendments to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) to provide for this.

New civil order to compel the disconnection of unauthorised mobile phones in prison (new clause "*Prevention or restriction of use of communication devices by prisoners etc*" and amendments to clauses 76 and 77 and the long title)

Under section 40D(3A) of the Prison Act 1952 it is an offence to possess a mobile phone in prison without authorisation. Unauthorised mobile phones in prisons enable organised criminals to carry on offending from prison, and can facilitate a range of other criminal activity such as radicalisation, harassment or drug dealing. We know of cases of serious crimes including large drug imports, escapes and murders being organised from prison, enabled by illicit mobile phones.

The National Offender Management Service (NOMS) takes a range of approaches to tackle this problem including measures to stop phones getting into prisons and measures to find and seize phones in prisons. Indeed, in 2013/14 NOMS seized over 7,400 SIM cards and phones in prisons in England and Wales. Nonetheless, these measures are only a partial solution and significant numbers of unauthorised phones remain in use.

Following discussions with mobile network operators, new clause "*Prevention or restriction of use of communication devices by prisoners etc*" confers a power on the Secretary of State and the Scottish Ministers to make regulations, subject to the affirmative procedure, conferring power on the County Court in England and Wales (and the Sheriff in Scotland) to make a telecommunications restriction order.

The effect of such an order would be to require the relevant communications provider(s) to blacklist unauthorised mobile phone handsets and block SIM cards in prison (or other relevant institutions, namely (in England and Wales) young offender institutions, secure training centres and secure colleges). We expect that applications for such orders would normally be made by NOMS having identified unauthorised phones and SIM cards that are in use in a particular prison. Subsection (3) of the new clause sets out the matters that must be addressed in any regulations, including provision conferring rights on persons to make representations and provision about appeals. Subsection (4) of the new clause identifies further matters which may be provided for in any regulations, for example provision about the

enforcement of orders (it would not be necessary to make such provision if, as we currently envisage, the normal rules governing contempt of court are to apply).

Preparation or training abroad for terrorism (amendments to clause 77)

Clause 72 of the Bill extends extra-territorial jurisdiction (ETJ) to enable persons who commit acts abroad that constitute an offence under section 5 (preparation of terrorist acts) or 6 (training for terrorism) of the Terrorism Act 2006 to be prosecuted in the UK. So that, in appropriate cases, early action can be taken to prosecute individuals carrying out preparatory activities and terrorist training abroad, these amendments provide for clause 72 to come into force on Royal Assent.

The explanatory statements published alongside the amendments explain the effect of the various minor and consequential amendments.

I attach supplementary ECHR and delegated powers memorandums in respect of relevant amendments.

I am copying this letter to all members of the Public Bill Committee, Keith Vaz (Chair, Home Affairs Select Committee), Sir Alan Beith (Chair, Justice Select Committee), Dr Hywel Francis (Chair, Joint Committee on Human Rights), Baroness Thomas of Winchester (Chairman, Delegated Powers and Regulatory Reform Committee), Baroness Smith of Basildon, Lord Rosser, Lord Laming, Baroness Hamwee, Lord Harris of Haringey and Lord Wigley. I am also placing a copy in the library of the House and on the Bill page of the Government website.

Karen Bradley