

# **Criminal Finances Bill**

## **Privacy Impact Assessment**

**December 2016**

### **Executive summary**

1. This document is the Privacy Impact Assessment (PIA) for the implementation of new measures included in the Criminal Finances Bill. The purpose of this PIA is to consider the privacy impact of the proposed legislation; and address any issues raised in the regulatory impact assessments covering each policy area.
2. This Privacy Impact Assessment (PIA) follows the approach and guidelines recommended by the Information Commissioner's Office (ICO). It considers the impact on privacy of the proposed legislation.
3. This PIA identifies the risks to privacy arising from the capabilities that will be available under the new legislation, and sets out the safeguards, existing and new, intended to address these risks (section 4). The PIA concludes with a Privacy Impact Statement (see section 5).
4. This document should be read in conjunction with the overarching Criminal Finances Bill Impact Assessment; and the standalone Impact Assessments covering each of the measures in the Bill. These documents can be found on the dedicated Criminal Finances Bill page on the Gov.uk website.

### **The case for legislation**

5. The purpose of the Bill is to make legislative changes necessary to significantly improve our capability to recover the proceeds of crime; to tackle money laundering and corruption; and to counter terrorist financing. The Bill seeks to make the UK a more hostile place for criminals to move, use and hide their proceeds of crime.

### **Background**

6. In October 2015, the Government published the National Risk Assessment for Money Laundering and Terrorist Financing (NRA). It provided a candid and robust assessment to better understand the UK's money laundering and terrorist finance risks, and to inform the efficient allocation of resources to the highest risks and where there will be the greatest impact.
7. In April 2016, the Government published an Action Plan for Anti-Money Laundering and Counter-Terrorist Finance setting out the steps that it will take to address the weaknesses identified in the National Risk Assessment. It focussed on three priorities: a more robust law enforcement response; reforming the supervisory regime; and increasing our international reach. All

three are underpinned by a commitment to building a new and powerful partnership with the private sector. The Bill is the vehicle to implement the legislative elements of the Action Plan, based on responses to the public consultation on the plan.

8. In May 2016, the Government hosted a landmark international Anti-Corruption summit in London. This brought together governments, businesses, civil society, law enforcement agencies, sports governance and other international organisations to step up global action to expose, punish and drive out corruption wherever it exists. This resulted in the first ever global declaration against corruption, committing all countries at the summit to work together to tackle it.
9. There is a need to legislate to tackle robustly the threat posed from serious and organised criminals. The provisions the Criminal Finances Bill will strengthen the capabilities of operational partners including the police, National Crime Agency (NCA), Serious Fraud Office (SFO), the regulated sector and Financial Conduct Authority (FCA) to detect, investigate, prosecute and disrupt the ability of serious criminals to hide and conceal their proceeds of crime and to prevent the financing of terrorism.

## **Strategy**

10. This legislation will help deliver a key part of the UK's Serious and Organised Crime strategy, by enhancing the capabilities of law enforcement to pursue serious and organised crime we hope to increase the protection of the public and to better ensure public safety. In addition, the Strategic Defence and Security Review (SDSR), published in November 2015 committed the Government to introducing "new measures to make the UK a more hostile place for those seeking to move, hide or use the proceeds of crime and corruption to evade sanctions".
11. The legislation is informed by close engagement with: the police, law enforcement and intelligence agencies; Government partners; the private sector; and international partners including overseas Governments and organisations who will be either have a wider responsibility or interest in its success or have similar policies in place currently and were able to share best practice. In addition, we undertook a public consultation on the Action Plan that has informed policy making.

## **Overview of the proposed legislation**

12. The objective of this legislation is to enhance the capabilities of law enforcement and operational partners to disrupt serious and organised crime; to prevent criminals benefiting from their proceeds of crime; to counter the financing of terrorism; and to make the UK a more hostile place for corruption.

An overview of each of the measures included in the Criminal Finances Bill is set out below:

### Unexplained Wealth Orders (UWOs)

13. The key elements of this power are:
- a. Unexplained Wealth Orders (UWOs) would require an individual to explain the origin of assets that appear to be disproportionate to his or her known income.
  - b. A rebuttable presumption that the property is the proceeds of crime would arise where the order is not complied with. This will make it easier for law enforcement agencies to recover the proceeds of corruption and other serious crime held in the UK.
  - c. A UWO would be made by the High Court, and would require the respondent to explain the origin of the property in question. A 'freezing order' could be applied for at the same allowing for the property in question to be frozen, for a strictly time limited period, while the UWO was dealt with.
  - d. A UWO can be used in cases where there is reasonable grounds to suspect that the individual or property involved is linked to criminality; or in relation to non-EEA Politically Exposed Persons (PEPs) – addressing a key driver behind this policy by targeting foreign officials that may seek to launder the proceeds of their grand corruption in the UK.
  - e. The respondent would be given a period of time to respond to the UWO. If a respondent fails to provide a satisfactory explanation in accordance with the UWO, the High Court can find that the property is available for recovery under existing civil recovery powers in the Proceeds of Crime Act. If a response is provided it can be used by the investigative agency to further develop their case against the individual in a civil recovery investigation.
  - f. A respondent commits an offence, if, in purported compliance with a requirement under a UWO, they make a statement that they know is false or misleading in a material way, or recklessly makes a statement that is false or misleading in a material way. If found guilty, a person is liable on conviction on indictment to a term of imprisonment not exceeding two years, or a fine or both (12 months on summary conviction).
  - g. In addition to the specific criminal offence of making a false or misleading statement, a law enforcement agency may alternatively elect to bring contempt of court proceedings if an individual fails to comply with an unexplained wealth order.
  - h. The value of the relevant property would need to be a minimum of £100,000.

### Disclosure Orders for money laundering and terrorist financing investigations.

14. The main elements of this power are to:
- a. Make an amendment to POCA and TACT extending the use of Disclosure Orders for money laundering and terrorist financing investigations.
  - b. Authorise a law enforcement officer to require someone they suspect has information relevant to an investigation to answer questions, provide

information or to produce documents on any matter that is relevant to that investigation.

#### Extension of the SARs moratorium period

15. The proposal is to reform the Suspicious Activity Reports (SARs) regime to allow senior officers in primarily law enforcement agencies to seek an extension to the moratorium period beyond the current 31 days to a maximum of 186 days. This would mean that providing a service in relation to property that is suspected to be criminally derived would be highly likely to result in the commission of a money laundering offence.

#### Information Sharing

16. The main elements of these proposals are to:

- a. Create a gateway that allows for the sharing of information between businesses that are subject to Money Laundering Regulations.
- b. Allow for regulated businesses to share information with each other, where they have notified the law enforcement agency that they suspect activity is related to money laundering or terrorist financing and provided all relevant information. That should in turn lead to one of the bodies in question submitting a further more detailed SAR. This measure will enable the submission of 'super SARs', which bring together information from multiple reporters into a single SAR that provides picture wider set of information to law enforcement agencies.
- c. Allow the law enforcement agency to request that a regulated company to share further information with them upon for investigation purposes

#### Power to request information

17. This power allows the NCA and a law enforcement officer for terrorist financing purposes to:

- a. Request any member of the regulated sector to provide further information in relation to a SAR, irrespective of whether they submitted the SAR. If the person does not comply, the law enforcement officer can apply to the Magistrate's Court for a Further Information Order. If the Order requirements are not fulfilled by the reporter they will face a fine of up to £5000.

#### Seizure of mobile stores of value

18. The main elements of this power are to:

- a. Enable the seizure of mobile stores of value including; casino tokens, precious metals and precious stones that are available for seizure under this power (see below for full list).
- b. Enable the Magistrates' Court to provide for this seizure or refer a case to a higher court if the value is significant, or the ownership of an item is disputed.

#### Forfeiture of bank accounts

19. The main elements of this proposal are to:

- a. Enable the seizure and forfeiture of criminal proceeds held in bank accounts or amounts held in bank accounts that are intended to be used for financing terrorism or belongs to a proscribed organisation without the need to secure a criminal conviction. The process and intention are similar to the existing powers in the Proceeds of Crime Act 2002 (POCA).

#### Criminal offences for corporations who fail to stop their staff facilitating tax evasion.

20. The main elements of this power are to:

- a. Create two new offences so that a corporation in this situation could be prosecuted – one to catch companies facilitating the evasion of UK taxes; another to cover evasion of foreign taxes facilitated by an entity that has some nexus with the UK (such as a UK-based office), and where there is dual criminality with the UK.
- b. Enable the imposition of a financial penalty as a result of prosecution under these offences. This may also lead to more significant knock-on effects i.e. the regulator may wish to cancel a bank's banking licence, or a corporation may be barred from bidding for certain contracts or operating in certain markets.

#### Other amendments to the Proceeds of Crime Act 2002 (POCA)

21. The main elements of these measures are to:

- a. To grant the Financial Conduct Authority and HMRC access to the civil recovery powers in the POCA 2002
- b. Extending POCA powers directly to the Serious Fraud Office
- c. Making it a criminal offence to obstruct/assault law enforcement officers
- d. Enabling the use of POCA investigation powers for confiscation order 're-visits'
- e. Allow the writing-off of orders made under the Drug Trafficking Offences Act 1986 in the same way as orders made under POCA
- f. Amending the levels of authorisation needed for the use of POCA search and seizure powers
- g. Expand the circumstances in which 'mixed property' is recoverable

#### Extension of powers to civilian Accredited Financial Investigators (AFIs) for terrorist finance purposes

22. This new legislation will extend investigation powers to civilian AFIs based in the police. The powers will:

- a. Amend TACT and ATCSA to allow civilian police staff to investigate the financial aspects of terrorism in addition to constables.

### **Existing measures**

23. This new legislation will principally add amendments to the existing suite of legislation that is already used to combat serious and organised crime and terrorist financing including; the Proceeds of Crime Act 2002, Terrorism Act 2000, and Anti-terrorism, Crime and Security Act 2001. A number of examples of existing measures under current legislation are:

### Proceeds of Crime Act 2002 (POCA)

- The ability to seize cash over £1,000 that is suspected to be the proceeds of crime or to be used for criminal purposes.
- The ability to seize assets over £10,000 through civil recovery proceedings if the property is suspected to be the proceeds of crime.
- The ability to use Disclosure Orders in confiscation investigations

### Terrorism Act 2002 (TACT) and Counter Terrorism and Security Act 2015

- The investigation powers available under TACT 2000 and POCA 2002 are separate regimes. While in theory, counter-terrorism policing could make use of the improvements being brought into effect through the Criminal Finance Bill to POCA and associated powers on money laundering, we are strengthening equivalent powers under terrorist legislation.
- In the case of terrorism, this is the terrorist finance offences as set out in the Terrorism Act 2000 (sections 15 – 18) and part 6 of the Counter Terrorism and Security Act 2015.

## **Overview of planned safeguards**

24. The UK already has in place a stringent framework of safeguards to strike the right balance between protecting the right to privacy and ensuring the proportionate use of law enforcement powers to prevent and detect crime. A significant number of the provisions in the Criminal Finances Bill are the extension of existing powers under POCA, TACT and ACTSA therefore adequate safeguards are already in place. A substantial proportion of the new legislation has inherent safeguards; the limited circumstances the powers can be used in provides limited scope for abuse. The current safeguards in place include amending existing or introducing new Codes of Practice to ensure consistency of application across the UK; independent judicial oversight; the Data Protection Act 1998; European Convention on Human Rights; and further administrative protections. In addition, the Home Office, Ministry of Justice and law enforcement agencies regularly publish guidance on how legislative measures should be used. For the provisions which create amendments to any terrorism legislation will be subject to scrutiny by The Independent Reviewer of Terrorism Legislation. The Criminal Finances Bill will strengthen the existing framework by introducing additional safeguards alongside protections that are currently in place.

25. We consider that these new safeguards provide a rigorous check against disproportionate interferences with individuals' and businesses right to privacy. These safeguards, along with the protections already in place, are examined in greater detail in section 4 below.

## Privacy Risks and Mitigation

The risk that the use of Unexplained Wealth Orders may infringe disproportionately on the privacy of individuals by unduly damaging their reputation.

26. The Bill includes provisions to enhance the existing investigatory powers to deal with corruption, money-laundering and serious crime. A UWO requires the respondent to produce an explanation for the source of their unexplained wealth. It may be sought against persons who are suspected of involvement in serious crime or are associated with such a person; and against non-EEA (European Economic Area) Politically Exposed Persons (PEPs). When using the UWO on a non-EEA PEP there is no requirement for suspicion of serious criminality. This measure is necessary to take action against property owned by persons involved in serious criminal activity and corruption, whether domestically or overseas. It addresses the difficulty for law enforcement agencies in obtaining evidence at the outset of such an investigation given that all relevant information may be outside of UK jurisdiction.

### *Safeguards*

27. The decision for a UWO to be granted will be subject to judicial oversight as an application will need to be made to the High Court. Furthermore, any statement made cannot not ordinarily be used as evidence in criminal proceedings against the individual making it. The ability to apply for a UWO will be reserved to the following bodies: National Crime Agency; Financial Conduct Authority (subject to Parliament extending civil recovery powers to this body – see below); HM Revenue and Customs (subject to Parliament extending civil recovery powers to this body); Crown Prosecution Service (or the Public Prosecution Service in Northern Ireland); or Serious Fraud Office. The Bill specifies a minimum threshold whereby a UWO cannot be obtained in respect of property whose aggregate value is not more than £100,000.

28. Use of the power is limited in one of two ways: either i) there must be reasonable grounds to suspect that the person's known or declared income would have been insufficient to obtain the property in question and there must be reasonable grounds to suspect that the individual or company is linked in some way to serious crime; or ii) they fall into the circumscribed category of non-EEA PEPs. It is arguable that the exclusion of UK and EEA PEPs could lead to the indirect effect of the provision being more likely to be used against non UK and EEA nationals by comparison with UK or EEA nationals. However, it is considered that any such indirect effect is justified on the grounds that there is a legitimate aim in having a mechanism to ascertain information in relation to property owned by such persons given the difficulties in obtaining such information that is often encountered in relation to non-EEA PEPs. It is considered that the safeguards on the use of the power ensure that its use will be proportionate. These difficulties are not present to the same extent in relation to UK and EEA PEPs. We consider the limited scope of this power provides inherent safeguards to prevent it from being used to disproportionately interfere with the right to privacy.

29. There is a presumption under existing court rules on civil recovery that applications for investigation powers will be held in private, having the effect of protecting the reputation of those involved. The Government will ensure that this principle is also true for UWO applications. This will ensure that the individual's reputation will not be damaged by the application to subject them to a UWO, and also ensure that law enforcement agencies are not deterred from exercising this power by potential claims against them by the subject.

#### The risk of infringing an individual's privacy by misusing Disclosure Orders

30. A Disclosure Order is an order authorising a law enforcement officer to require anyone that they think has information relevant to an investigation to answer questions, provide information or to produce documents. The provisions provide for an extension of powers that are currently available for confiscation, civil and exploitation investigation purposes under POCA. While the power to compel documentation or information may be viewed as an interference with privacy, the appropriate use of the power is safeguarded by the relatively high level of authorisation required as well as the investigating agency's obligations under an associated code of practice. In order to use a Disclosure Order a money laundering or terrorist financing investigation must already be underway.

#### *Continuing safeguards*

31. It is considered that the proportionate use of the power would be sufficiently assured by the requirement to have a money laundering or terrorist financing investigation in place, the senior authorisation required for an application and by judicial scrutiny of the process. Compelled evidence may not be used in criminal proceedings against the person making the statement or to obtain legally privileged material.

#### The risk of infringing on an individual's privacy if the extension of the SARs moratorium period power is misused

32. Under existing legislation, a reporter can avail themselves of a statutory defence against committing a money-laundering offence while providing financial services by submitting a Consent SAR report when suspicion arises. Where the NCA refuses to consent to proceed with the transaction, then they may no longer avail of the defence. A refusal of consent suspends the availability of the defence for 31 days.
33. In many circumstances, especially when information is located abroad, 31 days is not sufficient to progress an investigation to achieve for example restraint of assets. The Criminal Finances Bill allows LEAs to seek an extension to the moratorium period allowing for a longer freezing of the activity and the property behind it. There is a risk that an individual's right to lead a private and/or business life could be affected if their transactions or property was held up.



### *New Safeguards*

34. Financial investigators will be required to apply to the Crown Court to be granted permission for extending the time frame in which they have to investigate any transaction by up to 31 days. If they wish to extend the extension period, they will need to reapply to the court after each extension period. The following conditions ensure that privacy is not disproportionately inhibited:
- a. The ability to apply for an extension to the moratorium period is reserved to a senior officer;
  - b. The officer will have to satisfy a senior court that further time is required to investigate the disclosure for the purpose of potential criminal or civil recovery proceedings;
  - c. That an extension to the moratorium is necessary for that purpose and that the investigation is being conducted diligently and expeditiously.
  - d. All affected parties will have the right to be notified of the application and to be represented at the hearing.
  - e. The Court will have the power to extend the moratorium period by up to 31 days on each occasion an extension is sought.
  - f. There will be a limit of 186 days from the date of the commencement of the first moratorium period.
  - g. The Court must also have ensure that it is reasonable in all the circumstances for the moratorium

### The risk of infringing on an individual's privacy by misusing the power for private companies to share information

35. There is a risk that providers in the regulated sector could share data where not permitted to do so or otherwise mishandle the data they retain. It is possible, for example, that data on customers might be lost or misused or that data held might be exploited.
36. This is a change that will support information sharing provisions that have been successfully piloted since February 2015 by members of the Joint Money-Laundering Intelligence Taskforce (JMLIT). It is considered that while these provisions could potentially infringe on a person's privacy, they are justifiable as necessary and proportionate in a democratic society for the purpose of the prevention and detection of crime. In particular, the gateway is only triggered where there is suspicion that a person is engaged in money laundering. Appropriate notification must be provided to the law enforcement agency of the nature and extent of the information being shared and the sharing must be necessary for the purpose of assisting in the determination of any matter connected with the suspicion of money laundering. The processing and sharing of personal information, is regulated by the Data Protection Act 1998, which is overseen by the Information Commissioner. These data sharing powers are afforded protection against civil liability, however, data being shared as a result of this power will need to comply with the remaining provisions and safeguards laid out in the Data Protection Act 1998.

### *New Safeguards*

37. To prevent the misuse of data sharing the time available for the regulated companies to share data amongst themselves will be limited to a maximum of 28 days. The law enforcement agency will be notified when data begins to be shared, providing oversight to the process. The power solely covers information being shared for the purposes of money laundering investigation and any company found to be misusing these powers will be subject to penalty by the Information Commissioner's Office.

The risk that the power of the NCA or law enforcement agency (for terrorist financing purposes) to request a regulated company to provide further information in relation to a SAR will be misused.

38. Currently the NCA and law enforcement agencies can request that a regulated entity provides further information when investigating a SAR, however, there is no legislative duty for the regulated entity to comply at present. The Bill will enhance this provision and where there is non-compliance the law enforcement officers can apply to a Magistrate for an Order to compel the entity to provide the required information within a set timeframe. This has the potential to impede disproportionately on an individual's privacy.

### *Safeguards*

39. Where a person does not comply with a request, the order requiring them to do so will be subject to judicial approval. To obtain an Order an application will need to be made to and approved by the Magistrate's Court. This measure is deemed to be proportionate to the risk posed as this is simply an extension of the existing procedure. The regulated company would have already submitted a suspicious activity report to be able to request further information.

The risk of infringing on an individual's privacy by misusing the power to seize mobile stores of value and bank accounts.

40. We are aware that some types of personal property are used to transfer the proceeds of crime in the UK and internationally in a manner similar to cash. This property is also at risk of being used to fund terrorist activity. This power replicates the ability of LEAs to seize cash if they suspect that it is either the proceeds of crime, or that it is intended for the use in unlawful conduct including terrorism offences. It is considered that the powers are subject to sufficient legal safeguarding, including judicial oversight to ensure that law enforcement do not use them arbitrarily or otherwise misuse them to weaken privacy.

### *Safeguards*

41. The key safeguard of these seizures powers is that the LEA must have 'reasonable grounds for suspecting' that the property is either the proceeds of crime, or that it is intended for use in unlawful conduct. A further safeguard in place for cash seizure that will be replicated for this power is that the aggregated value of the seized property is over £1,000 (for money laundering). No such threshold will exist in relation to terrorist finance

investigations, the sums of money involved in terrorist financing are usually small but the potential implications are considerable. We therefore consider this measure to be proportionate to the threat that terrorist financing poses to the UK and its citizens. A Statutory Code of Practice will also be created for operational partners.

42. There will be a right to appeal against both the further detention of the item, and the forfeiture of the items. This will replicate the existing provision for appealing against cash seizure set out in POCA 297E and 297F. The mobile stores of value provisions will be limited to a list of items specified in the Bill, which could be edited by affirmative Order. The list includes:
- Precious metals.
  - Precious stones.
  - Artistic works.
  - Gift vouchers (not cards).
  - Watches.
  - Postage stamps.
43. As the value of the items seized may be difficult to assess on the spot (unlike cash), an officer would be able to seize the goods, assess their value, and either retain or return them. The initial seizure is subject to review by a senior officer, within six hours.
44. There will be no 'administrative forfeiture' available for mobile stores of value. A Magistrate's court would have to make any order of forfeiture.

The risk of a designated Accredited Financial Investigators (AFIs) for Terrorist Finance purposes.

45. While the financial investigation powers afforded to AFIs could be considered intrusive and have the potential to infringe on privacy there are a number of safeguards that have been in place for AFIs under POCA that will be replicated. The threat posed from terrorism is so significant that these powers are justified given the safeguards which will be in place and the extension of these provisions will be limited to civilian police staff.

*Safeguards*

46. AFIs undertake financial investigation training in order to be designated. Upon receiving their designation as an AFI they will be subject to monitoring by the AFI accrediting body.

**Privacy Impact Statement**

47. This Privacy Impact Assessment has been carried out to assess the risks to privacy posed by the work carried out on the basis of the proposed legislation. It is assessed that implementation of the proposed legislation is capable of being fully compliant with relevant domestic and international law; and appropriate checks and balances are in place.