Law Commission
Reforming the law

Anti-money laundering: the SARs regime

HC 2098

Law Com No 384

Law Commission
Reforming the law

(Law Com No 384)

Anti-money laundering: the SARs regime

Report

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons to be printed on 18 June 2019.

HC 2098

This publication is available at www.gov.uk/government/publications

Any enquiries regarding this publication should be sent to us at anti-money-laundering@lawcommission.gov.uk.

ISBN 978-1-5286-1191-6

CCS0419963024 06/19

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the APS Group on behalf of the Controller of Her Majesty's Stationery Office

The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Right Honourable Lord Justice Green, Chairman

Professor Nick Hopkins

Stephen Lewis

Professor David Ormerod QC

Nicholas Paines QC

The Chief Executive of the Law Commission is Phil Golding.

The Law Commission is located at 1st Floor, Tower, 52 Queen Anne's Gate, London SW1H 9AG.

The terms of this report were agreed on 27 March 2019.

The text of this report is available on the Law Commission's website at http://www.lawcom.gov.uk.

Contents

Glossary[1]

(1) **Account Freezing Order –** Account Freezing Orders allow a variety of law enforcement agencies to apply to the magistrates' court to freeze bank accounts they suspect hold criminal property. The relevant provisions are set out in sections 303Z1 to 303Z3 of the Proceeds of Crime Act 2002.

(2) **Action Fraud –** Action Fraud is the reporting mechanism for the National Fraud Intelligence Bureau within the City of London Police.

(3) **Advisory Board –** Advisory Boards are usually independent bodies with a remit to review or evaluate a particular part of the law.

(4) **Authorised disclosure** – Authorised Disclosures are voluntary disclosures, triggered when a person[2] has a suspicion that they have encountered criminal property and wishes to do one of the acts prohibited in sections 327-329 of the Proceeds of Crime Act 2002. He or she may make an authorised disclosure to a constable (including officers in the UK Financial Intelligence Unit ("UKFIU")), customs officer or nominated officer. Authorised disclosures are made by filing a suspicious activity report (SAR, see below).

(5) **Association of British Insurers** – The Association of British Insurers ("ABI") is the leading trade association for insurers and providers of long-term savings.

(6) **The British Private Equity and Venture Capital Association** – The British Private Equity and Venture Capital Association ("BPEVCA") is the industry and public policy advocate for the private equity and venture capital industry.

(7) **Code of practice** – A code of practice is an authoritative statement of practice to be followed in some field. It typically differs from legislation in that it offers guidance rather than imposing requirements.

(8) **Consent regime** – The consent regime refers to the process by which a person who suspects he or she is dealing with the proceeds of crime can seek consent to complete a transaction by making an authorised disclosure to the United Kingdom Financial Intelligence Unit. No criminal offence is committed where an authorised disclosure is made and appropriate consent to proceed with an act otherwise proscribed by sections 327 to 329 of the Proceeds of Crime Act 2002 is given.

---

1 These definitions are intended to provide a brief summary of key terminology used in this report. For detailed discussion of these terms, see Chapters 2 and 3 of CP 236 and for the legislative provisions please see Appendix 3.

2 In this report, although any individual may make an authorised disclosure, we will focus on individuals making disclosures which arise out of their employment within a bank or business, or in the course of providing a professional service or giving professional advice as this is the most common context in which reports are lodged.

(9) **Criminal property** – Criminal property is defined in section 340 of the Proceeds of Crime Act 2002 as property that constitutes a person's benefit from criminal conduct (in whole or part and whether directly or indirectly) where the alleged offender knows or suspects that it constitutes or represents such a benefit.

(10) **Defence against Money Laundering** – ("DAML") The term used by the UKFIU to describe an authorised disclosure in which the suspicion relates to money laundering – see above, where a reporter seeks a defence to an offence under the Proceeds of Crime Act 2002.

(11) **Defence against Terrorist Financing** - ("DATF") of the term used by the UKFIU to describe an authorised disclosure in which the suspicion relates to terrorism financing – see above, where a reporter seeks a defence to an offence under the Terrorism Act 2000.

(12) **Debanking** – The practice of withdrawing banking facilities from a customer due to the perceived risk he or she presents to the bank.

(13) **ELMER** – refers to the computerised system used by the UKFIU to process SARs. Reports are stored on the ELMER database for six years and may be accessed by a law enforcement agency during that time.

(14) **Financial Action Task Force** – The Financial Action Task Force ("FATF") is an intergovernmental body whose objectives are to set standards and promote effective implementation of legal, regulatory and operational measures for combatting money laundering, terrorist financing and other related threats to the integrity of the international financial system.

(15) **Financial Conduct Authority** – The Financial Conduct Authority ("FCA") is the conduct regulator for 58,000 financial services firms and markets in the United Kingdom.

(16) **Fourth Anti-Money Laundering Directive** – This is the fourth European Union directive to address the risk of money laundering.

(17) **Further Information Orders** – Further Information Orders ("FIOs") can be sought on application to the magistrates' court. An FIO can require the person making a disclosure (to the United Kingdom Financial Intelligence Unit) or any person carrying on a business in the regulated sector to provide specified information, or any other information that the court deems appropriate, in relation to a matter arising from a disclosure under Part 7 of the Proceeds of Crime Act 2002.

(18) **Geographic Targeting Order** – A Geographic Targeting Order ("GTO") is a specific form of thematic reporting, focussing on a particular location where a transaction or activity is occurring.

(19) **High street bank** – A high street bank is a credit institution which offers banking services to the general public. The term is generally reserved for larger, more widespread organisations with multiple branches.

(20) **High value dealers** – Under the Money Laundering Regulations, a high value dealer is any business or sole trader that accepts or make cash payments of €10,000 or more (or equivalent in any currency) in exchange for goods.

(21) **Historical crime** – For the purposes of this publication a "historical crime" refers to an offence perpetrated more than five years before an authorised disclosure was made to the United Kingdom Financial Intelligence Unit.

(22) **Her Majesty's Revenue & Customs** – Her Majesty's Revenue and Customs ("HMRC") is a non-ministerial department of the UK Government responsible for the collection of taxes, the payment of some forms of state support and the administration of other regulatory regimes.

(23) **Indictable offence** – An indictable offence is an offence which, if committed by an adult, is triable on in the Crown Court before a judge and jury, whether it is exclusively so triable or triable either way.[3]

(24) **Home Office Circular** – Home Office Circulars are documents used to communicate, or provide updates on Home Office policies.

(25) **Joint Money Laundering Intelligence Task Force** – The Joint Money Laundering Intelligence Task Force ("JMLIT") is a public-private partnership that facilitates information sharing between banks in the regulated sector and law enforcement agencies. It operates in accordance with the information gateway provisions contained in the Crime and Courts Act 2013.

(26) **Law enforcement agency** - Law enforcement agencies ("LEA") are organisations with responsibility for enforcing the criminal laws of the United Kingdom. In this context law enforcement agencies include, the National Crime Agency, the police and other bodies such as the Serious Fraud Office who investigate suspected money laundering and associated criminality.

(27) **Money Laundering Reporting Officer ("MLRO")** – Under FCA rules, a firm must appoint an individual as MLRO, with responsibility for oversight of its compliance with the FCA's rules on systems and controls against money laundering. The job of the MLRO is to act as the focal point within the relevant firm for the oversight of all activity relating to anti-money laundering.[4] The MLRO may also act as the "nominated officer", an individual with responsibility within a firm, company or other organisation to submit SARs to the UKFIU (see below).

(28) **Money Service Business** – A business which operates as a currency exchange office, transmits money (or any representation of monetary value) by any means or cashes cheques which are made payable to customers.[5]

---

3 Interpretation Act 1978, sch. 1.

4 Financial Conduct Authority Handbook SYSC 3.2.6IR and SYSC 3.2.6JG.

5 The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017 No 692, Chapter 3.

(29) **Mandate** – A service contract between a customer and their bank which gives the bank authority to act on the customer's behalf.

(30) **Moratorium period** – if a request for consent is refused during the statutory seven-day notice period, a statutory moratorium period of 31 calendar days begins. This allows further time for investigation. The Criminal Finances Act 2017 amended Part 7 of POCA to empower a Crown Court judge to grant an extension to the moratorium period up to a further 186 days in total on application.[6]

(31) **Nominated Officers** - The nominated officer's obligation to disclose only arises where they receive a required disclosure from another person (pursuant to section 330 of POCA) informing them of a knowledge or suspicion of money laundering.[7]

(32) **National Crime Agency** – The National Crime Agency is a non-ministerial government department with oversight of national law enforcement agencies in the United Kingdom. It is the UK's lead agency against organised crime; human, weapon and drug trafficking; cyber-crime; and economic crime that goes across regional and international borders, but can be tasked to investigate any crime.

(33) **Proceeds of Crime Lawyers Association** – The Proceeds of Crime Lawyers Association ("POCLA") is an association of lawyers established to foster and encourage best practice in matters involving the proceeds of criminal conduct.

(34) **Pecuniary advantage** – In this report, a "pecuniary advantage" refers to a financial advantage (other than property) obtained through criminal conduct. Section 340 of the Proceeds of Crime Act 2002 deems a person to have obtained a sum of money equivalent to any pecuniary advantage they have obtained.

(35) **Predicate offence** – A criminal offence which generates the proceeds of crime that may become the subject of any of the money laundering offences.

(36) **Principal money laundering offences** – Refers to the criminal offences in sections 327 to 329 of the Proceeds of Crime Act 2002 that prohibit particular dealings with actual or suspected criminal property and can be contrasted with the failure to report offences.

(37) **Reporter -** We use the term reporter to mean a person who has either an obligation to report under Part 7 of POCA or who makes a voluntary disclosure

---

6 Proceeds of Crime Act 2002, s335(6), 335(6A), 336A, B, C, and D and the Criminal Finances Act 2017, Part 1, s 10(2) (s 335(6A) in force, October 2017, subject to transitional provisions specified in SI 2017 No.991 reg 3(1)). See Home Office Circular 008/2018 [Criminal Finances Act: extending the moratorium period for suspicious activity reports]. See also CP 236 at para. 2.23.

7 A nominated officer is a person who is nominated within a firm, company or other organisation to submit suspicious activity reports on its behalf to the United Kingdom Financial Intelligence Unit.

seeking consent in order to protect themselves from a committing a money laundering offence under Part 7 of POCA.

(38) **Required disclosure** – Refers to the statutory obligation to make a report where a person knows or suspects, or has reasonable grounds to know or suspect that a person is engaged in money laundering. A failure to make a required disclosure is a criminal offence for which reporters can be found personally liable.[8] Required disclosures provide law enforcement agencies with intelligence and the opportunity to disrupt criminality.

(39) **Safe harbour** – For the purposes of this report a "safe harbour" refers to the notion that compliance with relevant guidance should provide reporters with a defence to a criminal offence under Part 7 of the Proceeds of Crime Act 2002.

(40) **Serious Organised Crime Agency** – The Serious Organised Crime Agency ("SOCA"), a forerunner of the National Crime Agency, is a former non-departmental national law enforcement agency that operated from 2006 to 2013.

(41) **Spanish bullfighter issue** – A shorthand reference for the application of money laundering provisions to the proceeds of an activity legal in a foreign jurisdiction, but illegal under the criminal law of the relevant part of the UK.

(42) **Suspicious Activity Report** – Suspicious Activity Reports ("SARs"), are an electronic or paper document in which the reporter discloses their suspicions of money laundering to the UKFIU, in accordance with their obligations under sections 330 to 332 or voluntarily pursuant to 338 of the Proceeds of Crime Act 2002.

(43) **Statutory guidance** – A statute may empower a Minister to issue guidance about the operation of its provisions. Although such statutory guidance is not to be treated as legislation, it is capable of having a legal effect. The courts will give guidance produced under a statutory power greater weight than guidance produced voluntarily.

(44) **Supervisory authority** – In this report a supervisory authority is a body with responsibility for supervising compliance with anti-money laundering legislation. Schedule 9, paragraph 4 to the Proceeds of Crime Act 2002 lists 25 supervisory authorities.

(45) **The regulated sector** – The regulated sector refers to those institutions specified in Schedule 9, paragraph 1 to the Proceeds of Crime Act 2002 (and corresponding provisions in the Terrorism Act 2000) which are subject to particular obligations under anti-money laundering legislation. This includes a broad range of sectors, such as credit institutions, those providing legal and accounting services and high value dealers.

---

[8] Reporters who fail to submit a required disclosure will be liable unless they fall within one of the narrow exceptions to the failure to disclose offence. The exceptions available will vary depending on the status of the reporter and whether they were operating within or outside of the regulated sector.

(46) **Thematic reporting** – Thematic reporting is an administrative approach to reporting suspicious activity which requires reports to be made based on set criteria irrespective of suspicion.

(47) **Terrorist financing** – Terrorist financing concerns money or other property likely be used for the purposes of terrorism and any proceeds of the commission of acts of terrorism or acts carried out for the purposes of terrorism.

(48) **United Kingdom Financial Intelligence Unit** – The United Kingdom Financial Intelligence Unit ("UKFIU") sits within the National Crime Agency and is responsible for receiving, analysing and disseminating suspicious activity reports.

(49) **Value transfer system** – A value transfer system refers to a mechanism, or network of people, which operates outside of formal banking channels to facilitate the transfer of goods and money directly, even to users in remote locations.

Chapter 1: Introduction

THE PROJECT AND OUR TERMS OF REFERENCE

1.1 In 2017, the Law Commission agreed with the Home Office to review and make recommendations for reform of particular aspects of the anti-money laundering regime in Part 7 of the Proceeds of Crime Act 2002 ("POCA") and of the counter-terrorist financing regime in Part 3 of the Terrorism Act 2000 ("TA"). This followed a discussion of ideas for inclusion in the Law Commission's Thirteenth Programme of Law Reform.

1.2 The primary purpose of the review is to improve the prevention, detection and prosecution of money laundering and terrorism financing in the United Kingdom ("UK").[1] However, our review is limited in scope. Our aim is to address systemic problems in the suspicious activity reporting process, in particular the "consent regime", to ensure that it is proportionate and efficient.

1.3 We agreed the following Terms of Reference with the Home Office:

(1) The review will cover the reporting of suspicious activity in order to seek a defence against money laundering or terrorist financing offences in relation to both regimes.

(2) Specifically, the review will focus on the consent provisions in sections 327 to 329 and sections 335, 336 and 338 of the Proceeds of Crime Act 2002, and in sections 21 to 21ZC of the Terrorism Act 2000.

(3) The review will also consider the interaction of the consent provisions with the disclosure offences in sections 330 to 333A of the Proceeds of Crime Act 2002 and sections 19, 21A and 21D of the Terrorism Act 2000.

(4) To achieve that purpose, the review will analyse the functions of, and benefits and problems arising from, the consent regime, including:

(a) the defence provided by the consent regime to the money laundering and terrorist financing offences;

(b) the ability of law enforcement to suspend suspicious transactions and thus investigate money laundering and restrain assets;

(c) the ability of law enforcement to investigate, and prosecutors to secure convictions, as a consequence of the wide scope of the money laundering and terrorist financing offences;

[1] It should be noted throughout this report that the Law Commission's remit covers England and Wales only.

(d) the abuse of the automatic defence to money laundering and terrorist financing offences provided by the consent provisions;

(e) the underlying causes of the defensive over-reporting of suspicious transactions under the consent and disclosure provisions;

(f) the burden placed by the consent provisions and disclosure provisions on entities under duties to report suspicious activity; and

(g) the impact of the suspension of transactions under the consent provisions on reporting entities and entities that are the subject of reporting.

(5) The review will then produce reform options that address these issues. In doing so, the review will take into consideration the Fourth Anti-Money Laundering Directive and the recommendations of the Financial Action Task Force, as well as the effect of new legislation or directives, such as the Criminal Finances Act 2017, the Fifth Anti-Money Laundering Directive, the Payment Services Directive 2, and the General Data Protection Regulation.

(6) The review will also gather ideas for wider reform which may go beyond the focussed Terms of Reference noted above. These will be intended to provide a basis for future development of the anti-money laundering and counter-terrorist financing regimes.

1.4 Before we provide a general overview of our recommendations and the structure of the report, we begin with a brief explanation of what money laundering is. We also explain how the disclosure of information about individuals and businesses by the private sector is linked to preventing and detecting the flow of criminal funds in the UK.

MONEY LAUNDERING AND THE UK'S LEGAL RESPONSE

1.5 Money laundering, in very general terms, describes the processing of criminal property in order to disguise its illegal origin. As Professor Liz Campbell observes:

> There is a lack of clarity as to the scope of the concept of money laundering, rendering it difficult to study and to measure. Legally the term encompasses not only the orthodox understanding of the "cleaning" of assets, but also their concealment, conversion, transfer and removal.[2]

1.6 The Government's Serious and Organised Crime Strategy, published in November 2018, described the problem of illicit funds faced by the UK:

> …illicit finance involves the holding, movement, concealment, or use of monetary proceeds of crime that has an impact on UK interests. Organised crime groups and corrupt elites launder the proceeds of crime through the UK to fund lavish lifestyles and reinvest in criminality.

[2] See Campbell, L, Dirty Cash (money talks): 4AMLD and the Money Laundering Regulations 2017 [2018] Crim LR, 103.

The vast majority of financial transactions through and within the UK are entirely legitimate, but its role as a global financial centre and the world's largest centre for cross-border banking makes the UK vulnerable to money laundering. There is a realistic possibility that the scale of money laundering impacting the UK annually is in the tens of billions of pounds.[3]

The UK's anti-money laundering framework[4]

1.7 As we explained in our Consultation Paper, our focus in this review is on four aspects of the existing anti-money laundering and counter-terrorist financing regimes in the UK.

1.8 Part 7 of the Proceeds of Crime Act 2002 created:

(1) three offences of money laundering which apply to the proceeds of any criminal offence;

(2) legal obligations to report suspected money laundering bolstered by criminal offences for failures to disclose;

(3) a complementary "consent regime" of authorised disclosures (Defence Against Money Laundering or (DAML SARs)); this offers the UKFIU ("UKFIU"), which is part of the National Crime Agency ("NCA") the opportunity to grant or refuse consent to proceed with a transaction.[5] Where consent is granted, the reporter is protected from criminal liability for what might otherwise have been a money laundering offence under sections 327 to 329 of POCA; and

(4) a prohibition on warning any person not authorised to receive the information that a report had been made to the authorities or an investigation had begun ("tipping off").

1.9 A parallel regime operates in relation to counter-terrorist financing and is contained in Part 3 of the Terrorism Act 2000. As we identified in our Consultation Paper, our focus has primarily been on Part 7 of POCA as, first, the number of terrorist financing SARs in which consent was sought is relatively small and, secondly, stakeholders were broadly in agreement that the issues identified in relation to the consent regime under Part 7 of POCA are not replicated in relation to counter-terrorist financing.[6]

---

3 HM Government, *Serious and Organised Crime Strategy* (November 2018), pp 13-14.

4 This is a non-exhaustive summary of the current law. For a fuller summary please see CP 236 and for the legislative provisions please see Appendix 3.

5 Deemed consent may also arise when (1) an individual who makes an authorised disclosure does not receive notice that consent to the doing of the act is refused before the end of the statutory seven-day notice period. See Proceeds of Crime Act 2002, s335(2) and 335(3); or (2) an individual who makes an authorised disclosure does receive notice of refusal of consent during the notice period but the moratorium period has expired (subject to any application to extend the moratorium period). See Proceeds of Crime Act 2002, s 335(2) and 335(4).

6 For a summary of the relevant provisions under the Terrorism Act 2000, see CP 236, Chapter 3.

1.10 The anti-money laundering and counter-terrorist financing framework is supplemented by the Financial Action Task Force Recommendations and European Union ("EU") Directives.[7]

The money laundering offences

1.11 Part 7 of POCA creates three principal money laundering offences.[8]

1.12 The offences in sections 327, 328 and 329 of POCA are intended to criminalise specific acts of money laundering. A person commits an offence of money laundering if he or she:

(1) conceals; disguises; converts; transfers; or removes criminal property from England and Wales, Scotland or Northern Ireland; or[9]

(2) enters into or becomes concerned in an arrangement which he or she knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person;[10] or

(3) acquires criminal property; uses criminal property; or has possession of criminal property.[11]

1.13 There are a number of legal exemptions and defences to the principal money laundering offences which were discussed in detail in our Consultation Paper.[12] However, our focus is on the consent regime which is underpinned by the authorised disclosure exemption. This exemption applies to any individual but for the purposes of this report, we focus on how the exemption relates in practical terms to individuals in banks and businesses who encounter suspected criminal property. In the next section, we deal with some of the key concepts in Part 7 of POCA and look at the legislative framework of the disclosure regime.

---

7 Domestic anti-money laundering provisions have been supplemented by successive EU Directives on money laundering. These have been implemented by Regulation in the UK.4AMLD was agreed in June 2015 and implemented in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("The Money Laundering Regulations 2017"). The Money Laundering Regulations 2017 create a system of regulatory obligations for businesses under the supervision of the Financial Conduct Authority and the relevant professional and regulatory bodies recognised within the Regulations. Additionally, the UK is one of the founding members of Financial Action Task Force, an inter-governmental body established in 1989 to set standards in relation to combatting money laundering and terrorist financing. Its recommendations are recognised as the international standard for anti-money laundering regulation. The recommendations set out a framework of measures to be implemented by its members and monitored through a peer review process of mutual evaluation.

8 Proceeds of Crime Act 2002, s 340(11) and ss 327 to 329.

9 Proceeds of Crime Act 2002, s 327.

10 Proceeds of Crime Act 2002, s 328.

11 Proceeds of Crime Act 2002, s 329.

12 See para. 2.69 of CP 236.

Key concepts

1.14 There are three important concepts common to the money laundering offences which are examined in detail below: "criminal property", "suspicion" and "criminal conduct".

Criminal property

1.15 Each of the principal money laundering offences is conditional upon the action in question (eg transferring or using) being done in relation to "criminal property". If the property is not criminal in nature, the principal offences in sections 327 to 329 of POCA are not committed.

1.16 For property to be "criminal", for the purposes of Pt 7 of POCA, it must satisfy two conditions:

(1) it must constitute a person's benefit from criminal conduct or represent such a benefit (in whole or in part and whether directly or indirectly); and

(2) the alleged offender must know or suspect that it constitutes or represents such a benefit.[13]

1.17 A person will be considered to have benefited from criminal conduct if he or she obtains some property (or other financial advantage) as a result of or in connection with the conduct.[14]

1.18 Criminal property has been broadly defined by the legislation. Whilst criminal proceeds may take the form of cash, more sophisticated levels of laundering are also accounted for. The definition would include a house or a car purchased with the proceeds of criminal activity. Criminal property is not restricted to physical money in the form of notes and coins. A credit balance on a bank account or equity shares in a company would fall within this wide definition.[15]

Suspicion

1.19 Suspicion is a key component of the money laundering offences. It is the minimum mental state required for the commission of an offence under sections 327, 328 and 329.[16] The fact that a person suspects that property is criminal may, depending on the circumstances, also trigger a reporting obligation under sections 330, 331 and 332 which will be considered below. In the absence of a statutory definition or guidance, it has been left to the courts to determine what "suspicion" means.

1.20 In the context of money laundering, the leading authority on the meaning of suspicion is *R v Da Silva.*[17] In this case, the Court of Appeal considered the correct interpretation

---

13 Proceeds of Crime Act 2002, s 340(3), (4).

14 Proceeds of Crime Act 2002, s 340(5) to (7).

15 Proceeds of Crime Act 2002, s 340(9).

16 Proceeds of Crime Act 2002, s 340(3)(b); a person must suspect that the property in question is criminal property.

17 [2006] EWCA Crim 1654, [2006] 2 Cr App R 35.

of suspicion within the meaning of section 93A(1)(a) of the Criminal Justice Act 1988 (the predecessor to the Proceeds of Crime Act 2002):

> What then does the word "suspecting" mean in its particular context in the 1988 Act? It seems to us that the essential element in the word "suspect" and its affiliates, in this context, is that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be "clear" or "firmly grounded and targeted on specific facts", or based upon "reasonable grounds".[18]

Criminal conduct

1.21 Criminal conduct is defined broadly as conduct which "constitutes an offence in any part of the United Kingdom".[19] The UK's approach to money laundering is described as an "all-crimes" approach. That means simply that laundering the proceeds of *any crime* of *any value* whatsoever will amount to the offence.[20] It is not limited to serious crimes, certain types of offending, or those punishable with imprisonment.

1.22 Criminal conduct is conduct which:

(a) constitutes an offence in any part of the United Kingdom; or

(b) would constitute an offence in any part of the United Kingdom if it occurred there.[21]

1.23 Conduct abroad which would be legal in that country but unlawful somewhere in the United Kingdom is sufficient. For example, conduct that took place in Egypt might amount to fraud in the UK and would therefore be criminal conduct for the purposes of section 340 of POCA. However, the limited exceptions to this will be discussed further at paragraph 2.73 below.[22]

1.24 There is no temporal limit to criminal property; it does not matter whether the criminal conduct occurred before or after the passing of POCA. If the property is generated by criminal activity at any stage, its use in any of the ways described in sections 327 to 329 is proscribed. For example, if an offender stole a painting and kept it for decades, it would remain criminal property regardless of the passage of time. It is an "all-crimes" "for all time" approach.

Authorised disclosures

1.25 An individual who suspects that they are dealing with the proceeds of crime can seek consent to complete a transaction by disclosing their suspicion to the UK Financial Intelligence Unit ("UKFIU"), a function as part of the National Crime Agency ("NCA"). A

---

18 [2006] EWCA Crim 1654, [2006] 2 Cr App R 35.

19 Proceeds of Crime Act 2002, s 340

20 Theft Act 1968, s 12(5) and (6). This offence is punishable on summary conviction with a fine not exceeding level 3 on the standard scale.

21 Proceeds of Crime Act 2002, s 340.

22 See Serious Organised Crime and Policing Act 2005, s 102 and the Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006, SI 2006 No 1070.

money laundering offence is not committed under sections 327 to 329 of the Proceeds of Crime Act 2002 where a person makes an "authorised disclosure" to the authorities and acts with "appropriate consent". The money laundering offences are widely drawn and the fault threshold for criminality, currently set at suspicion, is a low one. In addition, the all-crimes approach means that the proceeds of any criminal activity are caught by the offences in 327 to 329 of POCA. To balance this, the opportunity to obtain consent by making an authorised disclosure offers comfort and necessary legal protection, particularly to those who may, in the course of their profession, encounter property which they are suspicious may have criminal origins. Without such an exemption, such a low threshold would have a far-reaching impact and potentially place a large number of people at risk of criminal liability. For example, this exemption would apply where bank official suspects criminal property is in an account. That fact can be disclosed to the authorities and consent obtained to continue to process relevant transactions. An employee of a bank may frequently encounter situations in which they suspect property is criminal in origin and the authorised disclosure exemption mitigates the effect of such wide offences.

1.26 For a disclosure to be authorised, it must be made to either a nominated officer (a person nominated within a company, firm or other organisation to receive reports of suspicious activity), a constable, or a customs officer. The matter disclosed is that the property is known or suspected to be criminal property.

1.27 The timing of the disclosure is important. To benefit from the exemption, the disclosure must be made either:

(1) before the transaction is undertaken;

(2) during a transaction if the reporter only suspected that they were dealing with criminal property once they had begun to handle the property; or

(3) after the fact, if there was a reasonable excuse.[23]

1.28 If the disclosure is made during or after the transaction has taken place, the disclosure must be made on the reporter's own initiative and as soon as is practicable after the knowledge or suspicion arose.[24]

1.29 In broad terms, in return for their authorised disclosure, if consent is not refused by the UKFIU, the reporter receives protection against criminal liability for a money laundering offence. Therefore, authorised disclosures have a dual function: they both provide intelligence to law enforcement agencies (police forces in the relevant region), and may shield the reporter from relevant criminal liability. This process is known as the "consent regime". For example, a bank may become suspicious that funds in a customer's account represent the proceeds of crime. If the customer asks the bank to make a payment in accordance with their mandate, the bank will make a disclosure to the UKFIU to obtain consent to proceed with the transaction. Provided consent is not refused, the reporter will be brought within a statutory exemption which effectively

---

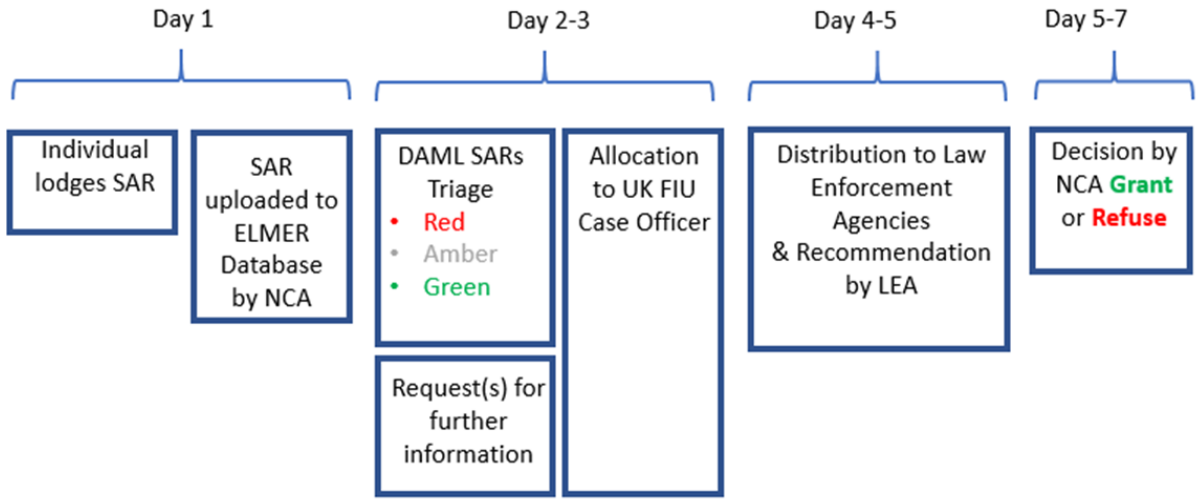
[23] Proceeds of Crime Act 2002, ss 327(2)(a), 328(2)(a), 329(2)(a) and 338.

[24] Proceeds of Crime Act 2002, s 338(3)(c).

precludes any future money laundering charge against the reporter in relation to that transaction.

1.30 The UKFIU facilitates the disclosure process by acting as the intermediary for intelligence between the private sector and law enforcement agencies. When an authorised disclosure is submitted, it is analysed by UKFIU and made available to law enforcement agencies who will investigate and decide whether to take further action. Because of the time it takes to conduct an investigation and intervene to preserve criminal assets, the authorised disclosure scheme requires the reporter to refrain from processing the transaction as they will not be protected by the statutory exemption if they undertake one of the prohibited acts in section 327-329 without appropriate consent. This allows time for the UKFIU to take a fully informed decision on whether to consent to the transaction proceeding.[25]

Life of an authorised disclosure[26]



Required disclosures

1.31 The legislation distinguishes between two types of disclosure that are made to the UKFIU: "required disclosures" and "authorised disclosures."[27] The important distinction is between whether the disclosure is required by law or whether the reporter wishes to protect themselves from a potential money laundering charge and makes a voluntary disclosure. If a reporter fails to lodge a SAR in accordance with their obligations under Part 7 of the Proceeds of Crime Act 2002, he or she may be liable for prosecution for

---

25 UKFIU may give appropriate consent, refuse consent or not give notice of either a grant or refusal in which case Proceeds of Crime Act 2002, ss335(2)-(4) apply. See also Proceeds of Crime Act, 2002, s 336(5)-(6).

26 This diagram is intended to provide a general description of the process, it may not be representative of all cases. For example, a decision may be made prior to days 5 to 7: Deemed consent may also arise when (1) an individual who makes an authorised disclosure does not receive notice that consent to the doing of the act is refused before the end of the statutory seven-day notice period. See Proceeds of Crime Act 2002, s335(2) and 335(3); or (2) an individual who makes an authorised disclosure does receive notice of refusal of consent during the notice period but the moratorium period has expired (subject to any application to extend the moratorium period). See Proceeds of Crime Act 2002, s 335(2) and 335(4).

27 See also voluntary information sharing provisions in Criminal Finances Act 2017, ss 339ZB-339ZG and Terrorism Act 2000, ss 21CA-21CF.

one of three disclosure offences, depending on his or her status and whether they were acting within or outside the regulated sector.

1.32 As outlined above, a reporter is obliged to disclose their suspicion that another person is engaged in money laundering. This is known as a "required disclosure". If a disclosure is not made, the person who ought to have reported is liable to be prosecuted for a criminal offence.

The regulated sector

1.33 The regulated sector is defined in Schedule 9 to the Proceeds of Crime Act 2002 and the original definition has been amended by various legislative provisions and EU law. Broadly, the regulated sector encompasses businesses where their activity presents a high risk of money laundering or terrorist financing. Businesses may be included within the definition by virtue of the type of activity they undertake. For example, the acceptance by a credit institution of deposits or other repayable funds from the public, or the granting by a credit institution of credits for its own account brings banks into the regulated sector. A firm of solicitors who undertake conveyancing work would be included as they are "participating in the buying or selling of real property" and would fall within the definition in Schedule 9. In addition, those who trade in goods are brought within the regulated sector whenever a transaction involves the making or receipt of a payment or payments in cash of at least €10,000 in total. This threshold applies whether the transaction is executed in a single operation or in several operations which appear to be linked, by a firm or sole trader who by way of business trades in goods. However, as the nature of the activity is relevant, it is possible that a business may undertake some work which falls within the definition of the regulated sector and other work which does not.

Failure to disclose by those working within the regulated sector

1.34 Section 330 applies to a person acting in the "course of a business in the regulated sector" who fails to make a "required disclosure". Disclosure is required where four conditions are met:

(1) he or she "knows or suspects" or has "reasonable grounds for knowing or suspecting") that another person is engaged in "money laundering";

(2) the information or other matter on which his or her knowledge or suspicion is based or provides reasonable grounds for suspicion must have come to him or her in the course of business in the regulated sector;

(3) he or she can identify the person engaged in money laundering or the whereabouts of any of the laundered property; and

(4) he or she believes, or it is reasonable to expect him or her to believe, that the information or other matter will or may assist in identifying the person or the whereabouts of any of the laundered property.

1.35 The information which the reporter is required to disclose is:

(1) the identity of the person, if he or she knows it;

(2) the whereabouts of the laundered property, so far as he or she knows it;

(3) information that will or may assist in identifying the other person or the whereabouts of any of the laundered property.

1.36 An offence is committed when a person does not make the required disclosure to either the nominated officer or the UK Financial Intelligence Unit as soon as is practicable after the information comes to him or her.

Failure to disclose by nominated officers working in the regulated sector

1.37 Section 331 applies to "nominated officers" who operate in the "regulated sector". A nominated officer is a person who is nominated within a firm, company or other organisation to submit SARs on its behalf to the United Kingdom Financial Intelligence Unit. If an employee has a suspicion, the nominated officer must evaluate the information reported and decide whether, independently, he or she has knowledge, or a suspicion or should have reasonable grounds to suspect money laundering based on what he or she has been told.

1.38 The nominated officer's obligation to disclose arises where he or she receives a required disclosure from another person (pursuant to section 330 of the Proceeds of Crime Act 2002) informing them of a knowledge or suspicion of money laundering. The nominated officer must decide if he or she is obliged to lodge a SAR by considering whether the following three conditions apply:

(1) He or she knows or suspects or has reasonable grounds to know or suspect, that another person is engaged in "money laundering"; or

(2) the information or other matter on which their knowledge or suspicion is based, or which gives them reasonable grounds for suspicion, came to them in consequence of a disclosure made under section 330; and

(3) he or she:

(a) knows the identity of the person engaged in money laundering or the whereabouts of any of the laundered property, in consequence of a disclosure made under section 330;

(b) can identify the person or whereabouts of the laundered property can from the information of other matter; or

(c) they believe, or it is reasonable to expect them to believe, that the information or other matter will or may assist in identifying the person or the whereabouts of any of the laundered property.

1.39 The information which the reporter is required to disclose is:

(1) the identity of the person, if disclosed in the section 330 report;

(2) the whereabouts of the laundered property, so far as disclosed in the section 330 report; and

(3) information that will or may assist in identifying the other person or the whereabouts of any of the laundered property.

1.40 An offence is committed when a person does not make the required disclosure to either the nominated officer or the UKFIU as soon as is practicable after the information comes to him or her.

Failure to disclose by other nominated officers

1.41 Section 332 applies to nominated officers other than those acting within the regulated sector. For example, a high street chain of jewellery shops may typically conduct transactions which fall below the transaction threshold of 10,000 Euros necessary to bring them within the regulated sector. If the nominated officer of this high street chain fails to make a required disclosure in accordance with section 332, he or she is at risk of criminal liability under that section.

1.42 Disclosure is required where the following three conditions are made out:

(1) he or she knows or suspects that another person is engaged in money laundering;

(2) the information or other matter on which his or her knowledge or suspicion is based came to him or her in consequence of a disclosure either under section 337 (a protected disclosure) or 338 (an authorised disclosure); and

(3) he or she:

(a) knows the identity of the person, or the whereabouts of any laundered property in consequence of the disclosure he or she received; or

(b) the person, or the whereabouts of any of the laundered property, can be identified from the information or other matter received; or

(c) he or she believes, or it is reasonable to expect him or her to believe, that the information or other matter will or may assist in identifying the person or the whereabouts of any of the laundered property.

1.43 The information which the reporter is required to disclose is:

(1) the identity of the person, if disclosed to him or her;

(2) the whereabouts of the laundered property, so far as disclosed to him or her;

(3) any information or matter disclosed to him or her that will or may assist in identifying the other person or the whereabouts of any of the laundered property.

1.44 An offence is committed when a person does not make the required disclosure to either the nominated officer or the UKFIU as soon as is practicable after the information comes to him or her.

Tipping-off

1.45 Part 7 of POCA also includes provisions designed to ensure the subject of a SAR is not made aware of any ongoing investigation into his or her finances. In our Consultation Paper we noted, for example, if a bank employee were to inform the subject of an investigation that a SAR had been submitted to the authorities, this could seriously affect the outcome of any investigation. It may also place the reporter in jeopardy if only a small circle of people could have known about the transaction or provided particular matters of personal information. Whilst certain disclosures are permitted, others are prohibited if they risk "tipping-off" a suspect in a criminal investigation.

1.46 Under section 333A of POCA, it is an offence to disclose:

(1) the fact that a disclosure (a suspicious activity report) under Part 7 of the Proceeds of Crime Act 2002 has been made; or

(2) that an investigation into allegations of a money laundering offence is being contemplated or is being carried out.

1.47 In addition, the following two conditions need to be satisfied:

(1) the disclosure must be likely to prejudice any investigation; and

(2) the information on which the disclosure is based must have come to the person in the course of business in the regulated sector.[28]

1.48 Section 21D of the Terrorism Act 2000 creates an offence for tipping-off in relation to counter-terrorist financing investigations.

PROBLEMS WITH THE CURRENT LAW

Retaining consent

1.49 Although it was not within the scope of our Terms of Reference to consider removal of the consent regime, we did ask consultees for their views on the system. In our Consultation Paper we set out the arguments in favour of, and the issues created by, the consent regime. We asked consultees whether they believed that the consent regime should be retained. If not, we asked whether consultees could conceive of an alternative regime that would balance the interests of reporters, law enforcement agencies and those who are the subject of disclosures.

1.50 The overwhelming majority of consultees who replied to this question did not think that the regime should be removed or replaced altogether. This confirmed our own perception that the system serves a useful function, but is in need of improvement.

1.51 In light of our analysis and the overwhelming support amongst consultees, we recommend retention of the consent regime with improvements to render it more efficient and effective.

---

[28] Proceeds of Crime Act 2002, s 333A.

Recommendation 1.

1.52 We recommend that the consent regime is retained.

The need for a balanced regime

1.53 The disclosure regime is required to perform a difficult balancing act between the interests of law enforcement agencies, reporters and those who are the subject of a SAR (for example, the bank customer whose account is frozen). Northumbria University's Financial Compliance Research Group response summarised the competing interests which must be balanced:

> We believe there to be a fundamental tension between the objectives and requirements of those tasked with submitting SARs and those seeking to make use of the information contained within them. The challenge of the proposed reforms will be to deliver a system that achieves objectives that may not be mutually compatible, namely, to be less burdensome and costly for the regulated sector but to provide maximum usefulness to law enforcement.

1.54 Many stakeholders we met with were concerned that the balance is not currently being struck correctly.

1.55 In our Consultation Paper we recognised that obliging those with a reporting obligation to file a SAR whenever they have a "suspicion" means that the trigger for reporting is a light one.[29] In principle this provides considerable benefit to law enforcement agencies, as it maximises the amount of information they are likely to receive. However, there is currently no means of ensuring that the burden of reporting is proportionate to the gravity of the offence, the value of the criminal property and the benefit to law enforcement agencies of this intelligence. This is problematic as resources are finite. The burden on those who are obliged to file reports is substantial. The burden on those whose accounts and transactions are frozen pending review is also very significant.[30] It undermines the aim of achieving a truly risk-based approach.

1.56 In our Consultation Paper we identified a number of pressing problems which arise from the operation of the disclosure regime:

(1) Complying with reporting obligations is expensive. UK Finance (formerly the British Bankers' Association), a trade association representing the banking and finance industry operating in the UK, estimates that its members are spending at least £5 billion annually on core financial crime compliance.[31]

---

29 Proceeds of Crime Act s 330; a report may also be triggered if an individual working in the regulated sector, as defined in sch 9 to the POCA knows or has reasonable grounds for knowing or suspecting that another person is engaged in money laundering, or related criminality.

30 See Chapter 5.

31 The British Bankers' Association (now UK Finance) estimated that its members spend at least £5 billion annually on core financial crime compliance, https://www.bba.org.uk/policy/bba-consultation-responses/bba-

(2) The burden on the reporters is compounded since there are common misunderstandings and a lack of clarity around reporting obligations, these arise because of the complexity of the provisions and the absence of a single definitive source of guidance on the law. This can result in wasted time for both the reporter and for those processing SARs.

(3) Defensive reporting arises from the risk of personal criminal liability for either a money laundering offence or a failure to provide information to the authorities. It can also arise from concern of being criticised by a regulatory body. This is exacerbated when reporters lack clarity concerning their obligations. Defensive reporting or reporting where it is unnecessary creates a larger volume of poor quality reports.

(4) Reporting and assessing authorised disclosures is a resource-intensive process, requiring analysis and administration by both the reporter and the UKFIU. Poor quality authorised disclosures and those which are unlikely to be of assistance to law enforcement divert resources and attention away from their ability to tackle serious and organised crime.

(5) Disclosures can have severe consequences for the subject of the report. Because a transaction is paused while the UKFIU reaches a decision on consent the subject will in all likelihood be unable to access their funds for that period of time.

Quality or quantity?

1.57 In the Consultation Paper we highlighted concerns from a cross-section of stakeholders that there were problems with the quality of disclosures made to the UKFIU. While there is an understandable desire among those working in law enforcement to maximise the amount of intelligence and raw data they receive, a large volume of SARs does not guarantee quality of intelligence. As the Proceeds of Crime Lawyers Association ("POCLA") noted in its response:

> the danger of casting the net this wide, is that valuable resources are deployed trawling through low grade material, allowing the larger fish and their associated predators to escape detection.

1.58 This concern has been echoed by Ben Wallace MP, the Minister of State for Security at the Home Office, who explained to the Treasury Committee that SARs reform was designed to deliver "quality not quantity of SARs".[32]

1.59 We have had clear confirmation from law enforcement agencies that SARs are a vital source of intelligence. High quality SARs – in other words SARs which are data rich, and are submitted to the UKFIU in a format which is easy to process - can provide evidence of money laundering in action. Furthermore, they are one of the primary methods of sharing information to produce intelligence for law enforcement agencies to investigate and prosecute crime more generally. All SARs may provide raw data,

---

response-to-cutting-red-tape-review-effectiveness-of-the-uks-aml-regime/ (Last visited 21 May 2019); this figure is not limited to compliance generated by the Proceeds of Crime Act 2002 ss 327-9 and 330-332.

[32] Rt Hon Ben Wallace MP's oral evidence to the Treasury Committee, Economic Crime HC 940 (31 October 2018).

such as a name or phone number, which may assist in the investigation and prosecution of a crime. Inferior quality SARs, in other words SARs which contain little or no data or are submitted in an inadequate format, are inevitably less valuable. They are more time-intensive to process, can contribute to delay in the system and may ultimately remain of little value to law enforcement agencies.[33]

1.60 Our focus throughout this project has been on identifying measures which can assist to strike the right balance between the quality of intelligence provided in disclosures and the burdens on those who submit and assess reports to improve the overall efficiency of the system. We are also concerned to ensure that the effect of a SAR on its subject is considered.

HISTORY OF THE PROJECT

Consultation

1.61 Work began on the project in February 2018. We engaged with a wide range of stakeholders. We heard first-hand from those working within the system about how the consent regime operates. We met with staff at the UKFIU, representatives from law enforcement agencies, officials from government departments, the judiciary, prosecutors, supervisors and reporting entities from across the regulated sector.

1.62 We also heard directly from practitioners who have represented individuals and entities who have been the subject of a disclosure, as well as those who have represented the NCA or law enforcement agencies in related proceedings. We learned of the personal experiences of those who had a personal or business account frozen from the subject of a disclosure whose accounts were subsequently re-opened.[34]

1.63 Additionally, we sought input from leading academics in this field on how the existing system might be improved. In total, we met with over 60 individuals with relevant experience of the consent regime in practice or from their own research.

1.64 We held a public symposium on 6 July 2018 at the Institute of Advanced Legal Studies. This was attended by over 100 people including anti-money laundering professionals, academics, practitioners, civil servants and individuals who work in law enforcement, as well as staff from the NCA and the UKFIU.

1.65 We published our Consultation Paper on 20 July 2018. It generated considerable interest and stimulated debate on the efficiency and efficacy of the consent regime.

1.66 The consultation period ran until 5 October 2018. In total we received 56 consultation responses. These responses came from:

(1) 12 entities in the regulated sector;

---

[33] The UKFIU waste valuable time and resource chasing reporters for making requests for further information; Anti-Money Laundering: the SARs Regime, Law Comm Consultation Paper 236 (2018) ("CP 236") para 1.25.

[34] For example, the consultation response of David Lonsdale.

(2) 19 supervisory authorities, other appropriate bodies or trade organisations;

(3) five police and prosecuting authorities;

(4) 16 individuals, practitioners and academics;

(5) three non-governmental organisations; and

(6) a joint response from the Home Office and HM Treasury.

1.67 We draw upon the valuable information and comments in these consultation responses throughout this report.

The SARs Reform Programme

1.68 Our work is separate from but complementary to that of the SARs Reform Programme. That is a public-private partnership between the Home Office, the NCA and UK Finance. This project will make proposals for operational reform, including improvements to IT systems, to make use of modern technology and data analytics software.[35] Throughout the duration of our project we have been mindful of the work of the SARs Reform Programme. Their operational review of SARs has the same stakeholders in common as our legislative review of Part 7 of POCA. We have therefore aimed to ensure that our proposals are broadly aligned where there may be scope for overlap. This is to ensure that that our recommendations for reform are relevant, realistic and have the support of those that they may affect.

Purpose of data analysis

1.69 In our Consultation Paper we drew attention to the large volume of SARs, of which a significant proportion are authorised disclosures. We also observed that there is anecdotal evidence from stakeholders suggesting that the quality of disclosures is poor in some cases. We identified four principal reasons why the quality of reports might be affected:

(1) a low threshold of culpability for the principal money laundering offences. The reporter is exposed to criminal liability for a money laundering offence carrying a significant maximum penalty of imprisonment based on his or her mere suspicion of the property being criminal;

(2) individual criminal liability. The criminal liability of the reporter is personal; it is not the liability of the organisation for which they work. We were told that the combined effect of a low threshold and individual criminal liability is, understandably, an overly cautious approach to reporting. In some circumstances reporting is defensive in nature rather than reflecting a true assessment of the risk of money laundering in any given transaction;

(3) confusion as to obligations. Reporters are faced with a complex set of inter-related reporting obligations with required and authorised disclosures requiring different approaches; and

---

35 National Crime Agency, *Suspicious Activity Reports (SARs) Annual Report* (2018), p 2.

(4) confusion as to the concept of suspicion. Some reporters struggle with applying the nebulous concept of suspicion. Consultees told us that the overall quality of the SAR is diminished when reporters do not understand the concept of suspicion. Many SARs fail to provide relevant information that will assist law enforcement agencies in a presentable, easy-to-read format to enable swift action.[36]

1.70 We made a number of provisional proposals designed to improve the quality of intelligence disclosed to law enforcement agencies and as a consequence, enhance the overall efficiency of the consent regime. Our analysis of SARs was designed to test the impact that our provisional proposals may have on the assumptions above and the scope and volume of reporting generally.

1.71 In undertaking this analysis our broad objectives were to quantify and measure:

(1) the proportion of authorised disclosures made in accordance with the current law;

(2) the proportion of authorised disclosures which fail to meet the threshold and are therefore made unnecessarily; and

(3) the proportion of authorised disclosures which could be improved upon or enhanced to provide focussed and well-presented intelligence which meets the needs of law enforcement agencies.[37]

1.72 Although the focus of our research was on authorised disclosures we performed a smaller-scale analysis of required disclosures for comparison. However, we note that required disclosures are not time-sensitive and resource-intensive in the same way as authorised disclosures as they do not require any decision to be taken on consent. An additional objective in respect of required disclosures was to establish how rich they were as an intelligence source and whether our proposals could assist law enforcement agencies by improving the quality of intelligence that is provided.

Data analysis

1.73 In our Consultation Paper we highlighted the paucity of data available with which to measure the effectiveness of the regime. There had been no independent analysis of the quality of disclosures made to the UKFIU. This concern was echoed by many consultees. POCLA observed in its response:

> As the Law Commission points out, the effectiveness of the current regime is unsupported by the evidence. The purpose of reporting is essentially two-fold. First to provide the authorities with information and intelligence on money laundering and financial crime. Secondly, to give the authorities an opportunity to freeze or restrain assets.

---

36 CP 236, para 4.16.

37 We base this part of our analysis on the categories of SARs identified by reporters, law enforcement agencies and the UKFIU as providing little intelligence value in Chapter 11 of CP 236.

> As to the first purpose, no data is available at all. As to the second, we are told that 634,113 reports were made between October 2015 and March 2017. Of those, only 1,558 were requests for consent to act where consent was refused. It is not clear from the statistics how many of these refusals resulted in freezing or, more importantly, prosecution and confiscation/recovery of assets, but the NCA identify only 36 cases where arrests were effected. It must be inferred that a substantial portion of those 36 cases did not result in prosecutions, convictions and asset confiscation. Consequently, the objectives of the reporting regime fall well short of being met.

1.74 Tristram Hicks (former Detective Superintendent on the national Criminal Finance Board), submitted a joint response with Ian Davidson (former Detective Superintendent with national financial investigation responsibility) and Professor Mike Levi, Cardiff University. They recognised that there was a shortage of evidence on the utility of SARs, but warned against concluding on that basis that the system was not working:

> We recognise that excellent results from some SARs have not been fed back adequately to the reporting sector by the NCA (or its predecessor bodies). This has perhaps engendered a lack of confidence in their value and may have contributed to the existence of this consultation. We also recognise that end-users of SARs (the other seventy-six agencies) do not feed the benefits back adequately to the NCA. In our view it would be a better use of time and money to invest in explaining better the known value of SARs through research and routine case reviews than to cut them off at source. This would provide empirical evidence of the utility of SARs to both the reporting sector and to senior managers in law enforcement, particularly those without investigative or intelligence backgrounds. This would enhance the legitimacy of the regime among user groups and reinforce their commitment.

1.75 Following the publication of our Consultation Paper, we undertook an examination of a number of SARs that had been submitted to the NCA. This was the first independent analysis of its kind in the UK. This small-scale review gave us a valuable insight into the detailed inner workings of the consent regime. As noted above, our principal focus was on authorised disclosures but we were also able to look at a smaller sample of required disclosures for comparison. The results were striking and allowed us to assess the consultation responses against the evidence we collated.

1.76 In chapter 2 we outline our methodology and summarise our findings. We examine the data in more detail in each subsequent chapter and use it to inform our recommendations.

RECENT DEVELOPMENTS

Volume of SARs

1.77 The numbers of SARs submitted to the UKFIU continues to rise. The UKFIU has confirmed that it received and processed 463,938 SARs between April 2017 and

March 2018. This amounts to a 9.6% increase on the volume of SARs in 2016-17. The NCA describe it as a "record number".[38]

1.78 Of the total number of SARs received, 22,619 were authorised disclosures seeking consent to proceed with a transaction where there was a suspicion of criminal property (now referred to by the UKFIU as a "Defence Against Money Laundering" SAR or "DAML SARs"). This represents a 20% increase on the previous year's volume of disclosures.[39] A further 423 resulted from suspected terrorist financing ("Defence Against Terrorist Financing" or "DATF SARs"). The trend for an increasing volume of disclosures has continued.

1.79 Of the total number of authorised disclosures lodged in respect of suspected money laundering, consent was refused in 1,291 cases (5.70%). In relation to authorised disclosures in respect of suspected terrorist financing there were 42 cases in which consent was refused (9.93%). The NCA reported that £51,907,067 was denied to criminals as a result of DAML requests (both refused and granted).

1.80 Of the 1,291 authorised disclosures where a suspicion of money laundering was identified and consent was refused initially, 440 (34.08% of overall refusals) were subsequently granted in the moratorium period.

1.81 The NCA have told us that since our consultation, the volume of authorised disclosures that they are receiving continues to rise and the regime in its present form is untenable:

> Pressures on the DAML (consent) regime have continued, to rise. In February 2019 we received 4,000 DAMLs compared with 2,000 in February 2018, a 100% increase. While the DAML regime produces operational results, clearly this is unsustainable.[40]

FATF Mutual Evaluation – underreporting and concerns about the quality of SARs

1.82 The Financial Action Task Force ("FATF") conducted its evaluation of the UK's anti-money laundering and counter-terrorist financing measures in 2018, publishing its findings in December. The evaluation offered a broadly positive assessment of existing measures. However, FATF observed that:

> … while reports of a high quality are being received, the SAR regime requires a significant overhaul to improve the quality of financial intelligence available to the competent authorities.

1.83 FATF also raised concerns about the quality of SARs lodged even by those who are regular reporters:

> The requirement to report SARs applies to all financial institutions and DNFBPs[41] as required by the FATF. Ordinarily, this should ensure that financial intelligence from

---

38 National Crime Agency, *Suspicious Activity Reports (SARs) Annual Report* (2018) p 3.

39 Above.

40 Further Comments from the NCA, 29 March 2019.

41 Designated non-financial businesses and professions.

all of the sectors covered by the FATF Recommendations is available, but the low level of reporting in many sectors and the poor quality of many SARs has a negative impact on the quality and usefulness of the financial intelligence available to the competent authorities.[42]

There is a risk that investigative opportunities, particularly relating to complex criminal activity, may be missed as a result of a lack of comprehensive, cross agency analysis of available financial intelligence and the poor quality of SARs.[43]

1.84 FATF reported that SARs contributed to around 7,900 investigations, 2,000 prosecutions and 1,400 convictions annually for standalone money laundering offences or where money laundering is the principal offence.[44]

Reflecting the high volume of reporting and the wide variety of sectors and businesses incorporated into the UK's anti-money laundering/counter terrorist financing regime, there are concerns about the quality of reporting by all reporting entities, including banks. During the on-site visit, some firms indicated that they were sometimes filing SARs in response to unexplained/unusual transactions without additional analysis or investigation. LEAs reported concerns about the quality of the SARs, including that they lacked information on a genuine suspicion of money laundering or terrorist financing.[45]

STRUCTURE OF REPORT AND RECOMMENDATIONS

1.85 In this section we summarise the contents of our report and our recommendations.

1.86 In chapter 2 we outline the data analysis we conducted in conjunction with the UKFIU. We set out our methodology and some of our overall findings. We use this analysis to inform our recommendations in subsequent chapters. In this chapter we recommend that samples of SARs are analysed at regular intervals in consultation with an Advisory Board constituted by those with relevant expertise.

1.87 In chapter 3 we make the case in principle for statutory guidance overseen by an Advisory Board. We set out our arguments for statutory guidance on three statutory concepts: suspicion, reasonable excuse and appropriate consent. We recommend that POCA is amended to impose an obligation on the Secretary of State to issue guidance covering the operation of Part 7 of POCA so far as it relates to businesses in the regulated sector. In particular, we recommend that explanatory guidance should cover the suspicion threshold, appropriate consent and the reasonable excuse defence to assist the regulated sector in complying with their legal obligations. We also recommend that an Advisory Board is created to assist in the production of

---

42 Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures: United Kingdom Mutual Evaluation Report* (December 2018) p 51.

43 Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures: United Kingdom Mutual Evaluation Report* (December 2018) p 59.

44 Above, p 3.

45 Above, p 121.

guidance, to measure the effectiveness of the reporting regime and to advise the Secretary of State on ways to improve it.

1.88 In chapter 4 we discuss the "all-crimes" approach to money laundering offences. The breadth of the definition of "criminal property" in section 340 of POCA means that the principal money laundering offences apply to dealings with property derived from all criminal offences. We recommend maintaining the "all-crimes" approach.

1.89 In chapter 5 we set out our recommendation for statutory guidance on suspicion. We couple this recommendation with a further one for the Secretary of State to make provision for an online SAR form. We recommend that the new form should have the capability to be tailored to the needs of the individual reporter while directing them to provide essential information for law enforcement agencies. In chapters 6 and 7 we make the case for statutory guidance to cover both appropriate consent and the defence of reasonable excuse.

1.90 In chapter 8 we consider the problems that can arise when the proceeds of crime become mixed with "clean" funds. The practice of freezing entire bank accounts, regardless of the value of the property that is suspected to be criminal, can have severe economic consequences for an individual or a business. To address this problem we recommend that POCA is amended to create an exemption to allow criminal property to be ringfenced by credit and financial institutions. We recommend that statutory guidance is issued on the operation of the ringfencing provision. We also recommend the addition of a provision allowing for funds to be released by a Crown Court Judge when an application for an extension to the moratorium period is made.

1.91 In chapter 9 we deal with the way in which information about suspected money laundering is shared between private institutions and law enforcement agencies, and how this sharing could be improved. We address whether it might be appropriate to permit information sharing before a suspicion crystallises, and if so how that might be achieved. We also consider the value of expanding the membership of the Joint Money Laundering Intelligence Taskforce. We make no specific recommendations in this chapter.

1.92 In chapter 10 we consider additional reporting requirements which might be introduced to complement and improve the existing regime. After discussing geographic targeting orders and thematic reporting, we conclude that there is currently insufficient evidence to make recommendations for reform.

1.93 In chapter 11 we consider three possible further reforms: (1) corporate criminal liability; (2) extraterritorial jurisdiction; and (3) the legal conduct overseas exception. We make no recommendations on reform of corporate criminal liability. We note that we did not consult on reform of extraterritorial jurisdiction of the money laundering offences, but we recommend that the Government conduct further work with a view to clarifying the law in this area. The policy questions raised by the application of legal conduct overseas exceptions extend beyond this review. However, we recommend the Government consider the scope of the exception, and the need for guidance in relation to transactions involving the legal cannabis industry.

ACKNOWLEDGMENTS

1.94 Commissioners want to record our thanks to the following people who worked on this Report: Lucy Corrin (team lawyer), Dom Bowes (research assistant), Holly Brennan (research assistant) and David Connolly (team manager). Rebecca Martin (research assistant) provided invaluable support at earlier stages of this project.

1.95 Data analysis was conducted by Lucy Corrin, Holly Brennan, Dom Bowes, and Alex Davidson (research assistant). We are grateful for the assistance of staff at the UKFIU for facilitating our access to SARs in order to conduct our research.

1.96 We are indebted in particular to Rudi Fortson QC (Visiting Professor at Queen Mary, University of London and practising barrister, 25 Bedford Row) who has acted as a consultant throughout the life of this project and Kennedy Talbot QC (practising barrister at 33 Chancery Lane) for his assistance on extraterritoriality, discussed in chapter 11.

Chapter 2: Measuring effectiveness: data analysis

INTRODUCTION

2.1 In this chapter we outline the data analysis work that we have undertaken since the publication of our Consultation Paper. This has been conducted in conjunction with the United Kingdom's Financial Intelligence Unit ("UKFIU"). Our aim was to analyse a sample of Suspicious Activity Reports ("SARs") in the form in which they are submitted. We consider the data gathered over the course of this research exercise and use it to assess the likely impact of the provisional proposals put forward in our Consultation Paper.[46] We demonstrate the ways in which our data analysis has been used to test the validity of our provisional proposals and inform our final recommendations throughout this Report.

2.2 In chapter 4 of the Consultation Paper we explored the inherent difficulties in measuring the effectiveness of a regime designed to disrupt criminal activity. We evaluated the effectiveness of the current consent regime using publicly available data on SARs. We observed that there was an absence of data on how SARs were used by law enforcement agencies.[47] There has been, to date, no independent evaluation and analysis of the content of SARs. Our research into SARs provides the first insight into the application of the law by reporters and the quality of disclosures made to the UKFIU.

THE CURRENT SCHEME

2.3 In our Consultation Paper we explain that SARs are the mechanism by which reporters make authorised and required disclosures to the UKFIU. The UKFIU is then responsible for processing the intelligence that has been received in those SARs before communicating it to any relevant law enforcement agencies. Disclosures can be very valuable to law enforcement agencies as they provide opportunities to disrupt criminal activity; in some cases that opportunity may not have arisen were it not for a SAR being filed.

2.4 The type of disclosure made by a reporter depends on the circumstances in which their suspicion arises. A single form is used but there are two types of disclosure that can be sent to the UKFIU:

(1) **Required disclosures** are triggered where a reporter knows or suspects, or has reasonable grounds to know or suspect (whether or not they do, in fact, suspect) that a person is engaged in money laundering. A failure to make a required disclosure is a criminal offence for which reporters can be found

---

46 Anti-Money Laundering: the SARs Regime, Law Comm Consultation Paper 236 (2018) ("CP 236").

47 CP 236, para 4.8.

personally liable.[48] Required disclosures provide law enforcement agencies with intelligence opportunities to disrupt criminality.

(2) **Authorised disclosures** (Defence Against Money Laundering or consent SARs) are most commonly triggered if, in a professional capacity, a reporter encounters suspected criminal property. These SARs have a dual function. First, they provide the investigative authorities with details of a reporter's suspicion of criminal property. Secondly, the fact that a report has been made and appropriate consent granted or deemed to have been granted affords the reporter a defence to a principal money laundering offence. In other words, the UKFIU is able to grant the reporter consent to carry out an otherwise prohibited act by, for example, allowing the suspicious transaction to take place.[49]

2.5 In our Consultation Paper we reported that the UKFIU receive an average of 2000 SARs daily. Of those 2000, it is thought that around 100 are authorised disclosures submitted by reporters seeking a defence to a principal money laundering charge.[50] Despite the fact that required disclosures constitute the vast majority of the overall total of SARs, they are not the focus of our enquiry. Instead, we are predominantly concerned with authorised disclosures.

Authorised disclosures[51]

2.6 The National Crime Agency ("NCA") have reported a 20% increase in the volume of authorised disclosures since 2017.[52] Between April 2017 and March 2018, the UKFIU received 463,938 SARs of which 22,691 were authorised disclosures requiring a decision on consent.[53] We observed in our Consultation Paper that authorised disclosures create pressure points in the system for two principal reasons:

(1) they are time-sensitive; and

(2) they are resource-intensive.

Time-sensitive

2.7 In chapter 2 of our Consultation Paper we outlined how an authorised disclosure is processed once it is received by the UKFIU and how delays in processing this type of SAR may be encountered.

(1) **Seven-working-day period**: once an authorised disclosure is received by the UKFIU a statutory period of seven-working-days is triggered. During this time

---

48 Reporters who fail to submit a required disclosure will be liable unless they fall within one of the narrow exceptions to the failure to disclose offence. The exceptions available will vary depending on the status of the reporter and whether they were operating within or outside of the regulated sector.

49 The NCA have since taken a decision to refer to authorised disclosures as Defence Against Money Laundering SARs ("DAML SARs"), and Defence Against Terrorism Financing SARs ("DATF SARs").

50 CP 236, p 10.

51 Proceeds of Crime Act 2002, ss 327(2)(a), 328(2)(a), 329(2)(a).

52 National Crime Agency, *Suspicious Activity Reports (SARs) Annual Report 2018 ",*p 2.

53 Above.

the transaction is paused to prevent the movement of funds or the dissipation of assets while a decision is taken on whether to consent to that transaction being allowed (there is a risk of confusion on this point. All that is being consented to is for the reporter to continue to process the transaction; it is not a broader authorisation or confirmation that there is no money laundering offence being committed by the person under suspicion). A reporter who proceeds with a transaction during this period without consent risks committing a money laundering offence.[54] Delays may arise in processing the SAR if a reporter has failed to include essential information in their report.[55] For instance, details of the bases for their knowledge or suspicion, or of the criminal property.[56]

(2) **Moratorium period**: if consent is refused during the initial notice period then an additional statutory period of 31 days is triggered, during which time the transaction remains paused. This power is necessary because, in a particularly complex case, law enforcement agencies may require additional time to investigate and consider any further action or simply to make an informed decision on consent.

(3) **Extension of the moratorium period:** the Criminal Finances Act 2017 introduced new powers for a Crown Court judge to authorise the extension of the moratorium period for up to 31 days at a time.[57] The process can be repeated for up to 186 calendar days in total. The extended powers were introduced to provide law enforcement agencies with the additional time they may require to complete a thorough investigation and to guard against the dissipation of the suspected criminal property while that investigation occurs.

Resource-intensive

2.8 In our Consultation Paper we also outlined that the process of granting consent is not always straightforward, it is estimated that further information is required in 12% of cases.[58] Where a SAR omits vital information, staff at the UKFIU may in some circumstances contact the reporter.[59] This process creates delay and diverts resources away from the investigation and prevention of money laundering. The UKFIU have confirmed that between April 2017 and March 2018, 2,015 authorised

---

54 Proceeds of Crime Act 2002, ss 327 to 329.

55 In the case of minor omissions, the UKFIU will contact the reporter to request further information. A response to a 'Clarification request for Information' is usually required within 48 hours, see National Crime Agency, *SARs Regime Good Practice Frequently Asked Questions* (May 2018), p 3.

56 The essential criteria that the NCA look for include details of knowledge or suspicion, criminal property, a prohibited act, the identity of the person and the whereabouts of the property, see National Crime Agency, *SARs Regime Good Practice Frequently Asked Questions* (May 2018), p 3.

57 Criminal Finances Act 2017, s 10.

58 Interview with UKFIU staff.

59 In seriously deficient cases the UKFIU may take a decision to close a case without further notice, see National Crime Agency, *SARs Regime Good Practice Frequently Asked Questions* (May 2018) p 3.

disclosures were rejected because they were in some way seriously deficient. These cases were closed despite resources having been invested into processing them.[60]

Methodology

Analysis of authorised disclosures

2.9 As previously discussed in this chapter, authorised disclosures were the focus of our analysis for two reasons. These types of disclosure require substantial resources to process and they are time-sensitive.[61] In addition, stakeholders had identified that there were issues with the quality of these disclosures. Given the constraints of time and resources, assessing the quality of these SARs was essential to test the validity of some of our provisional proposals.

2.10 We were provided with access to a sample of authorised disclosures by the UKFIU. In order to ensure that we analysed a representative sample, we asked the UKFIU to select based on two criteria:

(1) each batch of SARs within our overall sample should represent an entire day of authorised disclosures lodged with the UKFIU; and

(2) the whole sample should represent a week of authorised disclosures, covering each day from Monday to Friday but not on consecutive days.

2.11 Our overall sample size was 536 DAML SARs. Our sample was statistically significant[62] and allows us to draw robust conclusions from the evidence it generated. In addition, the results of our analysis were broadly consistent with the detailed submissions we received at both the fact-finding and consultation phases of the project.

2.12 Our focus was to understand how the test of suspicion was being applied in practice and measure the likely impact of moving the threshold for reporting to a cumulative test of reasonable grounds to suspect; in other words, requiring that a subjective suspicion be based on objective grounds before a disclosure was made.

2.13 There were two additional strands to our analysis. First, we set out to capture the proportion of disclosures made to the UKFIU which fell within ten specific categories (outlined below at 12.14(1) to (12)).These categories were identified by stakeholders during our pre-consultation phase as SARs likely to be those in which the quality of the intelligence was limited.[63] Secondly, we assessed the way in which the number of SARs might be affected if the “all-crimes” approach was replaced with a “serious

---

60 National Crime Agency, *Suspicious Activity Reports (SARs) Annual Report 2018*. These cases were closed because of one of the following reasons (a) the reporter withdrew the DAML request within the notice period, (b) they had requested a DAML in error, (c) they had failed to include a key piece of piece of information but were uncontactable, or (d) they had failed to submit the additional information in writing to the UKFIU within the notice period.

61 CP 236, p 24.

62 Using Cochran’s formula for minimum sample size, with our sample size of 536 SARs we can claim a 95% confidence level with a 5% margin of error.

63 CP 236, Chapter 11.

crimes approach" by examining whether reporters were able to identify the predicate offence that they suspected and, if so, assessing whether it met the threshold of seriousness.

2.14 We analysed the quality of our authorised disclosure sample using the following set of criteria:

(1) whether the information provided met the test of suspicion in *Da Silva*;[64]

(2) whether a reporter had provided evidence of one or more objective grounds on which their suspicion that the property in question was criminal property was based;

(3) whether the SAR related to a transaction of less than £1000;[65]

(4) whether the SAR related to a transaction equal to, or less than, £250;[66]

(5) whether the reporter was seeking consent to move funds internally within their organisation (for example from one account to another);

(6) whether the report was a duplicate; for example, a SAR which replicated information already submitted to another law enforcement agency such as Action Fraud or a SAR which was related to one the UKFIU had previously analysed and contained no additional information;[67]

(7) whether the reporter had lodged a SAR based solely on information that was already in the public domain;[68]

(8) whether the transaction in question related to suspected criminal funds being invested into immovable property within the United Kingdom ("UK"), for instance the purchase of a house or mortgage payments;

---

64 The court in *R v Da Silva* [1996] 2 Cr. App. R. 35 defined suspicion to mean "a possibility, which was more than fanciful, that the relevant fact existed." This interpretation of suspicion in *R v Da Silva* is relied upon as a guiding principle by those with reporting obligations.

65 The minimum figure permitted for cash seizures.

66 This is the value at which deposit-taking bodies have a limited exception to continue to make transactions. See Proceeds of Crime Act 2002, s 294(3). Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount) Order 2006, SI 2006 No 1699, para 2.

67 For instance, where a report was identical, or virtually identical, to another authorised disclosure that had already been processed during the data analysis exercise. A good example of this is where the subject of a SAR had committed multiple mortgage frauds. This had prompted the reporter to log several SARS, all of which had articulated the same reasons for suspicion of criminal property, the only differences being the addresses of the properties/value of the house. Ideally a reporter would link this information in a single authorised disclosure to cut down on processing time for the UKFIU.

68 This may occur, for example, where the reporter represents a high net worth individual and the property in question suspected to be criminal is widely reported in the media or where the reporter stated that their suspicions had arisen as a result of something they had seen in the media.

(9) whether the SAR relates to two or more transactions in the same account, or linked accounts;

(10) whether the reporter's disclosure concerned an historical crime;[69]

(11) whether the SAR had no UK nexus;[70] and

(12) whether the SAR was filed as a result of an enquiry from a law enforcement officer, or the reporter was invited to make the report by such an officer.

Analysis of required disclosures

2.15 Required disclosures are neither time-sensitive, nor resource-intensive because they differ in the way that they are processed. A number of consultees in law enforcement agencies stated that they are an unparalleled source of information which would not otherwise be available to investigators. Tristram Hicks (former Detective Superintendent on the Criminal Finances Board) stated that:

> SARs provide a unique way to detect unreported crimes, resolve existing enquiries, restore property or compensation to victims, build confidence in the justice system.

2.16 As discussed above, required disclosures are not the focus of our research. However, our provisional proposals on amending the threshold to the cumulative test of reasonable grounds to suspect would impact upon the threshold for requiring a disclosure and the quality of the information provided. For this reason, we sought to analyse a sample of required disclosures to assess the quality.

2.17 Our objective was to test the likely impact of our provisional proposals and discern whether these reports provided the sort of information required by law enforcement agencies on a consistent basis.

2.18 We were provided with access to a sample of required disclosures by the UKFIU. Our overall sample size was 100 required disclosures selected at random by the UKFIU.

2.19 Our focus was on understanding how the test of suspicion was being applied in practice and to measure the likely impact of moving the threshold for reporting to a cumulative test of reasonable grounds to suspect.

2.20 In addition, we looked at the quality and range of information provided by reporters. Required disclosures differ from authorised disclosures in that the reporter is directed

---

69 We defined an historical crime as an offence committed more than five years before the authorised disclosure was made.

70 For the purposes of the data analysis exercise this arose if there was no link to the UK other than that the investigative arm of the reporting organisation is based here. Neither the subject nor the transaction had any links to the UK if, the transaction was in a currency other than pounds sterling and the subject/s had a foreign address, and any additional information provided (for instance about a victim), could not connect the subject to the UK.

to provide certain pieces of information to ensure compliance with the legislative wording.[71] Reporters are directed to include:

(1) the identity of the person suspected of money laundering (or any information which may assist in identifying that person); and

(2) the whereabouts of the property (or any information which may assist in identifying the whereabouts of the property).

2.21 We analysed the quality of our required disclosure sample using the following set of criteria:

(1) whether the information provided met the test of suspicion in *Da Silva*;[72]

(2) whether a reporter had provided one or more objective grounds on which to base their suspicion of money laundering;

(3) whether the SAR included one of the following pieces of information:

(a) mobile telephone number;

(b) home address and/or business address;

(c) other contact details such as an email address;

(d) information relating to a business or company;

(e) passport number;

(f) country or origin or ethnicity of the subject;

(g) Internet Protocol ("IP") address;[73]

(h) any transactional associates;

(i) details of any events such as cash deposits or withdrawals;

(j) details of any storage unit facility;

(k) details of any criminal property;

(l) vehicle details.

---

71 The information that reporters are required to disclose in order to comply with their obligations is set out in ss 330 and 331 of the Proceeds of Crime Act 2002.

72 *R v Da Silva* [1996] 2 Cr. App. R. 35.

73 An IP address is the unique number assigned to every device on the internet. In some circumstances a financial institution, for example, may have knowledge of an IP address associated with a fraudulent bank transfer. For information on the way that law enforcement agencies used IP addresses to inform their investigations see Annex A of Law Enforcement Written Evidence to the Joint Committee on the Draft Investigatory Powers Bill, https://www.parliament.uk/documents/joint-committees/draft-investigatory-powers-bill/written-evidence-draft-investigatory-powers-committee.pdf (last visited 21 May 2019).

ANALYSIS

2.22 We analyse the findings of our research in each subsequent chapter as relevant. However, we make some general observations at this stage:

(1) There was substantial variance in the quality of disclosures. At one end of the spectrum SARs were unnecessarily long and contained irrelevant information which diverted the reader from identifying the essential information in the report. Other reports were incredibly brief and omitted essential information. There was clear evidence of reporters misunderstanding their legal obligations under Part 7 of the Proceeds of Crime Act 2002 ("POCA").

(2) Of particular concern was the inconsistent application of the concept of suspicion by reporters. The suggestion in our Consultation Paper that this was a weakness in the regime was borne out in our analysis:

(a) suspicion which met the *Da Silva* test[74] was not present in 15% of the authorised disclosures that we analysed and 13% of required disclosures;

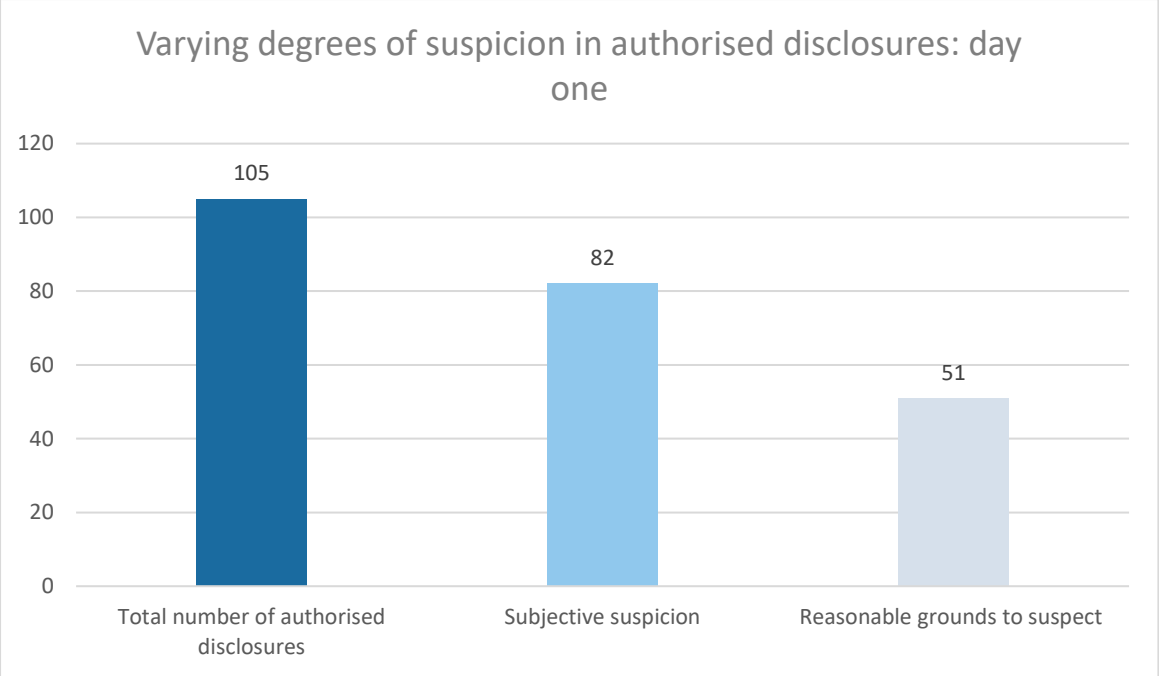
(b) reasonable grounds to suspect was present in approximately 53% of the authorised disclosures that we analysed and only 32% of required disclosures.

2.23 The chart below provides a snapshot of the application of suspicion in our sample of authorised disclosures. The results are taken from the first day of the data analysis exercise. Reporters failed to provide evidence of their suspicion in more cases on the first day of the data analysis exercise than on any other day of the analysis. In 78% of cases reporters demonstrated evidence of a suspicion of criminal property. In 22% of cases reporters failed to show that their suspicion met the *Da Silva* test.[75] Reporters provided one or more objective grounds in support of their suspicion in 49% of the SARs that we analysed.

---

74 *R v Da Silva* [1996] 2 Cr. App. R. 35.

75 *R v Da Silva* [1996] 2 Cr. App. R. 35.

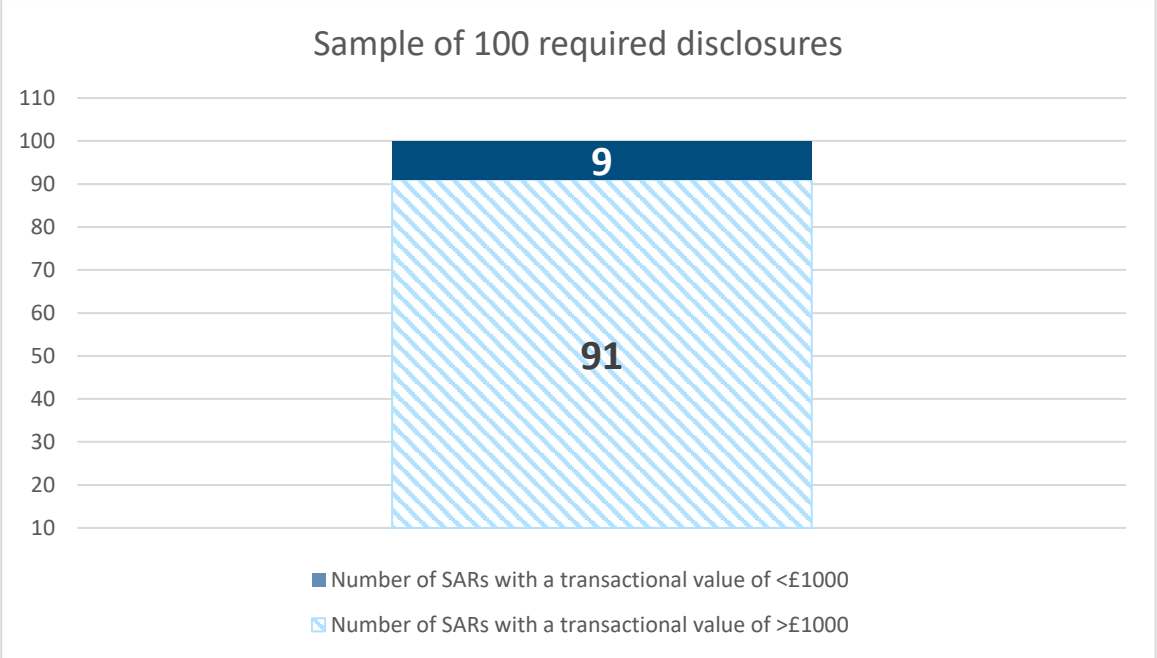


2.24 Other general observations to note are:

(1) where the predicate offence was identified, the overwhelming majority of authorised disclosures were related to serious crimes using our qualifying criteria for that concept. [76] In approximately 64% of the SARS we analysed reporters had identified predicate offences. Of those SARs, approximately 98% qualify as a serious crime;

(2) approximately 22% of the authorised disclosures we analysed were lodged in respect of suspected criminal property which amounted to less than £1000 in value. In relation to required disclosures, the chart below illustrates that figure was much lower at only 9%.

[76] Qualifying criteria: to be considered a serious crime the offence must fall within sch 1 of the Serious Crime Act 2007; or be a "lifestyle offence" contained in s75 of POCA by reference to sch 2 of that Act; or be an offence punishable on indictment by one years' imprisonment or more in accordance with the Fourth Money Laundering Directive (EU) 2015/849, Article 3(4)(f). See also Financial Action Task Force Recommendations, International standards on combating money laundering and the financing of terrorism and proliferation (2012), Recommendation 3 and Interpretative Note to Recommendation 3. 98% of SARs where the predicate offence was identified fell within one of these three categories.



CONCLUSION

2.25 We incorporate our findings from this research into our analysis in subsequent chapters. However, the value of the exercise itself merits further consideration. Our analysis has, by focussing on the quality of disclosures and their usefulness to law enforcement agencies, provided real insight into the effectiveness of the consent regime.

2.26 One limitation of our analysis is that we were not able to seek law enforcement agency input on the quality of the SARs we analysed. We believe that analysis of SARs would benefit from such a two-tiered approach to gain the perspective of those who will consider and potentially make use of the information in the SAR.

2.27 Testing the quality of disclosures using a two-tiered approach involving law enforcement agencies could provide essential feedback on:

(1) whether disclosures are made only when necessary, that is required by law or submitted in order to provide the reporter with an exemption from a criminal offence;

(2) whether disclosures provide the right information to assist law enforcement agencies to best effect;

(3) problems or misunderstandings arising within the regime which have an impact on reporters and/or the UKFIU.

(4) the success of any measures intended to reform the regime.

2.28 In addition, ongoing analysis could provide greater clarity on whether the threshold for reporting is set correctly at suspicion or whether it should be changed to reasonable grounds to suspect.

Recommendation

2.29 Given the richness of the data and the overall value that is obtained from analysing a sample of SARs, we recommend that similar analysis should take place at regular intervals on a larger scale. In chapter 3, we recommend the creation of an Advisory Board. We recommend that consideration be given to utilising the experience and expertise of such a Board to develop a robust process of ongoing analysis.

Recommendation 2.

2.30 We recommend that further analysis on the quality of SARs is conducted at regular intervals in consultation with an Advisory Board.

Chapter 3: Guidance

INTRODUCTION

3.1 Our principal objective in reviewing aspects of Part 7 of the Proceeds of Crime Act 2002 ("POCA") is to improve the prevention, detection and prosecution of money laundering and terrorist financing in the United Kingdom ("UK"). In our Consultation Paper, we considered the extent to which the better use of guidance might serve a role in achieving this objective. We argued that statutory guidance, covering key legal concepts within the consent regime would encourage greater consistency in reporting suspicious activity and reduce the burden on the regulated sector.

3.2 It is important to note that some of the existing guidance which we refer to in this report, published in respect of the consent regime, is also designed to supplement both legislation and Regulations which are outside of our Terms of Reference. Guidance published by the accounting sector supervisors (as discussed below), for instance, covers not only reporting suspicious activity but also customer due diligence, record keeping and training and awareness, which are beyond the scope of this review. Our aim in this chapter is to ensure that key legal concepts underpinning the consent regime are interpreted consistently across the reporting landscape as reflected in guidance.

3.3 Although, in our Consultation Paper, we acknowledged that statutory guidance was not a panacea, we observed that it would provide flexibility in the application of the consent regime and work in response to changes in money laundering behaviour, therefore promoting greater efficiency. We noted that there was precedent for using guidance to assist in interpreting and applying legislative regimes.[77] We sought consultees' views on our provisional proposals to introduce statutory guidance on a number of topics to assist the reporting sector.

3.4 Our broad recommendation is for POCA to be amended to impose an obligation on the Secretary of State to issue guidance covering the operation of Part 7 of POCA insofar as it relates to businesses in the regulated sector, focussing on suspicion, reasonable excuse and consent.[78] In subsequent chapters, we will deal with what form that guidance might take and what content it would include. In this chapter we consider the role of guidance more generally, focussing on the following:

(1) the current scheme of existing guidance;

---

77 For example, s 9 of the Bribery Act 2010 requires the Secretary of State to publish guidance about procedures which commercial organisations can put in place to prevent persons associated with them from engaging in bribery.

78 See para 4.5 of CP 236. As we note in our Consultation Paper, the number of consent SARS relating to terrorist financing are relatively small. Stakeholders report that problems are not encountered in the same way as in relation to Part 7 of POCA.

(2) criticisms of the current scheme and a summary of our provisional proposals on guidance;

(3) consultees' views on the value of guidance;

(4) our recommendations for reform.

THE CURRENT SCHEME

3.5 The complexity of the law has led to the creation of multiple layers of anti-money laundering guidance for those working in the reporting sector to consider.

3.6 The primary source of assistance, in the context of the consent regime, is sector-specific guidance produced by supervisory or other appropriate bodies (that is those that regulate or are representative of a trade, profession, business or employment). POCA permits supervisory authorities and other appropriate bodies to publish such guidance which the court must consider when deciding whether an offence has been committed under the provisions governing reporting obligations.[79] Accordingly, businesses and individuals may rely on guidance published by a supervisory body or appropriate body with HM Treasury approval in order to understand their reporting obligations.

3.7 The United Kingdom Financial Intelligence Unit ("UKFIU") published a "communication product" designed to deal with the most common queries in relation to authorised disclosures (DAML SARs).[80] Unlike guidance published by a supervisory authority or other appropriate body which gives an in-depth overview of a reporter's obligations in accordance with the legal framework, guidance published by the UKFIU gives practical advice to reporters about how and what to report. This guidance on best practice is aimed at improving the quality of SARs and promoting a better understanding of the reporting process amongst the reporting sector. In total, there are five sets of guidance issued by the UKFIU addressing different aspects of the consent regime. None have a statutory basis. Nor do these require the approval of the Government and none has involved a consultative process in its creation.[81]

CRITICISMS OF THE CURRENT SCHEME

3.8 It is a continuing challenge for reporters and commercial organisations to understand their obligations and apply the law correctly. To assist with compliance with reporting obligations reporters may consult guidance. Whilst some of this guidance is approved by HM Treasury, and must be taken into account by a court, it does not ultimately have the force of the law. At present, reporters carry the risk of individual criminal

---

79 Proceeds of Crime Act 2002, s 330(8).

80 National Crime Agency, *SARs Regime Good Practice Frequently Asked Questions* (May 2018).

81 National Crime Agency, Incorrect use of SAR Glossary Codes, (November 2018); National Crime Agency SAR Online User Guidance, (August 2018); National Crime Agency, SARs Regime Good Practice Frequently Asked Questions (May 2018); National Crime Agency, Guidance on Submitting Better Quality Suspicious Activity Reports (SARs) (August 2017); National Crime Agency, Guidance on Reporting Routes Relating to Vulnerable Persons (November 2016); and National Crime Agency, Submitting a Suspicious Activity Report (SAR) within the Regulated Sector (September 2016).

liability. They must identify their obligations from a complex legislative scheme and multiple sources of information offering guidance on the law.

3.9 In the Consultation Paper we made several observations about the way in which guidance has evolved:

(1) the large number of documents produced by various parts of the regulated sector and law enforcement agencies suggest a clear demand for guidance;

(2) individual sectors may benefit from guidance which gives examples and assistance specific to the relevant business practices;

(3) it is counter-productive and inefficient to have multiple interpretations of the law across several different documents;

(4) not all of the available guidance is consistent and different sectors may receive contradictory advice on the application of the law. This leaves reporters exposed to a greater risk of committing a criminal offence.

Fragmented guidance

3.10 Guidance should support those working in the reporting sector and aid understanding of their legal obligations under Part 7 of POCA. However, the lack of a single authoritative text to supplement Part 7 has resulted in a number of different sources of guidance on fundamental legal concepts within POCA that are common to all sectors. For example, a nominated officer in a bank would need to consult a number of sources in order to comply with their obligations under POCA. There is scope for consolidation or rationalisation of some of these sources of information into a single source of guidance on the law, in particular on important legal concepts which apply across all sectors.

EXAMPLE: POTENTIAL SOURCES OF LAW & GUIDANCE FOR A NOMINATED OFFICER OF A CREDIT INSTITUTION:

Conflicting guidance

3.11 Requiring every different segment of the reporting sector to consult multiple information sources to clarify their obligations presents obvious challenges and is burdensome. Furthermore, guidance issued by each sector does not, in this context, demonstrate a common understanding of important legal terms, concepts and exemptions/defences within POCA.

3.12 Some guidance is produced by those with supervisory or regulatory responsibilities (for example the Legal Sector Affinity Group ("LSAG")). Some of it is produced by trade associations or representative bodies (for example, the Joint Money Laundering Steering Group ("JMLSG")). Different sectors may diverge in how they interpret the legal obligations on a reporter working within their sector. They may offer different guidance on fundamental legal concepts.

3.13 Following the 2017 Money Laundering Regulations HM Treasury announced its intention to work with supervisors and industry to approve one set of guidance per sector. This is a welcome effort to harmonise these sources of guidance, rather than having multiple sources of guidance within an individual sector. For example, there is now one guidance document for the legal sector and one for the accounting sector.[82] This is a positive step, but does not go far enough. There remains a strong argument

[82] HM Treasury is clear that it will only approve one set of guidance per industry https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685248/PU2146_AML_web.pdf; for example see Legal Affinity Group, *Anti-money laundering guidance for the legal sector*, (March 2018); Consultative Committee of Accountancy Bodies, *Anti-money laundering guidance for the accountancy sector*, (March 2018).

for having a single, accessible, interpretation of universal legal concepts common to all sectors.

3.14 Examples of a lack of uniformity across approved guidance still exist, some of which we highlighted in our Consultation Paper. In relation to the application of the fundamentally important concept of suspicion for example, JMLSG guidance states:

> Suspicion is more subjective [than knowledge] and falls short of proof based on firm evidence. Suspicion has been defined by the courts as being beyond mere speculation and based on some foundation, for example "A degree of satisfaction and not necessarily amounting to belief but at least extending beyond speculation as to whether an event has occurred or not", and "Although the creation of suspicion requires a lesser factual basis than the creation of a belief, it must nonetheless be built upon some foundation".[83]

3.15 LSAG Guidance states that "there is no requirement for the suspicion to be clearly or firmly grounded on specific fact" and adds, "you do not have to have evidence that money laundering is taking place to have suspicion"[84].

3.16 The Consultative Committee of Accounting Bodies ("CCAB") counsels against "speculative" SARs and gives examples of disclosures which lack "specific supporting information".[85] The CCAB also makes observations as to what a suspicion is and in doing so it uses similar terminology to the legal and accounting sectors. However, it also use additional phrases including "more than mere idle wondering", "a positive feeling of actual apprehension or mistrust" and "a slight opinion, without sufficient evidence". Whilst the phrases are designed to assist reporters, they may create confusion or complication.

3.17 The practice of individual sectors placing a gloss on legal terms embedded in guidance which are meant to be interpreted generically creates difficulties in practice. Our data analysis certainly suggests significant variation in understanding; stakeholders' application of the concept of suspicion varied substantially.[86]

3.18 HM Treasury has confirmed to us that when approving guidance it does not insist that each supervisory body uses precisely the same terminology . There is clear merit in allowing each supervisory body to tailor its approach to the different challenges each sector faces in complying with the obligations under POCA. However, even small differences in terminology can impact significantly on how reporters apply the regime and can be responsible for creating additional confusion and inconsistency across different reporting sectors. Were it the practice of Crown Court judges to direct juries on the concept of suspicion in criminal trials across the country in such a way, it would create confusion and risk producing inconsistent verdicts. Where a reporter is at risk of committing a criminal offence and the subject of a disclosure can be denied access

---

83 Joint Money Laundering Steering Group, Anti-money laundering guidance for the UK financial sector, (December 2017).

84 Legal Affinity Group, *Anti-money laundering guidance for the legal sector*, (March 2018).

85 Consultative Committee of Accountancy Bodies, *Anti-money laundering guidance for the accountancy sector* (March 2018), para 6.1.5.

86 Chapter 5, paras 5.29 – 5.33.

to their bank account, divergence on such fundamental terms in published guidance creates potential unfairness.

Insufficient collaboration in creating and maintaining guidance

3.19 Where guidance is drafted by a supervisory or trade body for the benefit of its members, it is unclear to what extent, if any, guidance produced for other sectors is considered and reconciled within it. In addition, there are currently limited mechanisms for law enforcement agencies to have direct input into the creation and updating of guidance in any systematic way.[87] It may very well be that law enforcement agencies take a different view on how the law is interpreted and what information or intelligence is valuable. Consultation with the law enforcement agencies seems vital when such guidance is being constructed or updated if it is to be of maximum benefit to the relevant users, subject to ensuring that such guidance accurately reflects the current law. Inconsistency also arises between sectors, with some sectors providing this information in their disclosures to the UKFIU and others failing to do so, understandably relying on guidance issued by their supervisor. This presents real challenges in practice.

3.20 Key concepts within POCA are interpreted differently in sector-specific guidance. These interpretations do not always match with the views of law enforcement agencies. For instance, section 338 of POCA provides a defence of reasonable excuse. The CCAB anticipates that such a defence will only be made out in extreme circumstances such as duress or threats to safety.[88] By comparison, the LSAG takes a more pragmatic view on useful intelligence. For example, LSAG guidance advises that the defence will be available to those who fail to make a disclosure where the only information that a reporter would be providing would be entirely within the public domain.[89] In our discussions with law enforcement agencies, however, disclosure was considered to be crucial in these circumstances. This lack of clarity about when an offence may be committed fails to provide the reporters with the information that they need to avoid criminal liability.

3.21 Consultation is, of course, a two-way process. There are examples of key policy changes taken by the UKFIU which have been implemented by way of non-statutory guidance without formal consultation or oversight with the sectors. For example, in July 2016 a decision was taken by the UKFIU to rename the grant of appropriate consent as a 'Defence Against Money Laundering' ("DAML") or a 'Defence Against Terrorist Financing' ("DATF"). There has been no legislative change to reflect this and arguably, a fragmented approach to guidance risks confusion for those concerned with complying with their legal obligations.

No legal protection for reporters ("safe harbour")

3.22 While sector-specific guidance can be amended and updated, its non-statutory basis limits its usefulness. The courts are only permitted to "consider" any relevant

---

87 HM Treasury send relevant sections of guidance to the National Crime Agency for comment.

88 Consultative Committee of Accountancy Bodies, *Anti-Money Laundering Guidance for the Accountancy Sector* (March 2018), p 9.

89 Legal Sector Affinity Group, *Anti-Money Laundering Guidance for the Legal Sector* (March 2018), p 92.

guidance. Moreover, compliance with it does not, in itself, provide reporters with a defence to a criminal charge.[90] Although it may be advisable, individuals are not bound to follow or apply guidance.

Conclusion

3.23 In the Consultation Paper, we provisionally concluded that statutory guidance would be the optimal way to resolve the issues of fragmentation and conflict. It could also provide greater legal protection for reporters. Further, consultation across all of the stakeholder groups could still be achieved by this method.

3.24 We provisionally proposed that POCA be amended to include an obligation that the Secretary of State produce guidance (subject to adequate consultation) on the following topics:

(1) the suspicion threshold;

(2) what may amount to a reasonable excuse not to make a required and/or an authorised disclosure under Part 7 of the Proceeds of Crime Act 2002;

(3) the process of making an authorised disclosure and the concept of appropriate consent.

3.25 We will discuss each of these matters in the relevant chapter below. However, in the next section we focus on consultees' responses to our provisional proposal that, in principle, statutory guidance is the optimal approach. We also analyse the best approach to drafting and issuing statutory guidance and consider how it might be created before making our final recommendations.

CONSULTATION

3.26 Consultees were overwhelmingly in favour of statutory guidance. Their responses can be broken down as follows:

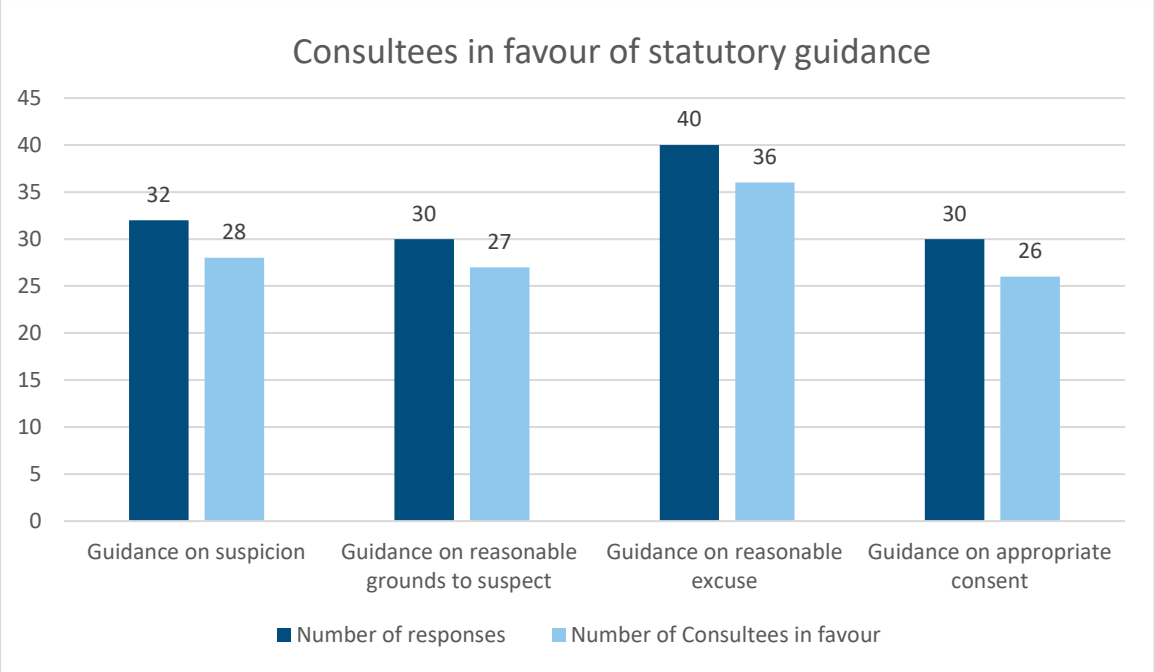
(1) In relation to statutory guidance on **suspicion**, 28 out of 32 consultees were in favour of our provisional proposal; in other words, 87.5% of those who responded agreed that it would be beneficial. Likewise, if the threshold for reporting were amended to one requiring reasonable grounds to suspect, 27 out of 30 consultees who responded were in favour of statutory guidance; amounting to 90% of consultees who answered this question.

(2) On the **reasonable excuse** defence, 36 out of 40 consultees who responded were in favour of our broad provisional proposal that statutory guidance should be issued; this amounts to 90% of consultees who answered this question.

(3) In relation to our provisional proposal on issuing statutory guidance on **appropriate consent**, 26 out of 30 consultees were in favour of our proposal: 87% of consultees who answered this question.

---

[90] Proceeds of Crime Act 2002, s 330(8). See also Updating the Land Registration Act 2002 (2016) Law Commission Consultation Paper No 227, 14.88.



3.27 In terms of individual responses, the National Crime Agency ("NCA") were open to statutory guidance stating:

> We are willing to explore, with policy departments, the development of a single, comprehensive, authoritative source of guidance (developed by Government, regulators, UKFIU and reporters) if that would drive up the clarity and consistency of SAR reporting.

3.28 The FCA agreed that statutory guidance would be welcomed by many reporters and observed that it has the merit of being more flexible and easier to update than definitions set out in law. The FCA did note that they had some doubts about the practicalities of providing guidance on many aspects of the SARs regime but were in favour in principle.

3.29 The Metropolitan Police Service ("MPS") agreed that it would be beneficial for the UK to develop a single authoritative source of guidance supported by continuing education:

> Collective learning and training should be considered alongside any authoritative document produced, to provide clarity and enhance the quality of reporting and the regime.

3.30 Only a small number of consultees, queried whether statutory guidance was the right approach at all. For example, The Association of British Insurers ("ABI") suggested that consideration should be given to whether guidance issued by supervisors would be more beneficial than guidance issued by the Government. Tristram Hicks (former Detective Superintendent on the national Criminal Finance Board) in collaboration with Ian Davidson (former Detective Superintendent with national financial investigation responsibility) and Professor Mike Levi of Cardiff University suggested that the Joint Money Laundering Steering Group ("JMLSG") would be best placed to issue such guidance.

3.31 Of those consultees who agreed with our provisional proposal that statutory guidance should be issued, there was a general consensus on three key points:

(1) there should be a single source of definitive guidance on the law;

(2) guidance should be produced in consultation with the reporting sector and law enforcement agencies; and

(3) compliance with guidance should provide reporters with a defence to a criminal offence under Part 7 of POCA ("safe harbour").

Single definitive source

3.32 Many of those in favour of statutory guidance noted that having a single authoritative document, applicable to all sectors, which covers the key concepts underpinning the reporting of suspicious activity would promote greater consistency in the application of POCA. Those opposed to statutory guidance commonly felt that there was a risk it could become too prescriptive and replace a risk-based approach.

3.33 Overall, consultees were attracted by the proposal for a single source of definitive guidance on the law. For example, the ABI stated that:

> One set of guidance will improve consistency of application and make for a more effective SAR regime with improved quality of reports. Greater clarity would help to reduce the volume of low-quality SARs.

Collaboration

3.34 UK Finance favoured a collaborative partnership between the public and private sector to shape a single source of definitive guidance:

> Some members thought this requirement should be mandated to the Secretary of State, but whatever mechanism is used, members were strongly of the view that it would be more useful to reporters if it was developed in discussion with the private sector to allow it to effectively addresses areas where there is a lack of clarity. If undertaken in consultation with the private sector, as described above, this would promote better quality SARs and reduce low value SARs.
>
> In developing any guidance (and more generally), the utility of reports is likely to improve if the private sector had more insight into what is suspicious to the law enforcement agencies as those agencies see a broader picture of criminal activity. This role could potentially be one for the new National Economic Crime Centre. Subject to resourcing issues at the Financial Intelligence Unit ("FIU"), some members would also welcome more direct feedback on the utility of their reports.

3.35 The Association of Accounting Technicians ("AAT") agreed that any guidance would benefit from a broad range of input:

> A joint consultative approach might result in better outputs as it would take into account the views of all affected parties providing definitions based on practical experience, and ensuring buy-in across the sectors.

3.36 The ABI also supported a joint approach to the drafting of guidance. They submitted that consultation during the drafting process would be crucial to ensure that guidance reflected accumulated expertise in identifying suspicious behaviour.

3.37 Dickinson Minto[91] highlighted the need for a more collaborative approach in the future:

> Moving forward, a greater dialogue between the regulated sector and the NCA should be encouraged. This would, no doubt, both reduce the quantity and improve the quality of SAR reporting.

3.38 The British Private Equity and Venture Capital Association ("BPEVCA") also agreed that consultation with the reporting sector was vital. They proposed that any indicative lists should be provided in consultation with industry prior to publication.

Safe harbour

3.39 Freshfields Bruckhaus Deringer was strongly of the view that guidance would need to be statutory in order to achieve the desired impact:

> We agree with the Law Commission that the Government should produce guidance on the suspicion threshold. We recommend, in particular, compiling a list of indicative factors which might contribute to, or detract from, a finding that there is suspicion of money laundering.
>
> For guidance to have the most significant impact for both intelligence agencies and reporting institutions, it should be placed on a statutory footing and there should be a clear basis in law for relying on the guidance when interpreting the provisions of POCA. Compliance with guidance should not be mandatory, but compliance with the guidance should provide a safe harbour against potential sanctions/liability for those entities that do choose to comply.

3.40 In relation to the form any guidance should take, Dickson Minto submitted that guidance similar to that issued in relation to the Bribery Act 2010 would be helpful:

> We note that the Bribery Act 2010 is, like POCA, drafted in broad terms but it is accompanied by useful guidance. POCA is not supplemented by any guidance at all. This should be remedied as part of this consultation process. The guidance could deal with both interpreting the meaning of suspicion as well as providing additional assistance on what the NCA is hoping to receive in terms of SAR reporting.

3.41 While the Proceeds of Crime Lawyers Association ("POCLA") welcomed one source of definitive guidance, there was concern that it may not achieve its objectives due to the continued risk of criminal liability for individuals who fail to report:

> Presumably, the intention is to protect some of those who fail to report (or who commit what would now be prohibited acts in relation to property that is or represents the proceeds of criminal conduct), and thereby reduce the volume of SARs. Clearly, such guidance has the potential to create problems as well as solve them, so the detail would be important. It has to be acknowledged that the

---

91 Consultation response of Dickinson Minto, a boutique law firm specialising in corporate matters.

requirement to make a report based on suspicion is an international requirement, but the sanction of criminal liability is not. As the sanction for not making a report in the UK is criminal liability and a sentence of imprisonment, reporters will continue to make reports on tenuous grounds.

Statutory guidance which replaces the plethora of conflicting material is to be welcomed, but it is naïve to think it will make much practical difference. We believe the better solution is to remove the requirement to make a report from the criminal law completely. Reports of suspicions should be made a regulatory requirement. Then the mental element of the substantive money laundering offences can be converted to knowledge or belief, without impacting significantly on the obligation to make disclosure of suspicious transactions.

ANALYSIS

3.42 Guidance can be issued under different labels. In our Consultation Paper we explored existing models for issuing guidance, in particular:

(1) statutory guidance (for example, guidance produced under a requirement within the Bribery Act 2010 and HMRC Guidance on the corporate offences of failure to prevent the criminal facilitation of tax evasion in the Criminal Finances Act 2017);

(2) a code of practice (for example those issued pursuant to the Police and Criminal Evidence Act 1984 ("PACE")).

Statutory guidance

3.43 It is not uncommon for an Act to require or permit a Minister to issue guidance about how something is to be done under its provisions. Although such guidance is not to be treated as legislation, it is capable of having legal effect. The courts will give guidance produced under a statutory power greater weight than guidance produced voluntarily.[92] Statutory guidance can be of substantial value in helping to administer complex and important areas of policy.

3.44 Statutory guidance was issued in relation to the Bribery Act 2010. Section 7 of the Bribery Act 2010 created a new offence which can be committed by commercial organisations which fail to prevent persons associated with them from committing bribery on their behalf. Although section 7 holds a commercial organisation liable for the actions of their associates, the legislation provides for a defence. If the commercial organisation can prove, on a balance of probabilities, that it had in place adequate procedures designed to prevent associated persons from paying bribes, it can avoid liability. This is true notwithstanding that corruption occurred.

3.45 The legislation does not clarify what would amount to adequate procedures. After much debate during the Bill's passage, an additional clause was introduced at a late stage obliging the Secretary of State to publish guidance.

---

92 D Greenberg, *Craies on Legislation* (11th ed 2017), p 166.

3.46 Section 9 of the Act requires the Secretary of State to publish guidance about the types of procedure organisations can implement to prevent those associated with it from bribing, or being bribed by another. In March 2011, the Ministry of Justice published the Government's guidance on the Bribery Act 2010.[93]

3.47 The Secretary of State may, from time to time, publish revisions to guidance or revised guidance. The Act imposes an obligation on the Secretary of State to consult the Scottish Ministers and the Department of Justice in Northern Ireland before publishing guidance. The Secretary of State may publish such guidance in any manner considered appropriate.

3.48 The guidance is non-prescriptive and requires commercial organisations to adopt a risk-based approach based on a set of guiding principles. It was not intended to "provide a box-ticking exercise for commercial enterprises."[94] Whether procedures are in fact adequate remains a matter to be decided by the courts:

> The guidance is designed to be of general application and is formulated around six guiding principles, each followed by commentary and examples. The guidance is not prescriptive and is not a one-size-fits-all document. The question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case.

3.49 Statutory guidance has also been produced in relation to offences under sections 45 and 46 of the Criminal Finances Act 2017 ("the CFA"). The legislation creates offences of failure to prevent the facilitation of tax evasion offences in the UK or abroad. It is a defence to these offences if a relevant body is able to establish that when the tax evasion was facilitated it either had in place such procedures as it was reasonable in all the circumstances to expect it to have, or it was not reasonable in all the circumstances to expect the relevant body to have any procedures in place.[95]

3.50 Section 47 of the CFA places an obligation upon the Chancellor of the Exchequer to prepare and publish guidance about the procedures that commercial organisations can put in place to prevent their employees from committing a tax evasion facilitation offence. The Government has published guidance in accordance with this provision which assists in consideration of whether the reasonable procedures defence is available to an organisation. The guidance explains the policy behind the creation of the new offences and offers assistance on how corporations can institute proportionate procedures to prevent the commission of a criminal offence. Additionally, section 47(7) allows the Chancellor to approve and endorse guidance produced by a trade association that addresses sector-specific risks. This allows for

---

93 Ministry of Justice, *The Bribery Act 2010 Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing* (2010).

94 M Raphael, ***Blackstone's Guide to the Bribery Act*** (1st ed 2010), p 62.

95 See, K Laird, "The Criminal Finances Act 2017 – an introduction*"* [2017] *Criminal Law Review* 915; and Criminal Finances Act 2017, ss 45(2), 46(3).

guidance directed towards specific industry issues which supplements statutory guidance.

A code of practice

3.51 Modern legislation frequently provides for a Minister, for example the Secretary of State, to issue guidance in the form of a code of practice in relation to particular matters contained in a given Act. Codes are an effective way of keeping the law relevant and operative as they can be revised regularly.[96] Codes of practice published to supplement criminal legislation usually relate to the powers exercised by law enforcement.[97] For example, both the Police and Criminal Evidence Act 1984 ("PACE") and the Terrorism Act 2000 are supplemented by various codes of practice governing police powers.[98]

3.52 The Cabinet Office's 'Guide to Making Legislation' defines a code of practice in the following way:

> A 'code of practice' is an authoritative statement of practice to be followed in some field. It typically differs from legislation in that it offers guidance rather than imposing requirements: its prescriptions are not hard and fast rules but guidelines which may allow considerable latitude in their practical application and may be departed from in appropriate circumstances. The provisions of a code are not directly enforceable by legal proceedings, which is not to say that they may not have significant legal effects. A code of practice, unlike a legislative text, may also contain explanatory material and argument.[99]

3.53 PACE codes have to offer guidance on concepts similar to those in the POCA context. Some of the powers exercisable by police officers contained within PACE require a minimum threshold to be reached before they can be exercised. Whilst the concept of suspicion is not a term in PACE, reasonable grounds for suspicion and/or reasonable suspicion are included in the provisions. These concepts are not defined within the legislation itself but are amplified in the codes of practice in a manner designed to be of maximum use to the people applying them and needing to do so consistently and fairly. There are parallels to be drawn. To some extent, the obligations to make required and authorised disclosures can be said to confer a law enforcement function on reporters and, arguably, providing clarity around those obligations is paramount.

3.54 In 2015 the Attorney General issued a code of practice as to how, in England and Wales, the Director of Public Prosecutions, the Director of the Serious Fraud Office and other specified persons are to use investigatory powers under Part 8 of POCA. [100]

---

96 D Greenberg, *Craies on Legislation* (11th ed 2017) p 162.

97 The Highway Code is an example of an exception to this.

98 See s 43 powers to stop and search, s 47(2) authorisation to stop a vehicle, s 47(3) powers to stop a pedestrian and s.47(6) powers of seizure and retention; see Codes A to H https://www.gov.uk/guidance/police-and-criminal-evidence-act-1984-pace-codes-of-practice.

99 See Appendix D, Cabinet Office, Guide to Making Legislation, p 342 (July 2017).

100 Attorney General's Office, *Code of Practice issued under Section 377A of the Proceeds of Crime Act 2002 (England and Wales)* (2015), (last visited 21 May 2019).

The Code explicitly states that it should not be regarded as a complete and authoritative statement of the law:

> Only the courts can give an authoritative interpretation of the legislation, and the contents of this Code may be affected by subsequent judicial decisions and changes to the relevant legislation.[101]

3.55 Codes have also been used in relation to the private sector. For example, a code of practice was issued in relation to landlords to avoid unlawful discrimination when conducting "right to rent" checks in the private rented residential sector.[102]

Home Office Circular

3.56 We have also considered the alternative course: that of recommending that the Home Office produce a Circular to educate reporters as to their obligations under Part 7 of POCA.

3.57 Circulars are official Home Office documents that are used to communicate Home Office policy. They can be used to provide updates and further detail on policy and procedures. For example, circulars have been issued to advise of changes to the Misuse of Drugs Act 1971, to firearms provisions in the Policing and Crime Act 2017 and to issue guidance on police misconduct.

3.58 A number of Home Office Circulars were published to accompany the new provisions relating to extended moratorium periods and information sharing in the Criminal Finances Act 2017.[103] Circulars can be a useful educational tool when there are significant policy changes. A Home Office Circular could be used to restate or clarify reporters' obligations under POCA.

3.59 The Home Office issued a short Circular in 2008 on the operation of the consent regime. It was issued to ensure greater consistency in considering requests for consent under Part 7 of POCA. This circular covered the decision-making process and the fundamental principles to be balanced by the Serious and Organised Crime Agency ("SOCA")[104] in arriving at a decision on consent.[105]

3.60 The Home Office could issue a series of Circulars to offer additional guidance on the statutory concepts of suspicion, reasonable excuse and appropriate consent. However, Circulars are intended to be short documents. There may be multiple Circulars on a topic in existence, each issued and modified at different times resulting

---

101 Attorney General's Office, *Code of Practice issued under Section 377A of the Proceeds of Crime Act 2002 (England and Wales)* 2015 (last visited 21 May 2019).

102 Home Office, *Right to rent immigration checks: landlords' code of practice*, (May 2016), (last visited 21 May 2019).

103 See Home Office, *Circular 007/2018: Criminal Finances Act 2017 – Money Laundering: Sharing of Information within the Regulated Sector sections 339ZB-339ZG*; Home Office, *Circular 008/2018: Criminal Finances Act 2017: Extending the moratorium period for SARs.*

104 In 2013 the Serious Organised Crime Agency was merged into the then newly established National Crime Agency.

105 Home Office, *Circular 029/2008 Proceeds of Crime Act 2002: Obligations to report Money Laundering – The Consent Regime*.

in muddle and confusion. The main drawback with issuing a Home Office Circular rather than introducing statutory guidance is the inferior level of protection provided to reporters. While a court may take the guidance in a circular into account, it would not be afforded the same weight as statutory guidance which has a superior status. For this reason, we have decided that a Home Office Circular would not drive cultural change.

Measuring the likely impact of statutory guidance

3.61 The model which most closely aligns with our objective of improving compliance with legal obligations is the guidance issued under the Bribery Act 2010. A significant period has now passed since that Act came into force and guidance was published. This allows for an assessment of its relative strengths and weaknesses as a model for reform of Part 7 of POCA.

3.62 Awareness is an important consideration. While reporters are more likely to avail themselves of statutory guidance because of its status, its introduction must be part of a committed programme of bringing about cultural change. In 2015, the Government commissioned a study to assess the impact of the Bribery Act on small and medium sized business ("SMEs"). Of those SMEs surveyed, 26% were aware of the Ministry of Justice guidance on the Bribery Act 2010. Of those SMEs who were aware of the statutory guidance and had read it, the overwhelming majority (89%) of those who responded found it to be useful.[106] Only 3 SMEs who were aware of the guidance, and had read it, did not find it useful. It is vital that the introduction of statutory guidance is coupled with a general programme of bringing about cultural change for reporters and those involved in the day-to-day functioning of the consent regime.

3.63 One consideration, should statutory guidance be implemented, is what the legal effect of it would be. At present reporters are personally liable for a money laundering offence or for failing to disclose a suspicion of money laundering. To have a material impact on the number of defensive reports, reporters would need to feel confident when making individual judgements about whether or not to make a disclosure. Clearly drafted guidance about how reporters can comply with their obligations under Part 7 of POCA could help with this. As discussed at paragraph 3.40 above, the courts will give some weight to statutory guidance. Sections 330(8) and 331(7) of POCA currently go further than that in providing that, in deciding whether a person committed an offence under those sections, a court *must* consider whether a person followed relevant guidance. Whether that type of provision should apply to any new statutory guidance of the type under discussion would be a matter for government to decide.

3.64 We remain of the view that statutory guidance is the optimal way to provide greater clarity and certainty to reporters. Currently there is a diffuse range of sources of guidance presented in different formats. There are good arguments for reconciling and consolidating the numerous existing interpretations of the laws relating to the consent regime into a single coherent source of guidance on the law, upon which reporters can rely.

---

106 HM Government, *Insight into awareness and impact of the Bribery Act 2010* (2015), p 4.

3.65 We consider that statutory guidance would provide the most effective means of improving the effectiveness of the consent regime. We suggest that it would have six principal benefits:

(1) it would improve understanding of the current law;

(2) it would provide greater clarity and certainty for reporters;

(3) it would improve consistency of SARs and their quality;

(4) it would act as a counterbalance to the consent regime and help to reduce defensive and unnecessary reporting;

(5) it would introduce valuable flexibility in the system to respond to changes in money laundering behaviour and other legislation which may impact on SARs;

(6) it would reduce or stop the flow of those types of SARs which have been identified as having limited value.

Who would draft and approve the guidance we recommend: does the SARs regime need an Advisory Board?

3.66 We have considered the best way to ensure that guidance achieves the objectives of clarity and consistency and meets the needs of the specific sectors with reporting obligations. In this section, we go on to consider the best approach for ensuring that:

(1) the drafting process benefits from the collective expertise of those working in the regulated sector, law enforcement agencies and Government;

(2) there is adequate oversight ensuring that it is reviewed and updated at regular intervals; and

(3) there is critical oversight of the process of drafting guidance to ensure it accurately reflects the correct legal position.

3.67 In this section, we will explore the arrangement and merits of creating a Board with responsibility for overseeing the writing and updating of guidance.

3.68 Boards have been used with varying degrees of influence and oversight to review and consult on legislative matters.

3.69 The Home Office PACE Strategy Board was established in December 2007 as an independent monitoring group, appointed to oversee and advise on two public consultations commissioned by the Home Office in relation to the Police and Criminal Evidence Act 1984. It was disbanded in April 2008 following publication of the final Consultation Paper.

3.70 Board members included police, civil servants and other relevant parties. The Board's Terms of Reference were:

> [To] monitor the review process and advise on its strategic development. The Board will monitor and help direct the programme of work arising from the Review programme and oversee and support the evidence based development of policy.

3.71 In a recent evidence session before a Select Committee Rodney Warren[107] discussed the difficulties with failing to regularly review guidance and commented on the success of the PACE review mechanism:

> My example is the Police and Criminal Evidence Act. That is a very live piece of legislation. It is in operation all the time by very many people. It is at the cornerstone of our criminal justice system. It came up for review, and the Home Office, looking at the review after approaching 20 years…felt that it was helpful to see how the codes of practice were being operated; whether they were appropriate, whether they could be changed or improved.
>
> The then Home Secretary then set up the PACE review Board, which has continued to exist. As life has changed, with electronic working and so forth, there has been a ready opportunity to develop the codes of practice, to seek approval, and to seek input from specialists across the broad spectrum; the Board is not just made up of individuals in the Home Office—invited to participate are academics, practitioners, police officers of course, and those directly concerned with its operation.
>
> It has served to generate a constantly renewing focus on how the Act is operating, and it seemed to me that there is an opportunity here for the Ministry of Justice to consider doing something like that with the guidance so that it is frequently refreshed, maybe annotated at the point at which it is refreshed periodically—perhaps annually—and people will be able to look at it. It is a document that they will see and they will not think that it is stale or out of date.[108]

3.72 As a further example, the Firearms Consultative Committee ("FCC") was established in 1988 in accordance with the Firearms Amendment Act 1988. Its remit included keeping the working of the Act under review and making specific recommendations on amendments. The Act included no statutory criteria for membership of the FCC; therefore the Home Secretary was given a broad power to make appointments. The FCC's members included those who had knowledge and experience of either the possession, use or keeping of, or transactions in firearms, weapon technology or the administration or enforcement of the provisions of the Firearms Act.[109] They ranged from the Royal Society for the Prevention of Cruelty to Animals, to the National Rifle Association and the British Shooting Sports Council. The life of the FCC was extended numerous times but it was ultimately disbanded in 2004.The Select Committee on Home Affairs acknowledges its achievements:

> We believe that the Firearms Consultative Committee has operated effectively to its remit of reviewing the operation of the Firearms Act, and has provided a valuable

---

107 Senior Partner, Warren's Law and Advocacy, member of the Council of the Law Society of England and Wales and former Director of the Criminal Law Solicitors' Association.

108 Bribery Act 2010 Committee: Oral Evidence, (13th November 2018) Q 139.

109 Control over Firearms, Report of the Select Committee on Home Affairs Committee (1999-2000) HC 95-II.

forum for contact and discussion between representatives of shooting organisations, the police and other interested parties. We regret that successive Governments have not found it possible to implement some of the Committee's more detailed recommendations for the operation of firearms legislation, and we hope that this Government will, in reviewing the Firearms Acts, keep the full range of those recommendations in mind.[110]

3.73 Further examples are the Joint VAT Consultative Committee ("JVCC") and the Joint Customs Consultative Committee ("JCCC"). They are HMRC-sponsored bodies. They were designed to improve the administration of VAT or customs policies and procedures. Neither body has legislative powers. As purely advisory Committees, their functions include:

- exchanging views between HMRC and the relevant sector representatives;
- providing advice on strategic changes;
- reviewing progress against aims and objectives;
- suggesting remedial action for objectives that are not being achieved.[111]

3.74 As with the FCC, the membership of these bodies is drawn from relevant experts comprising representatives of professional trade and sector bodies. The JVCC has additional powers to establish and remit work to an informal sub-group.

3.75 We consider that there are significant benefits to the creation of a specialist Advisory Board for the SARs regime. The constitution could ensure that the views and needs of the reporting sector, law enforcement agencies and Government were represented. In addition, other members may include academics, experts with technological or digital or data interests. The inclusion of such experts would assist with ongoing analysis of SARs and measuring their effectiveness. Such a panel of experts would be able to advise the Secretary of State and produce valuable guidance clarifying the obligations of reporters. The Board could be established for a set period with the option to be extended.

RECOMMENDATIONS

3.76 The statutory guidance we recommend would build on the work that has already been done in both sector-specific guidance and risk assessments under the Money Laundering Regulations 2017[112] identifying indicative factors specific to each sector. Such guidance would benefit from a more collaborative approach which would also

---

110 Control over Firearms, Report of the Select Committee on Home Affairs Committee (1999-2000) HC 95-I.

111 Terms of Reference available at https://www.gov.uk/government/groups/joint-customs-consultative-committee#terms-of-reference and https://www.gov.uk/government/groups/joint-customs-consultative-committee (Last visited 21 May 2019).

112 The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, transposed the (European Union) Fourth Anti-Money Laundering Directive into domestic law. The Money Laundering Regulations 2017 create a system of regulatory obligations for businesses under the supervision of the Financial Conduct Authority and the relevant professional and regulatory bodies recognised within the Regulations.

meet the needs of law enforcement agencies and the UKFIU. It could also ensure that common language is developed to assist law enforcement agencies with making the best use of these reports. In order to be most effective, we have concluded that the Secretary of State should be advised by a Board whose constitution and expertise reflects the diverse range of stakeholders involved in the consent regime. By constituting a Board with responsibility for the oversight of the regime, it will make the scheme more responsive and agile as developments occur by drawing on a range of expertise to make necessary changes.

Recommendation 3.

3.77 We recommend that POCA is amended to impose an obligation on the Secretary of State to issue guidance covering the operation of Part 7 of POCA so far as it relates to businesses in the regulated sector. In particular, guidance should be provided on the suspicion threshold, appropriate consent and reasonable excuse to assist the regulated sector in complying with their legal obligations.

3.78 We also recommend that an expert Board is established to advise the Secretary of State. Membership of the Board should include representatives spanning a broad cross-section of the reporting sector, law enforcement agencies, Government and other members that may provide specific expertise. The Board should be established for an initial period of 5 years with the option to extend its life.

Recommendation 4.

3.79 We recommend that an Advisory Board is created, the constitution of which should include relevant experts such as representatives from the reporting sector, law enforcement agencies, Government and other relevant experts. Its role should be:

(1) to assist in the production of statutory guidance;

(2) to consult on monitoring the effectiveness of the reporting regime and to make recommendations to the Secretary of State as appropriate.

Chapter 4: The "all-crimes'' approach

INTRODUCTION

4.1 In this chapter we discuss the merits of the "all-crimes" approach to money laundering offences in the Proceeds of Crime Act 2002 ("POCA") and the effects of this approach on suspicious activity reporting.

4.2 The breadth of the definition of "criminal property" in section 340 of POCA means the principal money laundering offences apply to dealings with property derived from any criminal offence – the predicate offence.[113] A consequence of this is that individuals in the regulated sector are obliged to report suspected laundering of the proceeds of any criminal conduct. Similarly, any person who handles property he or she suspects to be derived from crime may need to seek authorised consent to avoid criminal liability under sections 327-329. In either case an individual submitting an authorised disclosure (DAML SAR) or required disclosure does not have to turn their mind to what predicate offence might have led to property becoming classified as criminal property.

THE CURRENT LAW

4.3 The obligation to report suspected laundering of the proceeds of "all-crimes" derives from the combined effect of the way "criminal conduct", "criminal property" and "money laundering" are defined in section 340 of POCA. The legislation provides:

> (2) Criminal conduct is conduct which—
>
> > (a) constitutes an offence in any part of the United Kingdom, or
> >
> > (b) would constitute an offence in any part of the United Kingdom if it occurred there.
>
> (3) Property is criminal property if—
>
> > (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
> >
> > (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.
>
> (11) Money laundering is an act which—
>
> > (a) constitutes an offence under section 327, 328 or 329,

[113] Proceeds of Crime Act 2002 ss 327-329 and 340; Anti-Money Laundering: the SARs Regime, Law Comm Consultation Paper 236 (2018) ("CP 236"), paras 2.57-2.68 and 5.1.

(b) constitutes an attempt, conspiracy or incitement to commit an offence specified in paragraph (a),

(c) constitutes aiding, abetting, counselling or procuring the commission of an offence specified in paragraph (a), or

(d) would constitute an offence specified in paragraph (a), (b) or (c) if done in the United Kingdom.

4.4 A person "benefits from conduct" if he or she obtains property as a result of or in connection with the conduct.[114]

4.5 Once an individual in the regulated sector[115] suspects that they are dealing with criminal property, sections 327, 328 and 329 of POCA prohibit the reporter from certain actions unless they make an authorised disclosure and receive appropriate consent to proceed with the transaction.

4.6 The obligation to report suspected money laundering in sections 330 to 332 will also apply.

4.7 In both cases, disclosures will be required regardless of the seriousness of the underlying offences that are suspected and irrespective of whether the reporter can identify what offence might have generated the benefit.

EVALUATION OF THE CURRENT LAW

4.8 As we observed in our Consultation Paper, in adopting an "all-crimes" approach, the United Kingdom ("UK") has chosen to exceed the minimum international standards required by European Union laws or recommended by the Financial Action Task Force ("FATF").[116] This simplifies reporting obligations to some extent because reporters need not try to identify the types of crime that may have been committed. However, it does mean that all criminal activity that generates funds or other property is caught by both the consent regime and the required disclosure provisions regardless of the gravity of the crime.

4.9 The "all-crimes" approach has led to some unintended consequences. One is the disproportionate burden placed on the legal profession. We outlined Dr Sarah Kebbell's research on the anti-money laundering regime and the legal profession in our Consultation Paper. Kebbell noted that the legal sector tended to make authorised disclosures rather than required disclosures: 75.5% of all legal sector SARs were

---

114 Proceeds of Crime Act 2002, s 340(5).

115 The regulated sector refers to those institutions specified in Schedule 9, paragraph 1 to the Proceeds of Crime Act 2002 (and corresponding provisions in the Terrorism Act 2000) which are subject to particular obligations under anti-money laundering legislation.

116 CP 236, paras 5.3-5.4. Since the publication of the Consultation Paper the Sixth Money Laundering Directive has come into force. The new directive, which EU member states have until December 2020 to transpose, but the UK is not bound by, stipulates that money laundering offences should apply to dealings with proceeds from 22 specific categories of predicate offences and offences punishable by more than one year's imprisonment: Sixth Money Laundering Directive (EU) No 2018/1673 Official Journal L284 of 12.11.2018 p 22, art 2.

authorised disclosures seeking consent. There is a perception that a large number of those reports concern minor offences or "regulatory" offences that technically amount to money laundering because of the definition of criminal property.[117] In Kebbell's research, this was identified as problematic as it shifted the focus away from serious crime:

> A focus on technical SARs diverts resources away from areas of real money laundering risk. This focus can even foster a division between what is considered by the legal professional to be "real" money laundering, as separate and distinct from "technical" laundering.

4.10 For example, a solicitor executing a high value commercial transaction may identify a regulatory breach or the commission of a low-level offence (such as a copyright licencing infringement or planning law breach). Notwithstanding the non-serious nature of the offence, the solicitor will need to submit an authorised disclosure and seek consent to continue. So, for example, a solicitor may identify that a client has, at some stage, failed to comply with a tree preservation order during the development of a piece of land (a non-imprisonable offence).[118] The transaction would be paused, pending consent from the NCA, resulting in delay and additional costs to all parties involved in the process.

4.11 Moreover, the crime may be historical and the criminal property in question may amount to a pecuniary advantage rather than a tangible asset such as money or property, for instance where an individual may have avoided paying for a software licence. If a person obtains a pecuniary advantage as a result of or in connection with criminal conduct, he or she is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.[119] The reporting of such conduct has a disproportionate effect, because a transaction will be paused pending consent despite the crime potentially being historical and unlikely to require urgent investigation or intervention. This is illustrated in the example below.

---

117 S Kebbell, ""Everyone's looking at nothing" – the legal profession and the disproportionate burden of the Proceeds of Crime Act 2002" [2017] *Criminal Law Review* 741.

118 Town and Country Planning Act 1990, s 210.

119 Proceeds of Crime Act 2002, s 340(6).

Example of a legal sector authorised disclosure:

A solicitor executing a high value commercial transaction may identify a regulatory breach or the commission of a non-imprisonable offence (such as failing to comply with a tree preservation order when building new homes) but which results in a person obtaining a pecuniary advantage. In those circumstances, the solicitor will need to submit an authorised disclosure and seek consent to continue. The transaction would be paused, pending consent from the NCA, resulting in delay and additional cost to all parties involved in the process. The transaction could be delayed for up to 7 days initially, for a further 31 days if the case enters the moratorium period. An application could also be made to extend the moratorium period.

4.12 Stakeholders expressed the view that when reporters submitted SARs for what they perceived to be "technical" compliance, they felt the burden was disproportionate.[120] Some stakeholders queried whether an obligation to file a SAR in every instance where such offending is identified may be disproportionate and whether it might be more appropriate to focus their energies on more "serious" crime, however that term might be defined.

CONSULTATION

4.13 We asked whether we should maintain the "all-crimes" approach in POCA or move to a "serious crimes" approach. For those consultees who favoured a change, we also sought views on three alternative formulations:

(1) a serious crimes approach, whether based on a list of offences or maximum penalty; or

(2) retaining an "all-crimes" approach for the money laundering offences but requiring SARs only in relation to "serious crimes". This could be achieved by extending the reasonable excuse defence to those who do not report, for example, suspected non-imprisonable crimes or those less serious crimes which would be listed on a schedule to the Act; or

(3) providing the opportunity to those in the regulated sector to draw to the attention of the Financial Intelligence Unit in the NCA any non-serious cases, whilst maintaining a required disclosure regime for offences on a schedule of serious offences listed in one of the ways identified above.

4.14 Of the 42 respondents who specifically addressed this question, 31 favoured retaining the "all-crimes" approach; 11 favoured change. Some consultees who disagreed with the "all-crimes" approach acknowledged the difficulties that are likely to arise in implementing any of the alternatives put forward in the Consultation Paper.

[120] CP 236, paras 5.5-5.8.

4.15 There was little support among consultees for option (1). There was, however, more support for retaining an "all-crimes" approach broadly while making changes to reporting obligations as proposed in options (2) or (3) or in a similar manner.

4.16 Options (2) and (3) both approach a similar end by different means. In option (2), the obligation to report "all-crimes" would remain, but a reporter might have a reasonable excuse for failing to report in non-serious cases. Reporters could be assisted by guidance in making their decision as to whether or not to report.

4.17 In option (3) reporters would only be obliged to make reports for serious cases (however defined), but could voluntarily draw the attention of the UKFIU to non-serious cases by submitting a SAR.

4.18 Shearman & Sterling LLP, the Association of Accounting Technicians and American Express offered some support for option (3). Shearman & Sterling LLP noted it "would allow judgement to be exercised but would limit required disclosures to only those matters within scope of the 'serious crime' definition." It follows from the response of Government stakeholders that they would prefer to receive reports in all cases so that they retain the opportunity to assess the possible intelligence even in non-serious cases rather than relying on a voluntary SAR to flag up concerns.

4.19 Some stakeholders who favoured retaining an "all-crimes" approach also acknowledged the potential merit of option (2). For example, Freshfields Bruckhaus Deringer supported option (2), while Northumbria University noted it offered the greatest flexibility and Linklaters favoured a version of it.

4.20 Stakeholders who disagreed with option (2) stressed that it would be difficult to maintain a list, especially as new offences were created.

4.21 Most stakeholders expressed the view that each of the three alternative proposals suffered from a common problem: it will often not be apparent at the point of submitting a SAR what predicate crime may have been committed. The shift to a "serious crimes" approach may make the task of reporters more onerous, not less. So, for example, the Crown Prosecution Service ("CPS") argued that the "all-crimes" approach "does not over-burden the drafting of a SAR nor require the identification of a predicate offence."

4.22 This position was further explained in the response of Freshfields:

> A narrower definition would mean that, in addition to identifying certain patterns of transactions as indicative of criminal conduct, compliance officers/systems would have to perform an investigative function to link a transaction to a specific crime before filing a SAR… .it is intelligence agencies, rather than reporting entities, that are best placed and qualified to investigate what the predicate offence which renders property criminal may be in any given context.

4.23 UK Finance concurred:

> A reporter may observe suspicious transactional activity, which may indicate money laundering but cannot be linked to a predicate crime… reporters would be unable to consistently determine the predicate offence or the seriousness of the crime.

4.24 Not all professions in the regulated sector face the same difficulty in identifying predicate offending. It is notable that more than half of those responses that supported moving away from the "all-crimes" approach were from the legal sector.[121]

4.25 These consultees cited examples where, in the conduct of due diligence investigations into a client, it was possible to identify precisely which minor offences and regulatory breaches had been or may have been committed. The combination of the detailed documentary evidence about the affairs of a business available during those investigations, coupled with the legal training of those processing the information in the law firm means that specific offences will often be readily identifiable.

4.26 There was also a perception that, where a minor or regulatory offence was identified, the intelligence value of these SARs was limited as they were unlikely to lead to a criminal investigation. Consultees variously suggested there was "no value", "no real value" or "little or no useful intelligence" to be gained from such reports.[122] From this perspective these SARs merely detracted from the anti-money laundering scheme generally and reduced goodwill in the regulated sector.

4.27 On the other hand, Government stakeholders, including law enforcement agencies, stressed that the intelligence value of a SAR could not and should not be tied to specific crimes. For example, both the Metropolitan and City of London Police Services noted that serious and organised criminals also often commit less serious crimes. These police forces favoured the retention of an all-crimes approach on the basis that any given SAR could contribute to the broader intelligence picture and provide a "gateway" to disrupt criminality. The City of London Police, for example, suggested "what may seem like a fairly innocuous or insignificant piece of offending can actually be part of a much larger criminal enterprise." The type of offence in itself may not in itself be decisive in determining the usefulness of the intelligence it generates.

4.28 One consultee, the Law Society of England and Wales, proposed a fourth option of a "de-scoped list":

> There are several types of SARs which clearly result in reporting *de minimis* issues. With thousands of criminal offences, deciding which do not produce useful intelligence would require extensive assessment and stakeholder consultation by the Law Commission. The results of the assessment could help determine which offences should be reportable, or preferably, produce a list of offences that would not need to be reported even where knowledge or suspicion of money laundering of proceeds derived from these offences was present. The latter approach would result in a shorter and more manageable list of offences, and one that all stakeholders could agree on. For the sake of brevity, we will call this approach a 'de-scoped list' approach.

---

121 Including law firms, the Law Society of England and Wales, Alistair Craig (a solicitor), and academic research derived from engagement with the sector conducted by Dr Sarah Kebbell.

122 Consultation responses of Norton Rose Fulbright, the Association of Accounting Technicians and Sherman & Sterling LLP, respectively.

4.29 The de-scoped list could include failure to obtain certain licences or situations where the only benefit derived is a pecuniary advantage (except in the case of tax evasion). The list would have to be coupled with statutory reform or clear Government guidance that a reasonable excuse for failure to report offences on the list would be available. The reasonable excuse approach would allow – indeed, require – reports in cases where the predicate offence may be 'de-scoped' but is not known to the reporter, solving the challenge of needing to identify the predicate offence.[123]

DATA ANALYSIS

4.30 In our data analysis of SARs discussed in chapter 2, we examined a sample of authorised disclosures in which consent to proceed with a prohibited act is sought.

4.31 We set out to test two hypotheses outlined in our Consultation Paper. First, that one of the causes of the high volume of reports was the inclusion of non-serious crimes. Secondly, that it might be difficult for reporters to identify with any level of accuracy the offence which generated the criminal property in question.

4.32 In order to carry out this exercise, we needed to identify what would constitute a serious crime for the purpose of our analysis.

Serious crimes

4.33 In our Consultation Paper we identified two potential approaches to the classification of offences as either serious or non-serious. We observed that there were at least two existing examples where serious criminal offences have been classified and listed in a statutory schedule. We also outlined the alternative approach of using a penalty threshold, in other words, categorising offences as serious by referring to the length of the maximum sentence available.

4.34 Based on the above, we used three different reference points for deciding if a crime met the threshold of seriousness in our data analysis:

(1) Schedule 1 to the Serious Crime Act 2007;[124]

(2) Schedule 2 to POCA;[125] and

(3) all offences punishable by way of a maximum penalty of more than one year's imprisonment. We set the penalty threshold to meet the requirements of the Fourth Money Laundering Directive ("4AMLD").[126]

Identification of the predicate offence

4.35 We recorded whether reporters had purported to identify the predicate offence in their disclosure. However, we could not judge the reporter's accuracy or level of confidence

---

123 See also para 4.64 to 67 below.

124 Eligibility offences for Serious Crime Prevention Orders.

125 Criminal lifestyle offences for the purpose of confiscation.

126 CP 236, para 5.11; Fourth Money Laundering Directive, (EU) No 2015/849 Official Journal L141 of 5.6.2015 p 73, art 3(4)(f).

in their assertion. We found that, in over a third of cases, no predicate offence was included in the SAR as filed.[127] Currently, there is no requirement to identify the crime from which the criminal property originates. Therefore, we cannot be sure of the reason why a reporter did not identify the predicate offence in their disclosure. It could be that further investigative work would be needed, it was impossible to identify the predicate offence or the reporter simply chose not to provide the information as they were not obliged to do so.

Proportion of disclosures for non-serious offences

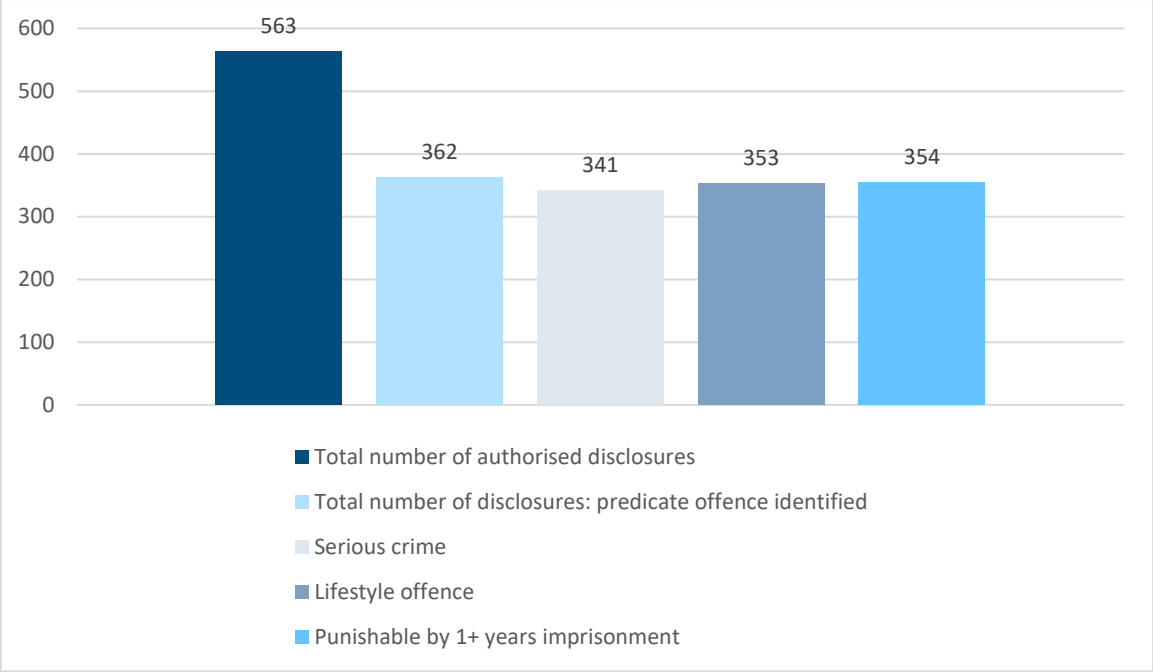
4.36 Our data analysis also offered the opportunity to assess the proportion of authorised disclosures that related to non-serious crimes. This would allow an assessment of what proportion of the total volume of reports filed with the FIU relate to non-serious offences and an estimate of those resources that might otherwise be able to focus on more serious reports. Our analysis suggests that a shift to a serious crimes approach, on its own, would not significantly impact on the total volume of authorised disclosures filed.

4.37 Our review of a sample of authorised disclosures found that in 94.2% of cases where a predicate offence had been identified, the offence was a "serious offence" listed in Schedule 1 to the Serious Crimes Act 2007. This figure rises if seriousness is defined by reference to the "lifestyle offence" provision in Schedule 2 to POCA (97.5%). Using a broad penalty threshold of offences punishable by way of a maximum penalty of more than one years' imprisonment the figure rises again to 97.8%.

4.38 The penalty threshold approach encompassed a broader range of criminality than the existing schedules. However, across all three tests, well over 90% of authorised disclosures where the reporter identified the predicate offence would amount to a serious crime.

4.39 The chart below demonstrates both trends.

[127] Our methodology included the identification of suspicion that a principal money laundering offence had been committed as a case where a predicate offence had been identified.



ANALYSIS

4.40 First, it is important to consider whether the perception of some consultees that technical SARs cause large volumes of reports is in fact correct. Secondly, it is valuable to examine whether intelligence value can be weighed with any accuracy based on the type of offences reported. Finally, we need to consider some of the objections to moving to a "serious crimes" approach – the difficulty of identifying the predicate offence, the practical and principled challenges in coherently distinguishing between offences which ought to lead to a report and those that potentially do not, and the risks of a "two-tier" approach.

Volume

4.41 Our examination of SARs demonstrated that where the reporter was able to identify a predicate offence, the overwhelming majority of SARs met the threshold for a serious crime based on the minimum requirements of 4AMLD (punishable by way of a maximum penalty of more than one year's imprisonment). In our sample, 97.5% met the penalty threshold of a serious crime.

4.42 Based on this analysis, where a predicate offence can be identified, it is likely that in most cases across the regulated sector reporters would still need to submit a SAR because the offence is "serious", using the baseline definition in 4AMLD. This is in part, as highlighted by the Government response, because many crimes, and especially fraud, encompass a "broad spectrum of offending from minor to very serious crime." We did not identify a large volume of non-serious crimes in our examination of SARs. It must be conceded that a third of our sample failed to identify the predicate offence at all. As we discuss below, where uncertainty remains it is likely that those SARs would need to be filed in any case.

4.43 We assume then that reporting suspicion based on non-serious crimes is not a significant cause of the volume of SARs. If this is correct, the broader question to consider is whether requiring SARs for this type of offending is proportionate. One of

the issues with the SAR regime today is that it has become a vehicle for reporting suspicions that a crime has been committed rather than reporting suspicions of a specific activity, namely money laundering. This will inevitably drive up the volume of disclosures.

Intelligence value

4.44 In order to consider proportionality, the intelligence value of "technical" SARs needs to be weighed against the burden of making these reports. Consultees within the legal sector cited specific examples concerning "technical" breaches such as the failure of an otherwise legitimate business to obtain necessary software licences. There may be instances where the existing regime obliges an individual to submit a "technical" SAR that is unlikely to lead to investigation of a serious offence or to contribute meaningfully to the broader "intelligence picture" about serious and organised crime.

4.45 However, that is not to suggest those SARs will never be of use to law enforcement or that the obligation to report should not ever apply in those circumstances. As we note above, law enforcement agencies favoured retaining the current approach, and argued that they were best placed to decide whether a SAR had intelligence value or not. "Technical" SARs, if referred to the appropriate investigative authority or prosecutor, may be especially useful. A logical corollary of the greater ability to identify the underlying offending is that it will often be the case that the strength and basis of the suspicion is stronger, or that there is actual knowledge (and evidence) of offending.

4.46 It is difficult, therefore, to judge whether the all-crimes approach places disproportionate obligations on some reporters. It does seem, however, that law enforcement and specific sectors might together be able to identify certain offences and types of offending that provide particular value in the way of intelligence. We return to this in our conclusions to the chapter.

Identifying the predicate offence

4.47 Identifying the underlying offence which generated the proceeds of crime is difficult. On the information available to some industries in the regulated sector, it may not be possible. Efforts to identify an offence may require the application of legal knowledge or expertise or necessitate a more thorough investigation. Both of these would place a burden on all reporters and will have a disproportionate impact on smaller businesses and individuals who do not work in the legal sector or have no knowledge of criminal law. If a "serious crimes" approach were to be adopted, someone who identified suspected criminal property but did not know what crime it may have derived from would either need to make further enquiries, seek advice regarding whether they had an obligation to submit a SAR, or continue to submit a SAR due to the uncertainty. At best it makes no material difference in these cases, at worst it may add to the reporting burden.

4.48 This could lead to irregular and inconsistent reporting. Smaller commercial organisations without the resources or technical knowledge to identify technical breaches may choose not to expend time and resources in identifying predicate offences. Reporters outside the legal sector may not be in a position to do so at all. However, it is conceded that in principle the existence of a list of offences which did

not require a disclosure could benefit those in the legal sector and reduce what is perceived to be a disproportionate burden.

Drafting a list

Serious offences

4.49 If we assume that there would be some benefit to removing reports which are considered not to generate intelligence of value to law enforcement agencies because the predicate offence is insufficiently serious, it is necessary to consider how a list of appropriately serious offences might be devised. Additionally, it is necessary to consider how such a list could be kept up to date following the introduction of new criminal offences or changes in money laundering trends and behaviour.

4.50 Consultees highlighted the difficulties inherent in devising an exhaustive list of offences. We are sympathetic to this view. There are approximately 10,000 criminal offences in England and Wales (alone) which would need to be considered and analysed. It would be a huge undertaking to consider each of those offences capable of generating criminal property to arrive at an agreed list of offences for which an authorised disclosure would not be required. Although a useful proxy for the purposes of this discussion, the existing serious crime lists in Schedule 2 to POCA and Schedule 1 to the Serious Crime Act 2007 were devised for different, and at least in the case of POCA, narrower policy ends.

4.51 A list might lead to unnecessary complexity, and, if not maintained, arbitrary outcomes. For example, in the context of sentencing, Schedule 15 to the Criminal Justice Act 2003 lists specified violent, sexual and terrorism offences. Schedule 15, for sentencing purposes, lists the specified offences that can attract extended sentences of imprisonment or detention under sections 226A and 226B of the 2003 Act and sentences of imprisonment or detention for life under sections 225 and 226. Currently, this list runs to 174 paragraphs and has been amended numerous times.[128]

4.52 Any list would require continual updating and amendment. If a list was contained in primary legislation it would be much harder to respond to the introduction of new offences or other issues which emerge in practice. Secondary legislation or guidance might provide a more flexible solution. However, many of the challenges of keeping this list updated would remain, whatever the format.

De-scoped offences

4.53 We could instead seek to identify purely regulatory or technical offences which do not merit a disclosure. The Law Society of England and Wales recommended this as an alternative, similar to, but distinct from option (2) above. They proposed creating a "de-scoped" list in lieu of attempting to devise a list of serious offences or a threshold of seriousness. In their view, a list of offences for which reports were not required could be developed to target those minor and regulatory offences legal (or other) stakeholders had identified, in consultation with law enforcement, as disproportionate to their public policy value as intelligence.

---

[128] Criminal Justice Act 2003, sch 15.

4.54 Where a reporter's suspicion related to an offence contained in the de-scoped list he or she would have a reasonable excuse for failing to submit a SAR. In the event a reporter was unable to identify the underlying offending, the obligation to report would remain. This proposal was supported by Norton Rose Fulbright and (though not in terms) by Linklaters.

4.55 We are not ultimately persuaded that the creation and maintenance a list of non-reportable crimes would be significantly less onerous than maintaining one for crimes that must be reported. For example, during the consultation for this report our attention has been drawn to criminal sanctions that flow from a diverse range of statutory provisions, such as:

(1) failure to obtain sufficient software licences in breach of the Copyright Designs and Patents Act 1988;

(2) failure to obtain a Tree Preservation Order contrary to the Town and Country Planning Act 1990 and associated regulations; and

(3) failure to obtain an asbestos-related environmental licence contrary to the Health and Safety at Work etc Act 1974.

4.56 There are, of course, many more such offences and consultees recognised that devising a list would require significant further consultation. Seeking to distinguish which offence might necessitate a SAR could lead to problems. A listing approach might be required to avoid the difficulties inherent in trying to carve out a particular category of offences, such as regulatory offences. A line of authority relating to determining the "benefit" for confiscation proceedings under Part 2 of POCA demonstrates that close consideration of the offence-making provision in each instance would be necessary. In *R v McDowell* the Court of Appeal observed:

> It is not sufficient to treat 'regulatory' offences as creating a single category of offence to which POCA is uniformly applied. We respectfully agree with the conclusion of the court in *Sumal* that the question whether benefit has been obtained from criminal conduct must first depend upon an analysis of the terms of the statute that creates the offence and, by that means, upon an identification of the criminal conduct admitted or proved… There is a narrow but critical distinction to be made between an offence that prohibits and makes criminal the very activity admitted by the offender or proved against him (as in *del Basso*) and an offence comprised in the failure to obtain a licence to carry out an activity otherwise lawful (as in *Sumal*).[129]

4.57 Moreover, offences which may on their face appear to be "technical" or minor could have significant impact. For example, crimes regulating illegal disposal of waste include a simple failure to obtain a relevant permit. However, the impact on public health and safety from even such a "regulatory" offence might be grave. Operating a business without a licence could leave members of the public exposed to unsafe

[129] *R v McDowell* [2015] EWCA Crim 173; [2015] 2 Cr App R (S) 14, para 34 and [2016] Crim LR 625. See *R v Neuberg* [2016] EWCA Crim 1927; [2017] 4 WLR 58 and *R v Palmer* [2016] EWCA Crim 1049; [2017] Crim LR 327.

practices without any regulatory oversight or scrutiny. Substantial profits can be made from breaching a regulation.

4.58 Finally, even the most serious criminals do commit purely regulatory offences. While an offence itself might be perceived as trivial, the identity of the offender and the operation of any business may provide crucial intelligence for an investigation.

4.59 Therefore, while a reporter might anticipate that a disclosure will be of little intelligence value due to the nature of the offence, the relevant law enforcement agency would be best placed to decide whether that is in fact the case. Seeking to draft a list of non-reportable offences may present real and insurmountable difficulties and ignore the complex factual issues that may arise in practice.

Pecuniary advantage

4.60 If we exclude the possibility of a list, we might consider amending the definition of criminal property to, in effect, exclude those offences where no property is obtained and the only benefit is a pecuniary advantage. However, this is likely to have unintended consequences. For example, it might exclude objectively serious tax evasion offences.[130] It may also include environmental crimes, such as the evasion of landfill tax and illegal waste crime dangerous to public health, such as burning or burying hazardous waste.[131]

4.61 If the concept of pecuniary advantage were used to decide whether or not a report was warranted this could also be challenging. In theory, attempts could be made to define a fixed set of cases by working through the thousands of legislative provisions where an offence might generate a pecuniary advantage. However, in practice it would prove to be impossible to generate a precise set of examples of offences where *only* a pecuniary advantage was generated without any impact. There are too many qualitative judgements to be made in such an exercise. Some offences may appear to be technical on their face, however their commission could be related or linked to more serious criminality.

Financial value

4.62 Likewise, relying on the financial value of the criminal property to attempt to draw distinctions is problematic. The value of criminal property does not necessarily correlate with the seriousness of the crime. For example, value would not be the most important consideration where there is a vulnerable victim. A value based threshold also fails to address potential cases of terrorist financing which may present as minor or low-level offending. In responses to our consultation there was also significant opposition to a proposed differentiation based on the financial value of a suspicious transaction. It would also conflict with our EU obligations and international standards.[132]

---

130 Consultation response of the Law Society of England and Wales; Proceeds of Crime Act 2002 s 340(6).

131 Notably the Sixth Money Laundering Directive specifically includes environmental and tax offences;: Sixth Money Laundering Directive (EU) No 2018/1673 Official Journal L284 of 12.11.2018 p 22 art 2.

132 Fourth Money Laundering Directive, (EU) No 2015/849 Official Journal L141 of 5.6.2015 p 73; and Financial Action Task Force, *International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation* (2012).

Maximum penalty

4.63 We are also sceptical about measuring seriousness by reference to the maximum penalty available for an offence. First, because identifying the penalty so as to know the category of offence would be more onerous for reporters. Secondly, a number of objectively serious offences, including those that create corporate commercial liability would be excluded if a custodial threshold was adopted. For this reason the CPS, despite favouring "all-crimes" generally, suggested "indictable offences"[133] might be a preferable alternative to the proposed approaches.

4.64 In our view it is also not practical for a distinction to be drawn in the reporting obligation on grounds such as seriousness within offence type or whether a suspect, in the specific case, would receive a custodial sentence.[134] This would require the regulated sector to engage in not only an investigation, but also an assessment of prosecutorial outcomes.

Two-tiered approach

4.65 In our Consultation Paper we outlined concerns about a "two-tiered" approach to criminality. For example, adopting a serious crimes approach may diminish the importance of environmental or other regulatory or corporate crimes. It is particularly difficult to justify this in principle. Moreover, there is an absence of any consensus regarding a practical alternative among consultees, notwithstanding that an "all-crimes" approach may be burdensome for stakeholders seeking to finalise significant commercial transactions.[135]

4.66 There is an intuitive appeal in distinguishing between "real" and "technical" money laundering when comparing the laundering of proceeds from the most serious offending (for example sex and drug trafficking offences) with the failure to comply with a regulatory obligation. However, there is little justification in principle for operating such a distinction when Parliament has designated a matter as criminal. Parliament, having determined that the latter is not merely a civil matter, can recognise distinctions as to the seriousness of the offence in the form of the maximum available penalties. For example, in *del Basso*[136] the appellants created and ran a 'park-and-ride' business on land in contravention of planning restrictions. Subsequently, they pleaded guilty to an offence contrary to section 179 of the Town and Country Planning Act 1990 of failing to comply with an enforcement notice. The court held that the business was an illegal operation whose benefits were represented by its turnover. Sir Brian Leveson (President of the Queen's Bench Division), delivering the judgment of the court, approved the following passage in the judgment of His Honour Judge Michael Baker QC in the Crown Court:

---

133 An offence that is triable only on indictment.

134 American Express proposed that an aggregated list of non-serious fraud cases, could be provided without imposing the burden of drafting a SAR.

135 Consultation response of S Kebbell; S Kebbell, ""Everyone's looking at nothing" – the legal profession and the disproportionate burden of the Proceeds of Crime Act 2002" [2017] *Criminal Law Review* 741.

136 [2010] EWCA Crim 1119; [2011] 1 Cr App R (S) 41.

> … Those who choose to run operations in disregard of planning enforcement requirements are at risk of having the gross receipts of their illegal businesses confiscated. This may greatly exceed their personal profits. In this respect they are in the same position as thieves, fraudsters and drug dealers.[137]

4.67 Given that our empirical research illustrates the most serious offending will always be captured by the anti-money laundering regime, the more relevant comparison is between regulatory breaches and other less serious offending. Once the potentially significant financial benefits from regulatory non-compliance are acknowledged,[138] the question arises whether it is fair to develop a de-scoped list that focusses solely on regulatory offences and not all less serious offending. For the reasons outlined above, we doubt there is a satisfying way of doing both. We also doubt that the differential treatment of some (likely to be) white collar offending as compared to other non-serious offending can be justified.

4.68 In the absence of evidence that a clear policy advantage can be secured in the form of significantly fewer SARs of limited intelligence value being submitted, it is difficult to justify a pragmatic departure from treating all criminal conduct similarly.

CONCLUSIONS

4.69 We agree that, of the options presented, retaining an "all-crimes" approach, but requiring SARs in relation to "serious crimes" is preferable (our option 2 above). Option (3), which would allow reporters to draw the attention of the NCA to non-serious cases, would leave many reporters uncertain as to whether they had an obligation to report in each instance where a suspicion arose. While the obligation to report would remain in option (2), it could cater to those reporters capable of identifying the predicate offence as the basis for having a reasonable excuse for not submitting a SAR. The reporter would bear some risk about the application of his or her judgement as it would be open to the prosecution to bring a charge testing the reasonableness of their excuse.

4.70 For option (2), retaining an "all-crimes" approach, but requiring SARs in relation to "serious crimes" to be workable, a satisfactory approach to defining what falls on either side of the line of "serious" would be necessary. Of those stakeholders who favoured this option there was no consensus view as to how that might be achieved. One option was to rely on a method of classifying offences under the present law (eg "non-imprisonable"). An alternative would be to rely on a specified list of offences enacted in the form of a schedule to the Act. The former would have the advantage of being easy to maintain; the latter ease of reference.

4.71 Our analysis of authorised disclosures suggests that the practical impact of any descoped list would be small: 97.5% of cases where the predicate offence was identified related to serious crimes.

---

137 [2010] EWCA Crim 1119; [2011] 1 Cr App R (S) 41, at 46.

138 So by way of example, in *R v Davey* [2013] EWCA Crim 1662; [2013] WLUK 219, the benefit to the value of a property from the failure to comply with a tree preservation order was £50,000.

4.72 The "all-crimes" approach is not perfect, but has two principal advantages. First, it helps to make the process of submitting SARs as simple as possible for the regulated sector, even if it means some SARs are submitted that will not lead to investigation or prosecution for serious offences. Secondly, it places the burden of assessment and triage, where necessary, on law enforcement agencies as those best placed and most qualified to pass judgement. It is principally for these reasons and to avoid the potential complexity of the alternatives that we favour the retention of the "all-crimes" approach.

4.73 We do not have the evidence we would need to recommend a change of approach which we recognise would risk complicating the existing system. We therefore recommend that the "all-crimes" approach to reporting is retained. However, notwithstanding these arguments, we consider that, if there was agreement between law enforcement agencies and the regulated sector on specific offences which are considered to generate little in the way of useful intelligence, there could be a greater focus on reporting only serious crimes. This may be achieved by way of examples included in statutory guidance illustrating what may amount to a reasonable excuse not to lodge an authorised disclosure.

4.74 The advantage with this approach is that it is more flexible and can adapt to changing circumstances and trends within the consent regime. It would enable the UKFIU to "switch off" the flow of certain types of SAR if they were proving to be of little value. Certainly, there is evidence that actors in some sectors believe themselves to be required to report unnecessarily.[139] While we recommend maintaining the "all-crimes" approach, it remains open to Government or the proposed Advisory Board, to conduct further consultation with the legal sector specifically to see if specific criteria or a list of de-scoped offences could in fact be drawn up.

RECOMMENDATION

Recommendation 5.

4.75 We recommend maintaining the "all-crimes" approach to reporting suspicious activity.

[139] S Kebbell, ""Everyone's looking at nothing" – the legal profession and the disproportionate burden of the Proceeds of Crime Act 2002" [2017] *Criminal Law Review* 741.

Chapter 5: Suspicion

INTRODUCTION

5.1 In this chapter we discuss our provisional proposals in relation to the test of suspicion as it applies in the money laundering offences and in the disclosure offences. We examine consultees' responses to our proposals and conclude by making recommendations for reform.

THE CURRENT LAW

5.2 As we discussed in the Consultation Paper, the concept of suspicion remains the keystone of the anti-money laundering regime. It underpins the suspicious activity reporting process and acts as the trigger for reporters to disclose information in Suspicious Activity Reports ("SARs") in two ways.

Authorised disclosures: sections 327(2)(a), 328(2)(a), 329(2)(a) and 338 of POCA

5.3 First, it governs voluntary disclosures of suspicious activity where the reporter seeks to benefit from an exemption from committing an offence ("authorised disclosures"). Suspicion is the threshold for such voluntary disclosures because it is the minimum threshold of the mental element for the money laundering offences. Once a person suspects that property is criminal property, they are liable to be prosecuted if they perform one of the acts prohibited in sections 327 to 329 of the Proceeds of Crime Act 2002 ("POCA"). They will not, however, commit an offence if they make an authorised disclosure (DAML SAR) and obtain notice of consent to act[140] from the United Kingdom Financial Intelligence Unit ("UKFIU"). Suspicion therefore triggers the filing of a SAR and engages the resources of the UKFIU who will process the SAR and reach a decision on consent within the statutory notice period of seven days. If consent is refused, a statutory moratorium period of 31 calendar days begins.[141] During that period the suspicious transaction cannot be processed or the individual risks commission of a money laundering offence under sections 327 to 329 of POCA.[142]

Required disclosures: sections 330-331 POCA

5.4 Secondly, the concept of suspicion underpins mandatory disclosures of suspicious activity. In these cases, the reporter risks commission of a criminal offence if they fail to disclose to the National Crime Agency ("NCA") when they know, suspect or there are reasonable grounds to know or suspect that another person is engaged in money laundering ("required disclosures"). These disclosures do not require a decision from

---

140 Deemed consent may also arise in the circumstances set out in the Proceeds of Crime Act 2002, s335(2)-(4).

141 This period may be extended in accordance with the Proceeds of Crime Act 2002, s 335(6). See also circumstances in which deemed consent may arise, Proceeds of Crime Act, s335(2)-(4).

142 See also Proceeds of Crime Act 2002, s336(5)-(6).

the UKFIU. They are made available by the NCA to law enforcement agencies who can use software tools to derive intelligence from the data.

Meaning of suspicion

5.5 In our Consultation Paper, we observed that there is no statutory definition of suspicion. We examined how the courts have interpreted the concept in the context of both the money laundering offences and the disclosure offences. The interpretation of suspicion in *R v Da Silva*[143] has been widely adopted by the courts and is relied upon as a guiding principle by those with reporting obligations:

> The defendant must think that there was a possibility, which was more than fanciful, that the relevant fact existed.

5.6 We noted that prior to the enactment of the principal money laundering offences in Part 7 of the POCA, "reasonable grounds to suspect" was used to describe the threshold for a money laundering offence in section 93C(2) of the Criminal Justice Act 1993. We examined the case of *R v Saik*[144] and set out the House of Lords interpretation of "reasonable grounds to suspect" in the context of section 93C(2), the wording of which was "knowing or having reasonable grounds to suspect that any property is the proceeds of criminal conduct". We concluded that the interpretation in *Saik* laid down a cumulative test of subjective suspicion coupled with objective grounds for holding that suspicion.[145]

5.7 In relation to the disclosure offences in Part 7 of POCA, because the fault element is expressed as being "knowledge, suspicion or reasonable grounds to suspect", it is sufficient that the prosecution prove that reasonable grounds existed without having to demonstrate that the reporter actually suspected. We analysed the recent case of *R v Sally Lane and John Letts*.[146] The Supreme Court clarified the meaning of reasonable cause to suspect in the context of section 17(b) of the Terrorism Act 2000. In doing so, Lord Hughes, on behalf of the unanimous Court, acknowledged that the cumulative test discussed in *Saik* was one legitimate interpretation of "reasonable grounds to suspect". However, Lord Hughes put beyond doubt that the words "reasonable grounds to suspect" in the context of the similarly constructed disclosure offences in the Terrorism Act were to be interpreted as an objective test.[147] In other words, as long as reasonable grounds existed, there was no requirement on the prosecution to prove that the reporter held a subjective suspicion.

The obligations of the reporter

5.8 A reporter's obligations under POCA are complex. Understanding the obligation to make a required disclosure and how it intersects with the authorised disclosure exemption is challenging. The following non-exhaustive flow charts outline the

---

143 [2006] EWCA Crim 1654, [2007] 1 WLR 303.

144 [2006] UKHL 18; [2007] 1 AC 18.

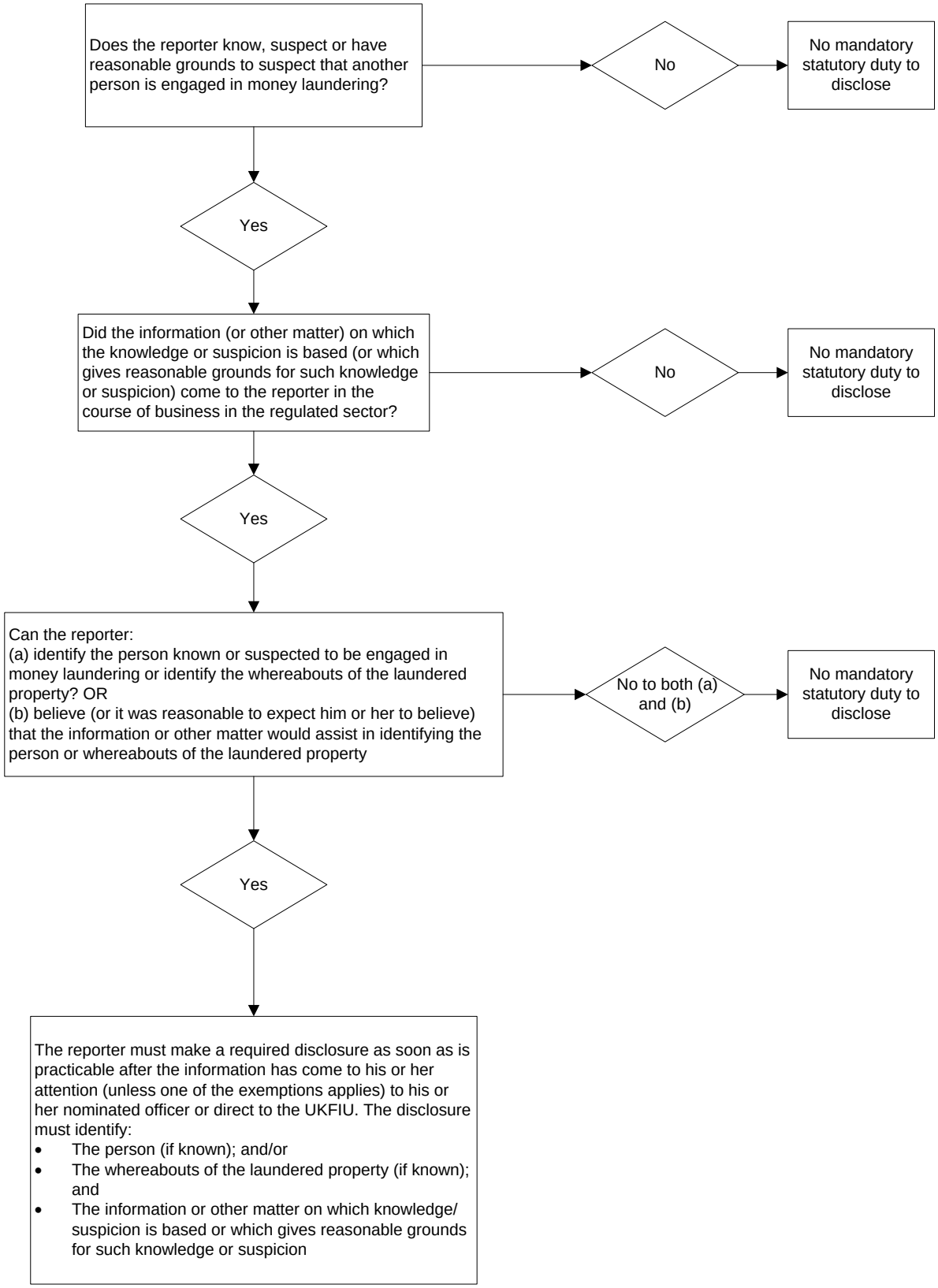
145 Anti-Money Laundering: the SARs Regime, Law Comm Consultation Paper 236 (2018) ("CP 236") paras 7.10-7.16.

146 [2018] UKSC 36; [2018] 1 WLR 3647.

147 [2018] UKSC 36, para 22.

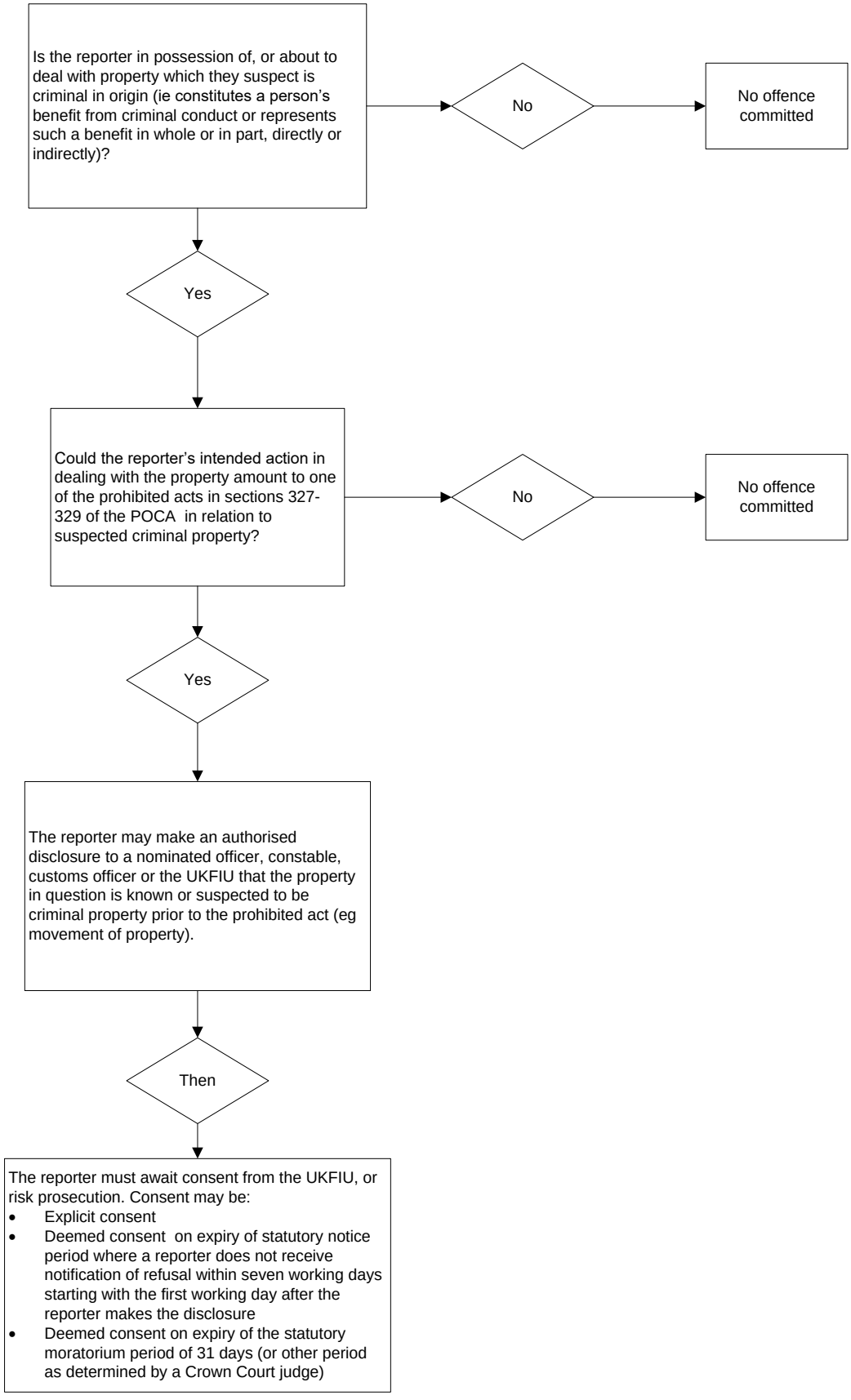
complicated process that a reporter is required to undertake to ensure that they are complying with their obligations under Part 7 of POCA.

Required disclosures[148]



148 This flowchart does not deal with the Proceeds of Crime Act 2002, s 332.

Authorised disclosures[149]



CRITICISMS OF THE CURRENT LAW

5.9 Based on the discussions with stakeholders that we had in the early stages of the project, we concluded in our Consultation Paper that some reporters struggle with understanding their legal obligations. POCA contains a number of complicated and knotty concepts including those of "suspicion" and "criminal property". Interpreting and applying them is compounded by the complexity arising from the two different types of disclosure under Part 7 of POCA.

5.10 We observed in our Consultation Paper that a large volume of disclosures are made to the UKFIU, a significant proportion of which are authorised disclosures requiring additional processing to reach a decision on consent. Between October 2015 and March 2017, the UKFIU received 634,113 SARs of which 27,471 were authorised disclosures (also known as consent or Defence Against Money Laundering ("DAML") SARs).[150] We now know that there has been a 20% increase in the volume of authorised disclosures since 2017.[151]

5.11 We concluded that the use of the threshold of suspicion contributes to this large volume of disclosures in three ways. First the principal money laundering offences set a low threshold for criminality. As soon as a reporter has a suspicion that property is criminal in origin, they are at risk of committing an offence. By lodging an authorised disclosure, a reporter is afforded potential protection from prosecution. Moreover, a disclosure is required in the circumstances specified by statute if a reporter can identify reasonable grounds to suspect that another person is engaged in money laundering. In combination, this creates a low threshold for reporting.

5.12 Secondly, as the risk of criminal liability rests with the reporter not the commercial organisation, this contributes to a culture of defensive reporting. We observed that there was anecdotal evidence of defensive or over-cautious reporting. Reporters and nominated officers told us that their fears of individual criminal liability often overrode rational judgement in deciding whether or not to make a disclosure. Law enforcement agencies observed that the quality of disclosures was inconsistent and there was a significant proportion of reports which were of little intelligence value. Combined with the statistical evidence that demonstrates a large and increasing volume of disclosures, this was problematic and inefficient. A large volume of reports does not necessarily equate to the provision of good quality intelligence to law enforcement agencies.

5.13 Thirdly, the concept of suspicion itself remains ill-defined, unclear and inconsistently applied by reporters.[152] This combination of factors results in both high volume and issues with the quality of disclosures.

---

149 This flow chart is based on the first scenario envisaged in the Proceeds of Crime Act 2002, s 338(2) and uses the example of an individual being in possession of, or handling suspected criminal property.

150 CP 236, para 1.29 and National Crime Agency, *Suspicious Activity Reports Annual Report* (2017) p 6.

151 See para 2.6 and National Crime Agency, *Suspicious Activity Reports (SARs) Annual Report* (2018) p 2.

152 CP 236, para 4.16.

5.14 The Government has recently echoed concerns about volume, highlighting the growth in the number of SARs and the opportunity for greater efficiency:

> SARs are submitted by the regulated sector to alert law enforcement, at all levels, to activity that might indicate money laundering or terrorist financing. The number of SARs has doubled over the last ten years, and the efficiency of the SARs regime could be substantially enhanced.[153]

5.15 In evidence to the Treasury Committee, the Minister of State for Security at the Home Office, the Right Honourable Mr Ben Wallace MP referred to the importance of ensuring that disclosures focussed on providing quality intelligence:

> We are working together on SAR reform, because we both want quality not quantity of SARs to be made…That is why we are working together, financially and on policy, to come up with SAR reform that helps my NCA do its job, but also helps to lift some of the cost of that regulation from banks, because they are going to be doing fewer SARs but of better quality.[154]

5.16 Donald Toon, Director of Prosperity at the National Crime Agency acknowledged that there are issues with the quality of reporting, with some SARs having no immediate value to law enforcement agencies:

> It may well be that you start an investigation today and SARs that were submitted two, three, four or five years ago then become relevant. There is a series of issues here around the fact that the SARs database includes a very wide range of information. Some of it is absolutely critical now; some of it very firmly supports other investigations; some of it we think would be better not reported at all. Part of the SARs reform programme is to try to work through how we lose that which has no value without throwing the baby out with the bathwater.[155]

5.17 While volume can indicate high levels of compliance with POCA obligations it does not necessarily follow that this is why a large number of reports are filed with the UKFIU. The quality is equally important in order to translate SARs into useful intelligence. There are, in general terms, two things a SAR can provide:

(1) raw data, such as a mobile telephone number, which may or may not be used in the course of an investigation; and

(2) detailed intelligence which may provide evidence of criminality.

5.18 Processing an authorised disclosure in order to investigate potentially useful intelligence requires significant resources. Recognising that, and the volume of such disclosures, we have sought to maximise the quality of each individual disclosure. By focussing on an increase in quality, our proposals are intended to have the following effects:

---

153 HM Government, *Serious and Organised Crime Strategy* (November 2018), Cm 9718.

154 Treasury Committee Oral Evidence: Economic Crime, Tuesday 30 October 2018 HC 940., Q 479.

155 Treasury Committee Oral Evidence: Economic Crime, Wednesday 4 July 2018. HC 940. Q 242.

(1) to at least maintain the volume of raw data presented to the NCA and at best, to increase the amount of data provided by introducing a prescribed form for SARs;

(2) to increase the amount of detailed intelligence. This will occur as a result of our recommendations to provide statutory guidance on suspicion;

(3) to render the process more efficient by reducing the amount of input necessary by the UKFIU to process an authorised disclosure once lodged; and

(4) to reduce the number of unnecessary SARs which arise from confusion as to legal obligations or defensive reporting.

Impact on resources of NCA

5.19 Required disclosures require minimal processing. They are made available to law enforcement agencies and have the potential to be exploited as a useful source of intelligence. Required disclosures may trigger an investigation, enhance an existing investigation, or lie dormant unless and until they become relevant.

5.20 Authorised disclosures in contrast do require additional resources to process in all cases and as soon as they are filed. As they alert law enforcement agencies to criminal property which is about to be subject to some activity, they require an informed response within defined time limits. In practical terms, lodging an authorised disclosure effectively pauses any commercial transaction pending a grant or refusal of consent. This process requires significant resources from the UKFIU. As we observed in our Consultation Paper, on average 2000 SARs are received per working day by the UKFIU. Of this figure, on average 100 of these SARs will be authorised disclosures requiring a decision on consent.[156]

Impact on individuals and businesses

5.21 During our initial fact-finding, we identified four significant issues with the suspicious activity reporting process which, in combination, have led to a large volume of disclosures, a significant proportion of which are of poor quality.

5.22 The money laundering offences in sections 327, 328 and 329 of POCA set a low threshold for criminality: suspicion. Authorised disclosures are therefore triggered on the basis of suspicion rather than a more carefully evaluated evidence-based judgement. Additionally, we found evidence that the test of suspicion is frequently misunderstood and inconsistently applied by reporters. This produces disclosures which are of low intelligence value and/or poor quality. Often this is compounded by confusion felt by many reporters as to their legal obligations. From our discussions with consultees, it was apparent that that there was little common understanding of the law as set out in POCA across the regulated sector. Individual reporters are at risk of personal criminal liability for their actions and this contributes to a defensive reporting culture.

---

[156] See para 1.14 for the life cycle of a SAR. Note Proceeds of Crime Act 2002, s 335(2)-(4) and the circumstances in which deemed consent may arise.

5.23 As we outlined in our Consultation Paper, understanding what suspicion means is essential for those working in sectors where their duties create a risk that they will encounter criminal property. If the concept is ill-defined or misapplied it increases the risk that a reporter may personally commit a criminal offence, either by laundering criminal property or failing to disclose. Where reporters lodge SARs seeking consent where there is, in fact, no suspicion of criminal property, this has an impact on the UKFIU's resources. It delays the processing of more serious cases, as it can divert resources away from serious and organised crime or vulnerable people where matters may be time-sensitive. In addition, the reporter wastes time and resources in the private sector by lodging a report that is of no value. That burden is ultimately borne by customers.

5.24 The UKFIU have also noted that between April 2017 and March 2018, 2,015 authorised disclosures were closed for one of the following reasons:

(1) the reporter withdrew the request;

(2) consent had been requested in error;

(3) the reporter had failed to include a key piece of information but were uncontactable or had failed to submit the additional information in writing to the UKFIU within the notice period.

5.25 Each disclosure has a significant impact on its subject. This ranges from, at best temporary inconvenience to, at worst severe financial loss. Reputational damage can ensue and in some cases, the subject may find that their bank closes their account permanently.[157]

Provisional conclusions

5.26 In light of all these factors, we provisionally concluded that the application of suspicion can be a complex exercise for reporters. Individuals need to consider both whether a disclosure is required and which type of disclosure is necessary in order to avoid potential criminal liability.

5.27 We noted in our consideration of the consent regime that there were a number of competing interests that needed to form part of any balancing exercise. In particular, the interests of those subject to reporting obligations, the UKFIU, law enforcement agencies and those who might be the subject of any disclosure. We outlined our aims to produce a regime which would promote the filing of more focussed and valuable SARs which were evidence-based and of greater assistance to law enforcement agencies. That would lead to fewer unhelpful SARs being filed. Furthermore, we aimed to ensure that the regime has a proportionate impact on individuals and businesses who may be the subject of a disclosure.[158]

---

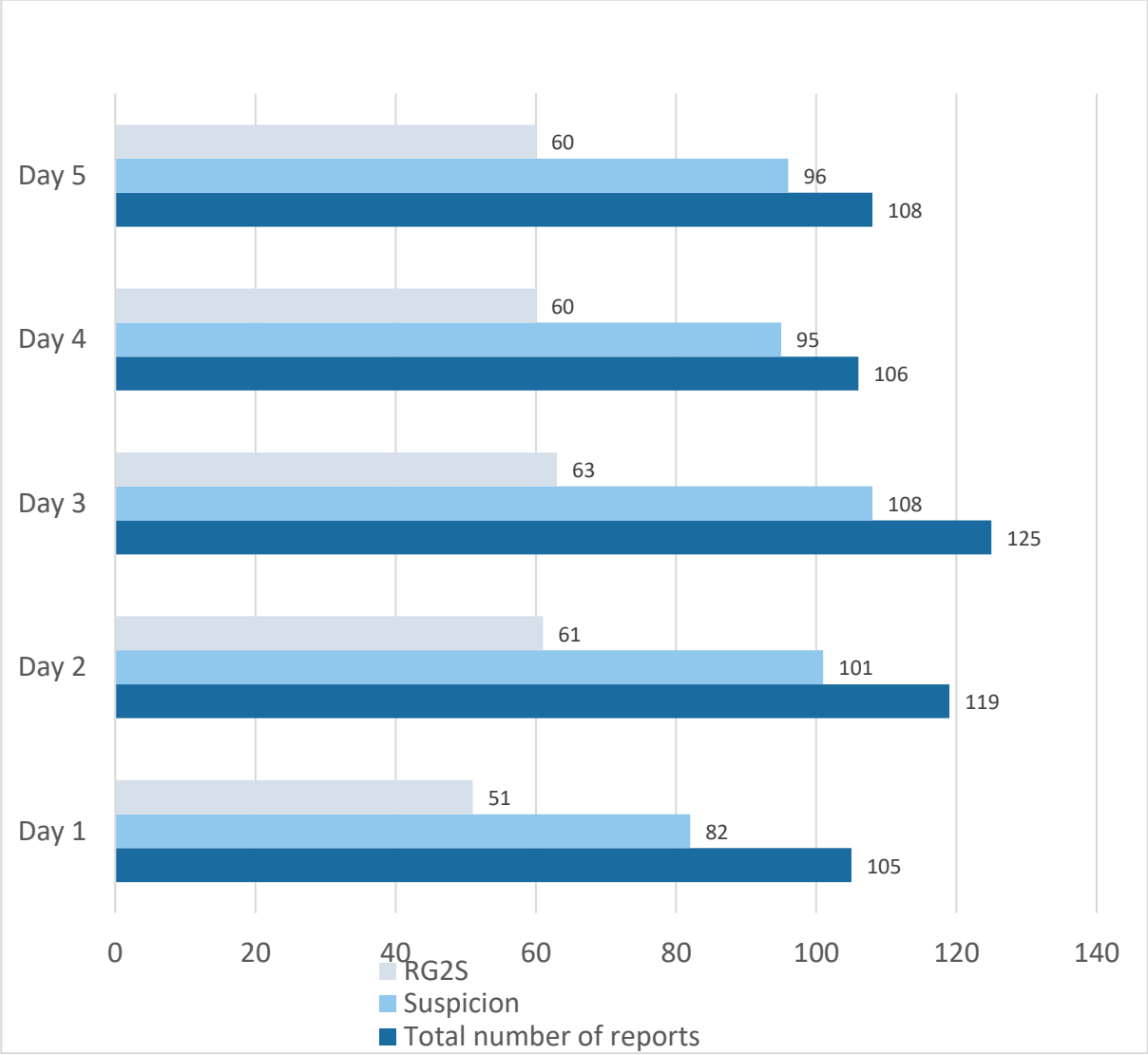
157 R Jones, *Pushed out: Natwest customers dumped and left unable to pay bills* (2018) https://www.theguardian.com/money/2018/nov/10/natwest-customers-dumped-and-left-unable-to-pay-bills (last visited 21 May 2019).

158 CP 236, paras 9.51 to 9.52.

Data analysis

5.28 In order to test the provisional conclusions in our Consultation Paper, we analysed a sample of 563 authorised disclosures (also referred to as consent or DAML SARs). The following diagram shows the overall breakdown of results.

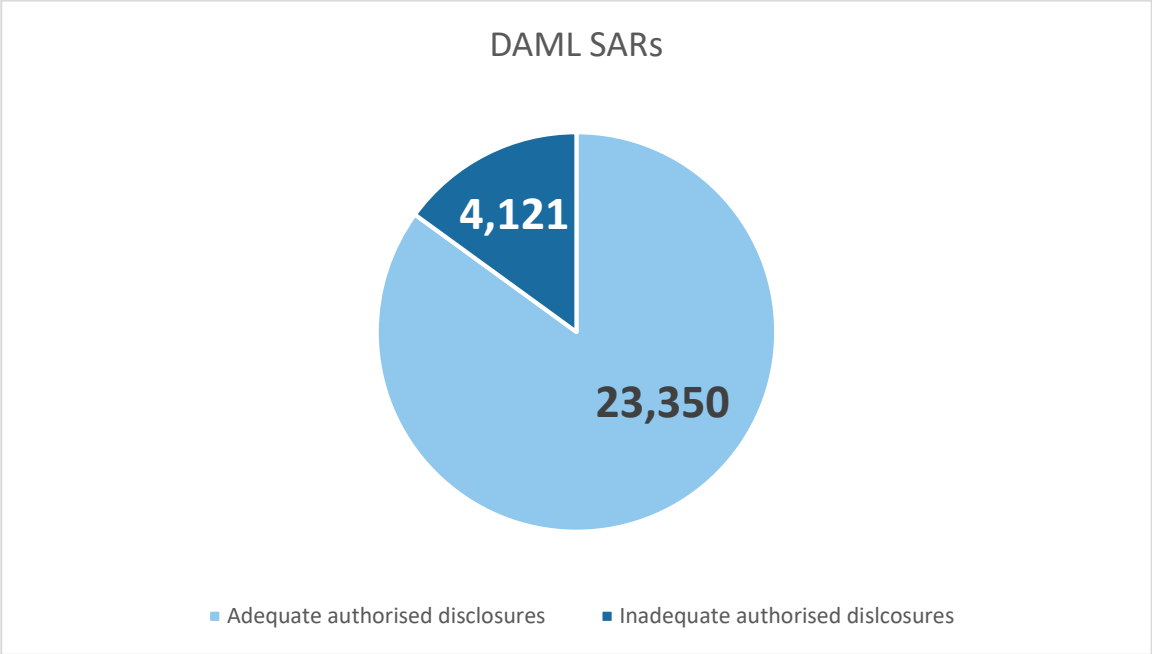
Analysis of authorised disclosures



5.29 The quality of disclosures varied over the five-day sample that we examined. Of the total sample we considered, 482 out of 563 (85.6%) met the *Da Silva* test of suspicion. On Day 1, only 78% met the *Da Silva* test. On Day 2, 84% met the threshold of suspicion. On Day 3, this rose to 86.4%. On Day 4 the number of SARs reaching the suspicion threshold peaked at 89%. On Day 5, 88% of disclosures met the test. Our analysis demonstrates that, approximately 15% of authorised disclosures do not meet the test of suspicion on the face of the information provided in the SAR, which is as it was received by the FIU.

5.30 If we assume that this proportion is representative across all 27,471 authorised disclosures submitted between October 2015 and March 2017, approximately 4,121 would have been submitted unnecessarily. This confirms our provisional conclusion in

the Consultation Paper that the UKFIU are devoting resources on authorised disclosures which do not even cross the threshold of suspicion. It is difficult to assess the cost to the UKFIU in terms of resources and any impact on other work with any accuracy.



5.31 During our examination of authorised disclosures, we also encountered significant numbers which revealed misunderstandings about the law. The presentation of the information varied in its level of detail and the ease with which it could be read and analysed by the FIU.

5.32 The following case studies, taken from our small-scale data analysis, provide illustrative examples of reporters making authorised disclosures which do not meet the test in *Da Silva*. Each of these examples resulted in a subject's account being frozen and access to their funds restricted for a period of time.[159]

[159] Due to the confidential nature of SARs all identifying details have been removed so these examples give an idea of the types of problems that arise.

Case Study 1: Application of suspicion

A high street bank lodged a SAR seeking consent to proceed with a transaction valued at under £100. The transaction involved the intended transfer of legitimate funds for the purchase of an unknown item from an ordinary retail business in Amsterdam. The reporter was concerned that there was a theoretical possibility that the customer may purchase lawful items that could be used by a drug user. The customer's bank account was frozen and they were unable to access any funds until consent was obtained from the UKFIU.

Case Study 2: Application of suspicion

An automated alert was generated within a large bank. It was reviewed and closed internally as the financial investigator was satisfied that there was no suspicious activity. A second investigator reviewed and made a report without any identifiable reasons for suspicion beyond the original automated alert.

Case Study 3: Application of suspicion

A British professional of minority ethnic origin arranged a transfer of funds to purchase a property. The funds were being sent from their parents' country of origin and documentation as to the source of the funds had been provided. The reporter lodged an authorised disclosure on the basis that they had never dealt with a transaction from the relevant country before and therefore made a report out of caution.

Case Study 4: Application of suspicion

The suspicion identified in the disclosure was based on informal pre-suspicion information sharing between credit institutions. The reporter acknowledged that their report was solely based on another credit institution's suspicion.

5.33 Our research confirms our provisional conclusion that the test of suspicion is being inconsistently applied by reporters. In addition to the deployment of UKFIU resources to process these disclosures, there is also an impact on the quality of intelligence provided in these reports. As the automatic consequence of an authorised disclosure is that the financial transaction is paused, this can have a significant effect on those who are the subject of a disclosure.

Case Study 5: Impact of an authorised disclosure

A barrister and small business owner became aware that both his personal and business bank accounts with a large retail bank had been frozen at Christmas-time. He was left with only £20 in cash and was unable to access any funds. He telephoned his bank and they were unable to tell him why his accounts had been frozen. He feared being unable to pay his employees at the end of the month. His regular mortgage payment was also due. He sought and was granted an urgent injunction to provide access to his bank accounts. He was only able to do so with the assistance of his solicitor who gave an undertaking to pay the issue fee to get the application listed. Although his accounts were unfrozen, the bank provided him with notice of closure and informed him that they were terminating the business relationship. He reported encountering great difficulty in opening new personal and business accounts with another high street bank.[160]

The issue

5.34 In our Consultation Paper we observed that concerns about the lack of clarity in the definition of suspicion had emerged only a short time after POCA had come into force.[161] These concerns have not abated.

5.35 The consultation responses revealed a similar picture. Consultees made specific comments regarding their concerns about the quality of disclosures being lodged with the UKFIU. Dickson Minto stated in their response that they were troubled by the quality of intelligence that they were providing to the UKFIU:

> Almost all of the SARs which we have submitted to the National Crime Agency under section 330 of the Proceeds of Crime Act 2002 relate to matters that we do not believe are of general use to the NCA nor to the prevention of financial crime but which we are required to act upon given the broad scope of the legislation.

5.36 The Serious Fraud Office ("SFO") agreed that "there are too many inappropriate authorised disclosures from the financial sector which lack real evidence and detail of suspicion". The SFO also highlighted a general issue with the quality of reports:

> …we see the narrative is often unduly long, written poorly with no punctuation making them hard to understand, and lack focus on the subject and the actual reason for suspicion.

5.37 During the consultation period we encountered many people, including nominated officers working within the consent regime who believed that they understood the disclosure obligations in Part 7 of POCA but in fact misunderstood or misapplied them. There were frequent differences of opinion over the interpretation of important legal concepts.

---

160 Consultation response of David Lonsdale.

161 CP 236, para 6.7.

5.38 In our Consultation Paper, we provisionally proposed several changes aimed at improving the quality and consistency of reporting. We proposed a number of alternatives which ranged from smaller changes to significant amendments to the existing regime.[162]

5.39 The options for reform were presented in a hierarchy as follows:

(1) defining suspicion in POCA;

(2) amending POCA to include a statutory requirement that Government produce guidance on the suspicion threshold in conjunction with a prescribed form for making disclosures;

(3) adopting an alternative threshold to suspicion, namely "reasonable grounds to suspect" as interpreted in *R v Saik*[163] accompanied by similar statutory guidance to assist reporters.

Defining suspicion

5.40 We provisionally concluded in our Consultation Paper that a lack of clarity of definition may be contributing to defensive reporting, and even the inadvertent commission of offences. We observed that one solution might be to amend POCA to include a statutory definition of suspicion. We identified two problems with such an approach. As a matter of principle, an ordinary English word should only be defined in law where it is to take on a specific legal meaning distinct from the natural English one. There are also considerable practical difficulties in formulating a precise yet practical legal definition which would add something to the ordinary, natural meaning of the word.

5.41 We asked consultees whether suspicion should be defined and if so how it might be defined. Twenty-seven responses out of 36 agreed that defining suspicion would be problematic. Professor Peter Alldridge was not in favour of defining suspicion. Corruption Watch felt that there was already sufficient case law which defined suspicion although they proposed that guidance which summarised the case law in a succinct manner would be useful.

5.42 Slaughter and May observed that:

> …our view is that attempting to define what is a normal English word may leave potential reporters in a difficult position where they may feel suspicious in the ordinary sense of but not meet the elements of the definition.

5.43 The City of London Police acknowledged that while initially attractive, formulating a definition of suspicion would be limiting with the focus shifting to the areas that fell well within the definition. Its preferred solution was the provision of guidance on suspicion to make the boundaries clearer:

> This would still allow some flexibility within the definition to cope with the particular circumstances of the case but provide a better framework thereby allowing a clearer

---

162 CP 236, Chapter 9.

163 [2006] UKHL 18; [2007] 1 AC 18.

articulation as to why someone has suspicion than is currently provided by the very vague case law available touching on the subject.

5.44 Nine consultees believed that suspicion should be defined in POCA.

5.45 The Crown Prosecution Service ("CPS") acknowledged the potential difficulties that arose from attempting to define suspicion. Notwithstanding the challenges, the CPS considered that a statutory definition would assist by focussing on "articulating identified and specific facts and then in turn the inferences which may be drawn from these". The CPS felt that a statutory definition would make the law clearer but would also "shape and assist proper and better reporting". The CPS concluded that:

> …Given the spectrum of potential definitions and a variance in how persons interpret and understand this concept…a statutory definition would assist. That is particularly so in shaping how reporters may be required to express and explain the report they make. We would deprecate the suggestion that suspicion is a "feeling" and cannot be defined more clearly than this and we are attracted by the formulation in Terry v Ohio.[164]
>
> We would suggest that suspicion requires:
>
> a. specific and articulable facts;
>
> b. from which rational, specific and articulable inferences can be drawn;
>
> c. which indicate the possibility that a state of affairs may exist;
>
> d. accompanied by a realisation by a person that the state of affairs may exist [if the *mens rea* is not simply to be limited to actual knowledge of the facts as of point a.]

5.46 The Association of Accounting Technicians were also in favour of a clear definition of suspicion. They noted that this was an issue which was raised on a regular basis by its members:

> As a result of the current lack of definition it is likely, indeed inevitable, that the quality and consistency of reporting is being affected.

5.47 Dickson Minto submitted that it would be helpful for suspicion to be defined in the legislation while conceding that formulating a definition would be challenging:

> We believe that ideally it would be helpful for suspicion to be defined in the legislation. We agree that the lack of clarity will most certainly have contributed to the increase in the volume of SARs. However, we appreciate that drafting a new definition would not be a straightforward exercise.

Analysis

5.48 In our Consultation Paper, we concluded that an ordinary English word should only be defined where it is to be qualified in some way. Furthermore, we identified significant practical difficulties in attempting to define a word of ordinary English meaning.

---

[164] 392 U.S. 1 (1968) 449. The case concerned suspicion triggering stop and search for firearms.

Consultees' responses to this question demonstrated an acceptance of these limitations and, with the exception of the CPS, no consultee proposed a new definition. The *Terry v Ohio*[165] formulation, which is taken from a very different context in a different jurisdiction, arguably imports a standard of reasonableness rather than simply defining suspicion. In addition, as we outlined in our Consultation Paper the qualitative concepts of "articulable reasons" or indeed that of founded suspicion have been criticised as falling short of providing clear guidelines.[166] The alternative, and in our view, better approach is to assist reporters with the application of suspicion rather than attempting to define it.

RECOMMENDATION

5.49 Having considered the arguments and the degree of consensus amongst consultees that a definition of suspicion is unwarranted and likely to be unworkable in practice, we do not recommend amending POCA to define suspicion. In the next section, we will suggest that the provision of guidance on the suspicion threshold is a better approach to improving the application of suspicion by reporters in order to increase the quality of disclosures.

Recommendation 6.

5.50 We do not recommend that an amendment should be made to the Part 7 of the Proceeds of Crime Act 2002 to define suspicion.

Guidance on suspicion

5.51 Of those who responded, consultees were overwhelmingly in favour of statutory guidance being issued on the concept of suspicion. Twenty-eight out of 32 consultees (87.5%) were in favour of this provisional proposal. We highlighted the potential problems that arise from having multiple sources of guidance to address universal legal concepts in our Consultation Paper. Consultees endorsed this view in their support for a single source of guidance on the law. The Association of British Insurers said that one set of guidance will improve consistency of application. The CPS went even further in their support of our provisional proposal adding that a single piece of guidance ought to exist to the exclusion of the others.

5.52 Consultees were also asked whether they would support the introduction of statutory guidance that would address the legal phrase "reasonable grounds to suspect" if the threshold for making a required disclosure were to be amended. We anticipated that this would assist by providing lists of indicative factors all contained in one place, accessible by all reporters. It was also intended to reduce the number of requests for further information that UKFIU staff have to make as part of their day-to-day processing of authorised disclosures. Again, a similar picture emerged: consultees were largely in favour, even those who did not support a change to the threshold recognised the benefits of statutory guidance if such a change were to be enacted.

---

165 392 U.S. 1 (1968) 449. See CP 236, para 6.59.

166 CP 236, para 6.60.

The National Casino Forum suggested that it would be "imperative" and the Association of Foreign Banks agreed, it would be essential as this would remove some subjectivity out of the reporter's decision.

5.53 As the Proceeds of Crime Lawyers Association ("POCLA") observed in its response to our Consultation Paper, reporters tended to adopt a cautious approach to the suspicion test rather than a genuinely risk-based assessment:

> From regularly advising professionals and others in this sector, we are in no doubt that the high volume of lower-value reports is due to the imposition of personal criminal liability for failure to make a report where one is due combined with the low threshold for reporting. Reports must be made (absent special circumstances) if there is a possibility, which is more than fanciful, that funds are criminally derived even if the reporter believes them to be legitimate. The courts will back a reporter and absolve them of liability to their customer even if there were no reasonable grounds to make a report, provided the reporter held a genuine suspicion (see *K v NWB*;[167] *Shah v HSBC*[168]). It is therefore unsurprising that reporters err on the side of caution, making reports which are of limited value. The danger of casting the net this wide, is that valuable resources are deployed trawling through low grade material, allowing the larger fish and their associated predators to escape detection.

5.54 The CPS commended and supported our provisional proposal of definitive guidance on the threshold to be applied:

> There should be a single piece of guidance, to the exclusion of others, to provide a clear explanation of these provisions. The guidance may not be able to provide exhaustive definitions but it should be able to inform and frame how decisions concerning suspicion should be taken and it should be the only guidance required in order to do so.

5.55 There was significant support from law enforcement agencies for this proposal. The City of London Police supported the proposal to introduce a statutory requirement for Government to produce guidance and considered that it would be helpful. The City of London Police also suggested that it would be most effective if the statutory requirement prescribed who would produce the guidance, the intended audience and the frequency with which it would be reviewed.

5.56 Additionally, the Metropolitan Police Service ("MPS") who are allocated approximately 32% of all SARs by the UKFIU once they have been processed, agreed that a single source of guidance would be welcomed:

> The MPS agree that it would be beneficial for the UK to develop a single authoritative source of guidance, if it is developed by all actors, including other end users in addition to the NCA. It is apparent, from engaging with individual reporters, that many need assistance and advice. Collective learning and training should be

---

167 [2007] 1 WLR 311.

168 [2010] EWCA Civ 31; [2010] 3 All ER 477.

considered alongside any authoritative document produced, to provide clarity and enhance the quality of reporting and the regime.

Reporters frequently articulate that they are unsure on what to include within their responses. The MPS feel the development of a single, comprehensive, authoritative source of guidance, would improve quality and consistency of SAR reporting. The MPS feel end-users should also be part of this process.

5.57 The NCA were also prepared to explore a single source of guidance with the objective of improving SARs reporting:

The summary in the Consultation Paper is a helpful source. We are content to explore, with policy departments, the development of a single, comprehensive, authoritative source of guidance (developed by Government, regulators, UKFIU and reporters) if that would drive up the clarity and consistency of SAR reporting.

5.58 There was broad support amongst those who responded from the regulated sector for a single authoritative source of guidance on suspicion. UK Finance welcomed guidance on the suspicion threshold but indicated that its preference is for guidance to be drafted in partnership with the public sector:

We agree it would be helpful for POCA to contain a requirement for the Government to produce guidance on the suspicion threshold. One of the challenges around the operation of the system is the unwillingness of any part of the public sector to produce guidance or provide feedback to help reporters better identify what is and is not suspicious (outside limited forums, such as the Joint Money Laundering Intelligence Taskforce). Any guidance would need to be consistently applied and granular enough to support adherence. High level and generic guidance would be unlikely to assist reporters.

5.59 Ashurst LLP were in favour of guidance on suspicion if suspicion remained as the requisite threshold for reporting:

A single source of definitive guidance could well improve the application of the suspicion threshold. We do not have any specific proposals on how this should be defined but generally speaking, the provision of additional guidance in this regard would, we think, be helpful.

5.60 The Investment and Life Assurance Group ("ILAG") agreed that guidance on suspicion would be proportionate and would deliver necessary improvements to quality. The Council for Licensed Conveyancers also agreed that POCA should contain a statutory requirement that Government produce guidance on suspicion. Likewise, the Personal Investment Management & Financial Advice Association submitted that a statutory requirement that the Government produce guidance on the suspicion threshold would be a positive development:

Comprehensive, clear and common-sense guidance would be beneficial, particularly if it contains best practice in relation to the types of issues commonly encountered in financial services and if it is updated periodically… Greater clarity on the suspicion threshold would allow firms to adopt a consistent approach and will help to reduce

the number of low-quality SARs that are submitted on a defensive basis, freeing up law enforcement resources and reducing the burden on the private sector.

5.61 The Investment Association agreed with our provisional proposal and suggested that guidance on suspicion would help firms subject to reporting obligations to understand how suspicion should be interpreted:

> A common understanding of what suspicion means, and the elements that can lead to it arising, is essential for all those involved. This would improve the consistency of application and make for a more effective SAR regime, with improved quality of reports and less defensive reporting.
>
> Guidance, with a list of explicit factors, could then be used by firms when creating internal policies and training for staff to improve general awareness. Having a non-exhaustive list would allow for circumstances where the expertise and industry knowledge of individual Nominated Officers results in the identification of suspicious circumstances outside a pre-defined list and ensures that the concept of an individual's honesty held suspicion is retained.

5.62 Northumbria University's Financial Crime Compliance Research Group agreed with our provisional proposal:

> Yes, we agree that Government should be required by POCA to provide guidance on the suspicion threshold. The threshold must be sufficiently high (to avoid over-reporting and defensive reporting) and guidance on the interpretation of suspicion on the basis of objectivity and subjectivity is critical. In order to be useful, guidance must be sufficiently broad to avoid encouraging a tick-box culture among the regulated sector which could lead to unforeseen activities being missed.

5.63 A small number of consultees disagreed with our provisional proposal. For example, the Electronic Money Association ("EMA") did not perceive there to be a problem with the meaning of suspicion. They argued that guidance would introduce unnecessary complexity into the reporting process.

5.64 Some consultees had reservations about the practical impact of statutory guidance. For instance, the Financial Conduct Authority ("FCA") agreed in principle with the proposal but had some doubts about how helpful any additional guidance might ultimately be.

5.65 In contrast, a minority of consultees were unpersuaded by the need for statutory guidance at all. The Law Society of England and Wales stated that:

> Anyone looking to find out the meaning of suspicion need only look at the case law. It is unlikely that Government guidance would do anything other than codify case law, meaning the guidance would need to reflect case law as it evolved. While this is not impossible, we do not see how doing so would help minimise the number of low value SARs.

5.66 The Law Society of England and Wales's response did not deal with the substance of our provisional proposal that guidance should demonstrate how the test pronounced

in *Da Silva*[169] should be applied in practice by identifying and cataloguing grounds or factors which may raise a suspicion. It is notable that the majority of responses of individuals and firms working within the legal sector were in favour of statutory guidance.[170]

Prescribed form

5.67 In our Consultation Paper we made the case for a prescribed form for the submission of SARs. We proposed that the information required for a disclosure and the form it should take could be set out in secondary legislation. The Secretary of State already has the power to prescribe the form and manner in which a required or authorised disclosure is made.[171] We argued that it would go hand in hand with our proposal for guidance on suspicion by giving greater direction to reporters as to what was required of them.

5.68 The majority of consultees agreed with our proposal for a prescribed form: 30 consultees saw the merits in this approach and six consultees dissented. Overall 83% in of those who responded to this question were supportive. The Solicitors Regulation Authority ("SRA") stated:

> We believe that prescribing a form for reporting would improve the efficiency of the SARs regime. We would expect anyone within our supervised population to be able to set out exactly why they are suspicious.

5.69 Of the small number who disagreed with our provisional proposal, most assumed that a prescribed form would necessarily be too restrictive. They were concerned that a prescribed form might inhibit the reporter from presenting the information they had in the way they thought might best assist the UKFIU. Bobby Hussain, an individual who responded to our Consultation Paper stated:

> A prescribed form would be too restrictive for each and every firm to use. However, it should be a mandatory requirement to include reasons and grounds for raising a SARS.

5.70 American Express were also concerned with a "tick-box" format without free-form space:

> We disagree with the introduction of a prescribed form directing the reporter to provide grounds for their suspicion. If a prescribed form is introduced in a tick-box format (or similar) and reporters have to articulate evidence-based grounds for a suspicion, we believe this will have a detrimental effect on the scope of reporting as it stands today. We continue to see new types of fraudulent behaviour on our products, and having a free format to articulate those grounds will better capture our industry-specific risks. With a prescribed format, on the other hand, there is the risk that suspicions will not be reported if they do not fall within the pre-determined

---

169 [2006] EWCA 1654; [2006] 2 Cr App R 35.

170 Consultation responses of Dickinson Minto, Ashurst, Simmons & Simmons, Proceeds of Crime Lawyers Association, Freshfields Bruckhaus Deringer and the Crown Prosecution Service.

171 Proceeds of Crime Act 2002, s 339.

categories. In short, we cannot see that having a prescribed form would add efficiencies or improve the quality of disclosures.

5.71 The Building Societies Association disagreed with our proposal but did so on the basis that it was unnecessary for a prescribed form to be introduced "via POCA". It stated:

> This is already underway as part of requirements assessment for the SAR Reform Programme and we don't consider it necessary for prescribed forms to be introduced via POCA. The scope for sector-specific SAR forms is part of this assessment but is likely to be dependent on the IT solutions adopted for SAR reporting management.
>
> In the interim, it has always been best practice when completing a SAR for the reporter to provide specific, evidence-based grounds for their suspicions. The NCA and its predecessors have had a continuing dialogue with reporters in the financial services sector on making sure that SARs contain all the information that law enforcement needs for them to take an investigation forward and this has resulted in better quality SAR reporting. If there are still sectors where reporters are not providing evidence-based grounds for their suspicions when reporting as SAR there is the option for the NCA to work with reporters in the same way. The ultimate remedy is for the NCA to send the SAR straight back to the reporter for it to be properly completed until reporting standards are driven up.

5.72 We also asked consultees whether sector-specific forms, designed in collaboration with a representative panel from the NCA, law enforcement agencies and the various reporting sectors, would be beneficial. Consultees were more divided on this issue. Of the 32 responses to this question, 19 consultees thought that creation of separate forms was the optimal solution and 13 were in favour of a single form. However, the consultees in support of separate forms all work on the front line in terms of processing reports within the consent regime. The NCA, UK Finance, the FCA and the City of London Police all argued for separate forms. The majority of consultees working in the regulated sector who responded to this question were also in favour of separate forms.

5.73 Both the Law Society of England and Wales and the Solicitors Regulation Authority ("SRA") argued that a single form was preferable. The Law Society of England and Wales made a strong case for an interactive online form and stated that:

> We do not believe that a proliferation of sector-specific forms would be helpful. Instead, a new interactive form could determine at the outset whether the transaction that is being reported is, for example, a monetary or a conveyancing one (regardless of the reporter's sector). If yes, questions specific to monetary or conveyancing transactions could follow, for example on the client's bank account details or the value of the property at the heart of the transaction. We would be glad to assist in the design of such a form, perhaps through a further stage in the SARs reform programme.

5.74 Whilst the Law Society of England and Wales did not advocate sector-specific forms, there is broad agreement on the need for tailoring forms to suit the individual reporter.

Analysis

5.75 Our independent examination of the material that was typically submitted in an authorised disclosure confirmed our initial view that a significant proportion of reporters were struggling to apply the test of suspicion. This has an impact on those who are the subject of a disclosure.

5.76 There was overwhelming cross-sector support for guidance on suspicion from those with reporting obligations.

5.77 Authorised disclosures which seek consent to proceed with a transaction require employees of the UKFIU to process them and reach a decision on consent. Furthermore, any transaction must be paused until consent is granted which has an impact on individuals and businesses if they are the subject of a disclosure leading to a wider economic impact. There is an enduring tension between the public interest in suspicions of money laundering being reported to the UKFIU and the need to ensure commercial transactions are conducted efficiently as well as the individual's right to enjoy banking facilities and preservation of their reputation.

5.78 Providing guidance on the suspicion threshold will have a number of benefits:

(1) it would raise awareness amongst the reporting sector and educate reporters about how to apply the suspicion test;

(2) by creating greater awareness of legal obligations and continuing education, statutory guidance would help to reduce the current proportion (which our analysis suggests is about 15%) of authorised disclosures which do not meet the suspicion test;

(3) it would at least retain, and might increase, the amount of raw data contained in authorised disclosures;

(4) it should promote greater consistency within organisations and across sectors and encourage the provision of more detailed intelligence;

(5) by promoting greater consistency in the information that is provided in the SAR, and the manner in which it is presented, the guidance would enable both UKFIU staff and law enforcement to ascertain more quickly the nature of the suspicion and key details underpinning it;

(6) guidance would reduce the prospect of unnecessary delay in the process of seeking consent and reduce the amount of resources used by the UKFIU to process such disclosures;

(7) it would reduce the risk of poor decision-making, in particular reporters relying on discriminatory factors in risk assessments and decisions on suspicion; and

(8) it would increase fairness and consistency in decision-making by reporters and lessen the impact on those who are the subject of a disclosure by safeguarding against unnecessary reports.

5.79 The idea of a prescribed form was considered by most consultees to be a positive step. Of those who disagreed, there were some misunderstandings evident in the consultation responses. For example, some appeared to be unaware that POCA already contains a power to issue a prescribed form. Any form introduced through SARs reform more generally could make use of this existing provision.

5.80 Understandably, some reporters and supervisors believed that the SARs that they lodged were of good quality and therefore no change was necessary. Unfortunately, that assertion is difficult to sustain across all sectors given that our independent data analysis of SARs demonstrated that there are serious issues with the quality of a significant proportion of those submitted.

5.81 A prescribed form simply means giving greater direction to the reporter as to the information required. It would not have to follow a tick-box format or be designed in such a way that there was no opportunity for free-form text to be included. These technical objections must fall away given they are based on assumptions about presentation which are, as yet, undecided. Beyond that debate about the practical detail, there is broad agreement in principle that reporters should be specific about the nature of their suspicion and assist law enforcement agencies as far as possible.

5.82 As the specific format has generated much debate, we recommend the introduction of a prescribed form in principle. However, in conjunction with our other recommendations, we believe that the creation of a form capable of being tailored to individual reporting sectors should be developed collaboratively between the UKFIU, law enforcement agencies, the regulated sector and their regulators and supervisors. We also acknowledge the ongoing work of the SARs reform project in this area which is providing valuable information and feedback on the best format. The idea of an interactive form which can be tailored to meet the needs of law enforcement agencies and reporters is a compelling one. We are persuaded that this is the best approach, the detail of which is best left to an Advisory Board in accordance with recommendation 3, to decide. Before making any such decision the views of those who will be required to use the form either as a reporter, an employee of the UKFIU or as an individual working in law enforcement should be taken into account.

Recommendations

5.83 In light of the above arguments, we recommend that POCA is amended to require the Secretary of State to issue guidance on suspicion. Further, we recommend that a prescribed form is introduced under the existing statutory power, the format of which is to be left to an Advisory Board.

Recommendation 7.

5.84 In accordance with recommendation 3, we recommend that POCA is amended to require the Secretary of State to issue guidance on suspicion.

Recommendation 8.

5.85 We recommend that the Secretary of State should introduce a prescribed form pursuant to section 339 of the Proceeds of Crime Act 2002 for Suspicious Activity Reports.

Moving to reasonable grounds to suspect

5.86 In our Consultation Paper we considered the merits of amending the reporting threshold to reasonable grounds to suspect. We set out our case for adopting a cumulative test of subjective suspicion coupled with objective supporting grounds based on the interpretation in *R v Saik*.[172]

5.87 We acknowledged the challenge in amending the threshold for both required and authorised disclosures bearing in mind the fact that both derive explicitly from the primary legislation. We offered a method for achieving this change. We proposed two discrete legislative amendments designed to have an impact on the two distinct forms of disclosure prompted by the current regime.

5.88 First, we provisionally proposed amending the threshold for reporting under sections 330-332 to "reasonable grounds to suspect". We suggested that this higher threshold would introduce a qualitative standard to suspicion, and import considerations of strength and cogency. It would thereby improve the quality of intelligence provided by reporters.

5.89 Secondly, we proposed that a new defence should be introduced for the regulated sector so that an authorised disclosure would not be required where the reporter did not have reasonable grounds to suspect.[173]

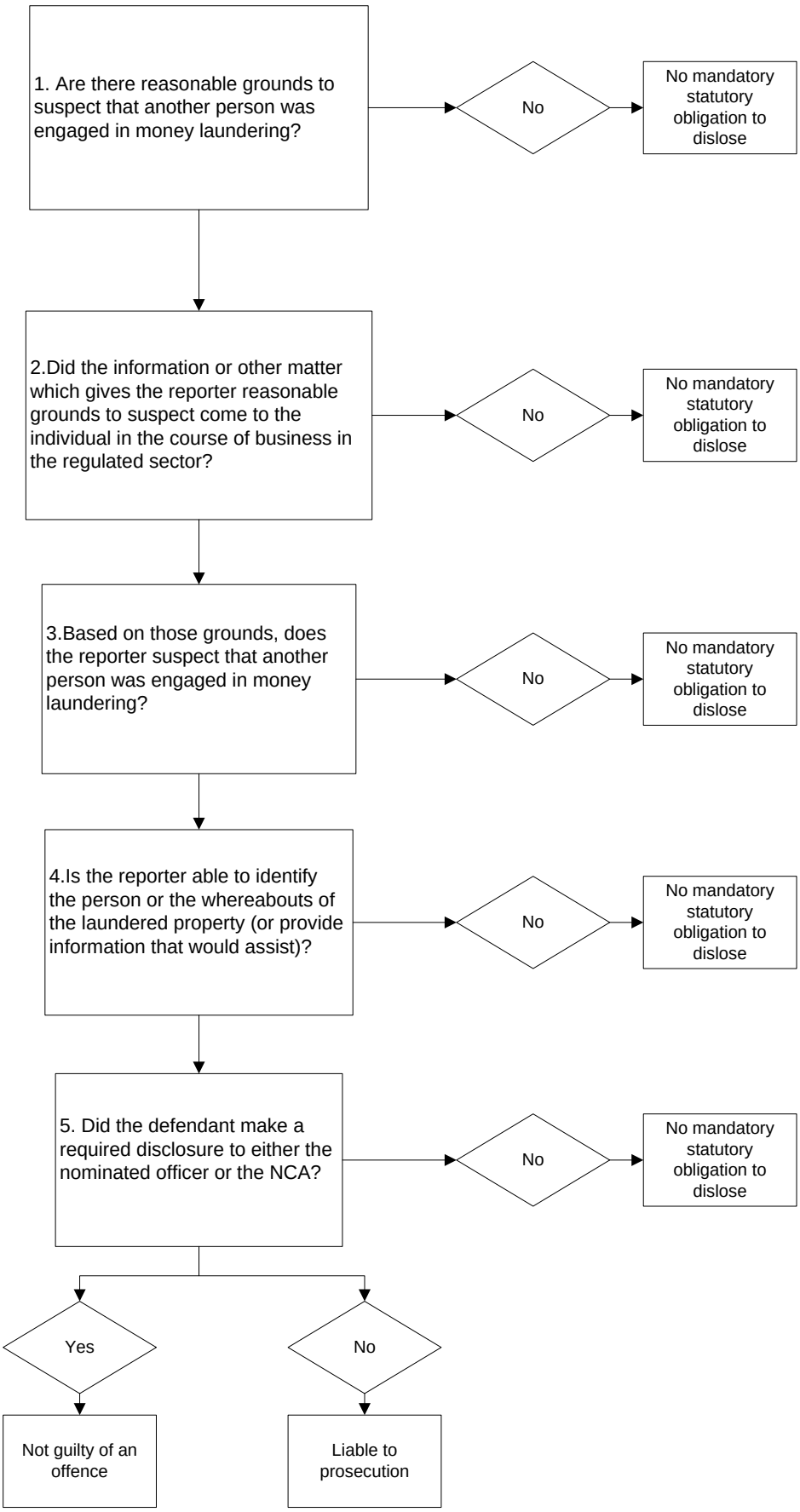
5.90 We concluded that the overall change to the reporting threshold achieved by these measures could reduce the number of poor quality or low intelligence value disclosures. If the reporter did not have objective grounds for their suspicion, there would be no obligation to report. Likewise, the specific defence we proposed would free reporters from the risk of committing a money laundering offence. As the risk of liability would be removed, an authorised disclosure would not be triggered. The following flow charts demonstrate how such a change would work in practice.

---

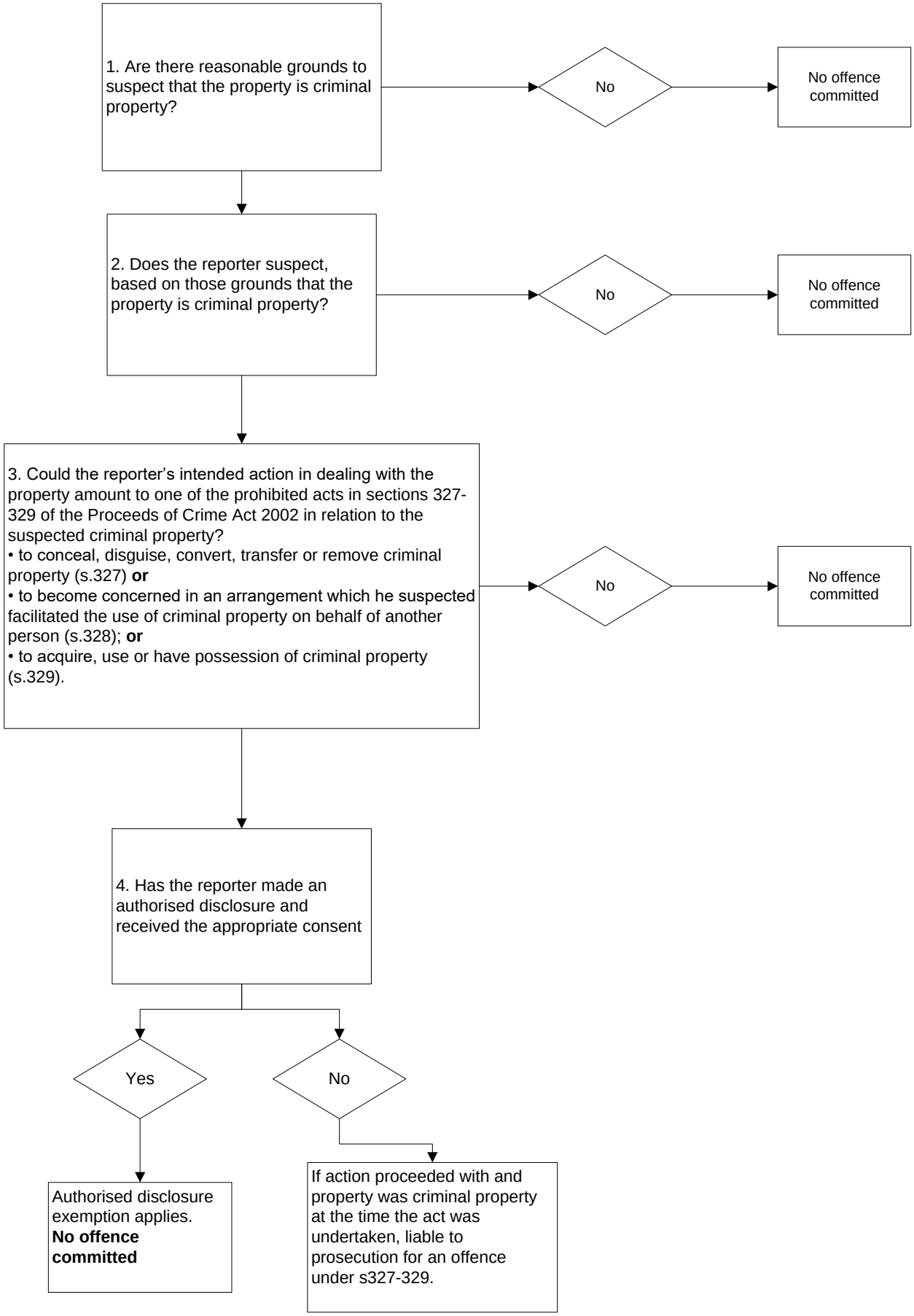
172 [2006] 2 WLR 993, [2006] 2 WLR 993.

173 Anti-Money Laundering: the SARs Regime, Law Comm Consultation Paper 236, para 9.52.

Required disclosures: reasonable grounds to suspect



Authorised disclosures: reasonable grounds to suspect



CONSULTATION

5.91 The response to these provisional proposals was mixed. Of the 40 consultees who responded, 20 were in favour of our proposal to amend the threshold, 18 were against it and two consultees were undecided. This amounted to 50% in favour, 45% against and 5% who did not express a firm view.

5.92 Some consultees fully supported this proposal. The Law Society of Scotland stated that "including the requirement for…an objective element to the suspicion required, would create greater clarity and proportionality.". Professor Liz Campbell was supportive of the proposal and the rationale for it, describing it as a "sensible" proposal. The Investment and Life Insurance Group also agreed with such a change on the basis that a suspicion must have a basis that can be articulated and is not wholly subjective.

5.93 The CPS also agreed with the proposal subject to their proposed definition of suspicion and that the fault element, "should more explicitly be knowledge of the facts giving rise to the reasonable grounds to suspect or the reasonable suspicion itself".

5.94 The City of London Police stated that it made sense for the regulated sector to benefit from the additional defence that we proposed where a reporter did not have reasonable grounds for their suspicion. It recommended that any such change be supported by clear guidance around what constitutes reasonable grounds to suspect. The EMA also responded positively regarding a requirement for objective evidence to support any subjective suspicion. It believed that this would prevent banks from, for example, reporting a suspicion merely on the basis that cryptocurrencies were used in the transaction.

5.95 American Express agreed with the proposal to amend the threshold for required disclosures:

> Amending the threshold to "reasonable grounds to suspect" in sections 330-332 of POCA would be very beneficial as the threshold for merely "suspicion" is too low, and a requirement for the objective obligation that a suspicion is based on reasonable grounds should reduce low value and defensive reporting.

5.96 Allen & Overy also agreed with the proposal to move to reasonable grounds to suspect:

> If implemented, the proposals are likely to provide greater clarity in relation to the current requirements to report suspected money laundering and terrorist financing, as well as introduce mechanisms which are likely to result in a smaller number of higher quality SARs being received by the NCA's Financial Intelligence Unit.[174]

5.97 UK Finance noted that there was no consensus amongst its members on whether the proposed change would be beneficial and offered no decided view. Some members supported the proposal as "high value transactions currently were being delayed in a way that was disproportionate to the concern." UK Finance responded that these

---

[174] S Hitchins and R Marshall, "Money laundering reporting obligations: rethinking the UK approach" (2018) Practical Law UK.

members thought that amending the threshold would produce better quality disclosures. It would result in more relevant reports being made to law enforcement, particularly where the reporter wished to highlight opportunities for law enforcement intervention.

5.98 Other members of UK Finance had reservations about such a change. Three broad arguments were put forward against it:

(1) it would generate far too many issues and inconsistencies on what constitutes "reasonable";

(2) it would be likely to lead to a spike in litigation to address this question – for example, affected parties alleging that a relevant suspicion was not reasonably held; and

(3) it would not necessarily have the desired effects of prioritising cases where intervention would be most helpful, or reducing low intelligence value reporting as a suspicion could still be of low intelligence value but based on reasonable grounds.

5.99 A significant number of consultees disagreed with our provisional proposal. The Law Society of England and Wales objection was based principally on the lack of protection from potential civil litigation commenced by the subject of a disclosure:

> There are clearly difficulties with a threshold for required disclosures which relies upon a subjective element of 'suspect'… a change to 'reasonable grounds' might even expose reporters to civil action by customers who believe that the grounds were not objectively 'reasonable'… As a result, amending the threshold to 'reasonable grounds' would necessitate the introduction of a new statutory defence to a civil action for having reported in good faith… Without this additional protection, the Law Society of England and Wales would strongly object to amending the threshold.

5.100 Additionally, the Law Society of England and Wales stated:

> We believe that the practical effect of the change would be very limited. There are likely to be very few occasions where a reporter subjectively suspects money laundering but has no reasonable basis for their submissions.

5.101 Corruption Watch strongly disagreed with the proposal to move to reasonable grounds to suspect if the consent regime were maintained. In their view, introducing a defence to sections 327 to 329 for the regulated sector where they did not have reasonable grounds to suspect would place an unnecessary barrier to achieving convictions. They highlighted that prosecution rates were already relatively low. Conversely, Corruption Watch also contended that it was highly unlikely that a prosecution would be initiated if there were no reasonable grounds to suspect that the property was criminal. These responses effectively cancel each other out.

5.102 Some had concerns that the flow of intelligence might be affected by such a change. Tristram Hicks (former Detective Superintendent on the national Criminal Finance Board), in collaboration with Ian Davidson (former Detective Superintendent with

national financial investigation responsibility) and Professor Mike Levi (Cardiff University) submitted a joint response in which they disagreed with the proposals to amend the reporting threshold. In their response they argue that the provisional proposal to amend the threshold for required disclosures to reasonable grounds to suspect "significantly weakens the whole regime by reducing the volume and quality of SARs."

> Volume is reduced because 'reasonable grounds' is a higher standard than 'suspicion', so fewer circumstances would meet this level. Quality would be adversely affected because introducing an evidential standard to an intelligence function inherently weakens the intelligence function… this proposal might effectively 'turn off the tap' to financial intelligence used by nearly 5,000 investigators across the UK, before doing this we should explore the consequences more fully.

5.103 The MPS also disagreed with the proposal to amend the threshold for reporting to reasonable grounds to suspect. In their response, the MPS also queried the likely consequences of such a change:

> This narrows the circumstances under which disclosures are required to be made and has the potential to significantly weaken the whole regime. A reduction in the volume of SARs submitted will impact on the ability of law enforcement to mitigate and investigate crime. The MPS are unaware of any analysis on the effect of such a proposal. Any analysis should consider the effect from law enforcement's viewpoint and the consequences on the behaviour of reporters in preventing money laundering.

5.104 The MPS also observed that, in their experience, "intelligence provided by SARs is frequently not available from any other source.".

5.105 Other consultees believed that reports were already being lodged on the basis of objective supporting grounds. Norton Rose Fulbright based their objection largely on the assumption that there would be very few reports which did not base a suspicion on a reasonable basis:

> … there would be little value in raising this to "reasonable grounds for suspicion" on the basis there are likely to be very few occasions where a reporter subjectively suspects money laundering but has no reasonable basis for his suspicion. It is unlikely that any such instances would be reported following discussion with a firm's MLRO.

5.106 Many who disagreed doubted the enhanced value that such an approach would bring. On this issue, it is worth examining the small-scale data analysis we undertook in conjunction with the UKFIU which undermines the assumption that such a change would not generate better quality SARs.

Data analysis

5.107 Some of the arguments advanced in opposition to the proposal were based on assumptions about the quality of the SARS that are currently filed. In order to establish how many reports were being lodged based on suspicion without objective grounds in support, we analysed a sample of 563 authorised disclosures. Of the 563

that we considered, only 295 were based on one or more objective grounds. This amounted to 52.4% of the sample. 47.6% of our data sample did not demonstrate reasonable grounds for suspicion. This represents a substantial proportion of authorised disclosures which are lodged without objective grounds in support.

Analysis

5.108 The suggestion that a change in the test would create a barrier to prosecution is not borne out by the practical reality of how these types of cases are prosecuted. The Crown Prosecution Service have confirmed in further discussion during the consultation period that the key challenge is demonstrating to a jury that objectively, there were reasonable grounds for a defendant to suspect. From this, a jury is likely to infer that the defendant must have been suspicious. From this perspective, a change to the test would not make prosecutions more challenging or introduce a new barrier.

5.109 There would be two possible consequences to amending the threshold to one based on reasonable grounds. First it could result in the same volume of SARs being lodged, simply with better quality intelligence and more raw data for law enforcement agencies to examine and utilise. Secondly, it could also have an impact on the quantity of disclosures being made if reporters felt that they did not have sufficient material in support of their suspicion to meet the higher threshold. However, our broad conclusion from analysing authorised disclosures was that, in the majority of cases, reporters had access to the information but had chosen not to provide it or had omitted it for other unknown reasons.

5.110 Having considered the many valuable points made by consultees and the data analysis we conducted, we consider that answering this question involves a difficult balancing exercise. It must not be forgotten that none of the responses refer to the impact on those who are the subject of disclosures. As we identified in our Consultation Paper, a balancing act is essential as individuals and businesses may suffer anything from temporary inconvenience to severe economic hardship as a result of being unable to access their funds. A complete analysis needs to consider whether resources expended in the gathering of intelligence are proportionate bearing in mind other impacts. One consultee, a barrister named David Lonsdale, had both his business and his personal accounts frozen. He described the impact it had on him:

> I think there are far too many trigger-happy irresponsible reports made by the banks in relation to many of their customers and these coupled with the freezing of accounts do untold damage to the lives of many innocent people. The practice also wastes a great deal of the time and resources of the NCA.
>
> The second bad aspect of the current law is that it is simply inhumane to freeze a person's account for up to eight working days without giving him access to any money at all. (In my case I had £20 in cash in my flat and no food and there was no one in London who could help me. I was left absolutely desperate.) But the banks think they must do this pending consent from the NCA or the passage of 8 working days. If the NCA received a report in a coherent prescribed form that related only to really serious crime, then there is no reason why it should not be able to decide within 48 hours whether consent could be given or not.

5.111 Whilst we concede the possibility that a change to a test based on reasonable grounds to suspect as the trigger threshold for reporting might reduce the number of reports, our own independent examination of SARs suggested that it would be likely to strengthen the quality of reports. Raising the threshold in this way may have the effect of a limited reduction on the volume of disclosures, but should also lead to a wider enhancement of the quality of the intelligence and amount of raw data provided for every SAR submitted. By amending the threshold, reporters would be directed to substantiate their suspicion on objective grounds. This would address the concerns raised by the SFO, for example, that there are too many authorised disclosures which lack real evidence and detail of the suspicion.

5.112 Whilst the concern about reducing the volume of intelligence is clear, it draws attention to a broader issue; the absence of any large-scale and comprehensive analysis of both required and authorised disclosures on which to base those conclusions. Those who responded were unable to provide evidence for their assumptions.

5.113 As we previously stated, during our data analysis work on authorised disclosures, 15% of disclosures lodged failed to meet the existing legal threshold of suspicion and 47.6% failed to provide one or more objective grounds in support of their suspicion. As such, statements from consultees suggesting that there is little to no room for improvement are undermined by the evidence that we have presented above.

5.114 Our analysis of the quality of reports demonstrated that some SARs are being lodged at present with an objective basis for the suspicion and some are lodged without any such grounding. In some cases, there may be objective grounds on which to base the suspicion but the reporter has failed to articulate them. In these circumstances, law enforcement agencies are not able to benefit from potentially useful intelligence. In other cases, there may be no objective basis for the suspicion. In some of the reports that we saw, irrelevant and, in some cases, discriminatory factors such as the nationality of the account holder were the basis for the report.

5.115 Where there are already objective grounds for a suspicion but they have not been articulated, it is unquestionably better for law enforcement agencies to have access to this information without having to make further enquiries. This saves time and scarce resources. Where there are no objective grounds for a suspicion, the value is more difficult to assess. A hunch may, in time, prove to be correct. Likewise, it may corroborate or relate to another reporter's suspicion and together both reports may provide a fuller picture of criminality. However, the lodging of SARs where they are based on irrelevant or discriminatory factors cannot, in our view be justified, even if law enforcement agencies would prefer to have such information. The consequences for the subject of the disclosure are potentially severe. Neither would this be proportionate.

5.116 However, our own small-scale data analysis and the responses of some consultees has highlighted that further research in this area would provide definitive evidence on which to make any decision on amending the threshold. In view of law enforcement agencies' concerns that this change may "turn off the intelligence tap", we are recommending a staged approach based on a continuing commitment to measure the volume and value of SARs. Our recommendations above - statutory guidance on

suspicion coupled with a prescribed form - will target those authorised disclosures which do not currently meet the *Da Silva* test. We also recommend that further empirical research is undertaken on the quality of required and authorised disclosures involving law enforcement agencies. The Advisory Board that we have recommended could then consider, in time, whether to pilot a new threshold test in order to provide a sufficient evidence base on which to build a stronger and more proportionate regime without sacrificing vital intelligence and raw data.

Recommendation 9.

5.117 We recommend that an Advisory Board should undertake a review as to whether to increase the threshold after further empirical research on the quality of required and authorised disclosures is completed.

SUMMARY OF OUR RECOMMENDATIONS FOR REFORM

5.118 Throughout this chapter we make a number of recommendations. In this section we conclude with a brief summary.

5.119 We do not recommend that the concept of suspicion is defined in Part 7 of POCA. We are recommending the introduction of statutory guidance on suspicion coupled with a prescribed form. We believe that an advisory Board is best placed to draft this guidance and to oversee the creation of a tailored form which makes best use of the most up-to-date IT solutions available to the UKFIU. The Advisory Board can draw upon the experience and views of those who make or receive disclosures by using the information gained from our consultation and the SARs reform project.

5.120 In order to achieve the greatest impact, further continuing education on the obligations under POCA is necessary. A continuing commitment to examining, researching and analysing the quality of intelligence and the amount of raw data provided is essential. Moreover, the usefulness of such research is dependent upon law enforcement agencies recording the usefulness of SARs to investigations and providing feedback. It is only with this evidence base that decisions can be taken regarding the future of the consent regime and any further changes to the reporting threshold which could be tested in the form of a pilot scheme.

Chapter 6: Appropriate consent

INTRODUCTION

6.1 As we observed in our Consultation Paper, an understanding of the concept of "appropriate consent" is key to the functioning of the authorised disclosure exemption (DAML SARs). It is the mechanism which operates to prevent the commission of a money laundering offence by an individual, the official in the bank or other organisation carrying out a transaction, who has a suspicion that property is criminal in origin.[175] However, it is a concept which is frequently misunderstood.

THE CURRENT SCHEME

6.2 Appropriate consent is defined in section 335 of the Proceeds of Crime Act 2002 ("POCA"). What is described is the legal power for the consent of a nominated officer (constable/customs officer) to be provided to the bank or other official in order for them to perform a prohibited act (carry out the suspicious transaction) if an authorised disclosure is made.[176] The Terrorism Act 2000 mirrors the protections of POCA by providing for "arrangements with prior consent".[177]

6.3 As we explained in our Consultation Paper the seeking and granting of consent has a practical function. When an individual in the reporting sector makes an authorised disclosure setting out their suspicion of criminal property, any financial transaction which the individual would otherwise have carried out is paused while the United Kingdom Financial Intelligence Unit ("UKFIU") considers whether consent to do so should be granted.

6.4 In some cases, no decision will be communicated to the reporter at all which will eventually result in "deemed consent": consent is presumed due to the absence of any formal decision within the statutory deadline.

6.5 The process of seeking and securing consent is intended to protect those who will inevitably encounter suspected criminal property in the course of business or in a professional capacity, although any individual can make a voluntary disclosure.

6.6 However, the effect of a grant of consent is limited: if granted or deemed it will exempt an individual from criminal responsibility for carrying out the transaction despite having suspicions about it, but it does not absolve others involved in the transaction who may be part of a money laundering scheme. If the property is indeed criminal in origin, it is not transformed or cleansed by a grant of consent. Future or related conduct by the original reporter or by a third party will still require consent in order to avoid criminal liability.

---

175 Proceeds of Crime Act 2002, ss 327(2)(a), 328(2)(a) and 329(2)(a) and 338.

176 This refers to those acts set out in Proceeds of Crime Act 2002, ss 327 to 329.

177 Terrorism Act 2000, s 21ZA.

EVALUATION OF THE CURRENT SCHEME

6.7 In our Consultation Paper we considered whether the terminology adopted in the present law was the most appropriate way of describing the formal process, or whether there were alternative terms that would improve, or more accurately describe the process. We pointed to some evidence that the term consent lacks clarity and is misunderstood by reporters.[178] The consequence is that the UKFIU receive authorised disclosures which are unnecessary and may subsequently be withdrawn. These reports create an additional burden on the UKFIU.

6.8 We also highlighted recent developments to tackle misunderstanding such as the UKFIU's decision to use non-statutory guidance to move away from the statutory language. In July 2016, the UKFIU unilaterally adopted the terms "Defence Against Money Laundering" ("DAML") and Defence Against Terrorist Financing ("DATF") as direct replacements for the term "appropriate consent" and "arrangements with prior consent". Upon a grant of consent, the UKFIU includes written clarification as to the effect of this. It clarifies that the grant of a request does not cleanse the property or the transaction; absolve individuals from their professional conduct duties or regulatory requirements, or provide any defence from other criminal or regulatory offences.[179]

CONSULTATION

6.9 In the Consultation Paper we considered a number of options for reform. We discussed the merits and drawbacks of amending POCA to insert a term deemed to be more appropriate in describing what the consent regime is designed to achieve (eg exemption or immunity). We provisionally concluded that a change of label alone would be unsatisfactory and highlighted the problems with this approach.

6.10 We concluded that amending the legislation merely to change the term consent was not the right approach. Instead, we provisionally proposed that there should be a requirement in POCA that government produces guidance on the concept of "appropriate consent" under Part 7 of the Act.[180] We did not propose similar guidance on arrangements with prior consent within the meaning of section 21ZA of the Terrorism Act 2000 for two reasons: the volume of disclosures is much lower than in the context of money laundering and the available evidence suggests that the current terrorist financing regime is working effectively.[181] However, we did ask consultees whether similar guidance would be beneficial.

6.11 In chapter 3, we set out our reasoning for recommending statutory guidance on three key areas of the consent regime in principle. In the next section, we will outline consultees' responses on the merits of statutory guidance specifically in relation to appropriate consent. We will then move on to analyse those responses and consider

---

178 Anti-Money Laundering: the SARs Regime, Law Comm Consultation Paper 236 (2018) ("CP 236"), para 12.10.

179 CP 236, Chapter 12.

180 CP 236, paras 12.28-29.

181 422 DATF SARs between October 2015 and March 2017. National Crime Agency, *Suspicious Activity Reports (SARs) Annual Report* (2017) p 6.

the reasons why we are recommending the issuing of statutory guidance on the concept of appropriate consent.

6.12 Of those consultees who answered this question, the overwhelming majority were in favour of statutory guidance on "appropriate consent". Of a total of 30 responses from consultees on this question, 27 agreed with our provisional proposal. This support was mirrored in relation to whether guidance on consent within the scope of section 21A of the Terrorism Act 2000 was also required.[182] Consultees saw a clear benefit in guidance on the concept of consent across both regimes.

6.13 Consultees recognised that there was continuing confusion surrounding the term "appropriate consent". The Investment Association, agreeing with our provisional proposal, observed that the introduction of the term "DAML SAR" has caused a degree of confusion. The Council for Licensed Conveyancers also agreed that statutory guidance could dispel confusion and help to ensure a level of consistency in its operation. The Association of Foreign Banks agreed that statutory guidance would remove any confusion of what consent means.

6.14 Simmons & Simmons also agreed with our provisional proposal and proposed that published statutory guidance should be the definitive place to advise on concepts rather than existing National Crime Agency ("NCA") guidance such as "Submitting better quality SARs" and "DAML FAQs".

6.15 In addition to consultees in the regulated sector, two law enforcement agencies who make substantial use of SARs in the investigative process also agreed that statutory guidance would be beneficial. The Metropolitan Police Service ("MPS") were in agreement with this proposal. The City of London Police stated that, if it was felt by reporters that greater clarity was needed on the more technical legal aspects of the consent regime, then statutory guidance would seem a logical choice. The City of London Police also noted that the term "consent" has been open to misinterpretation in the past, particularly in the mistaken perception that law enforcement agencies condoned a transaction when consent was granted. In addition, it also expressed its preference for statutory guidance to build on existing UKFIU guidance.

6.16 The Financial Conduct Authority ("FCA") and the Law Society of Scotland were both in agreement with our provisional proposal. The Solicitors Regulation Authority ("SRA") expressed approval for the consent regime as a whole and stated that:

> It is useful to have the conversation about how well the consent regime functions, as it is probably the area that presents the most practical problems for law firms. That said, we believe that the current regime is functioning sufficiently well not to require changes. There is a balance to be struck between the exemption for the reporting body for a specific transaction that consent provides and the seven-day period for waiting for that consent to be granted (or denied). The waiting period is a natural consequence of wanting to receive consent, and we believe that the current system balances the benefits and difficulties well.

---

[182] 19 out of 25 Consultees were in favour of statutory guidance on arrangements with prior consent within the meaning of section 21ZA of the Terrorism Act 2000.

Guidance is helpful for clarifying the purpose and function of the consent regime, and statutory guidance would provide greater certainty for reporters.

6.17 Of those supervisory authorities who responded, only the Law Society of England and Wales disagreed with our provisional proposal stating that:

> The NCA's DAML FAQs and the Legal Sector AML Guidance provide good advice to reporters on the meaning of "appropriate consent". We do not believe that it is the concept of consent or any synonyms that give rise to low value SARs.

6.18 The Proceeds of Crime Lawyers Association agreed in principle that statutory guidance could be helpful subject to its content. The Crown Prosecution Service ("CPS") also agreed with our provisional proposal.

6.19 The NCA agreed in principle with exploring statutory guidance, however it disagreed with our provisional proposal in relation to appropriate consent, because, in its view "the legislation is clear" regarding consent.

6.20 Some consultees suggested that changing the terminology would be appropriate. For example, the National Casino Forum was in agreement with statutory guidance, but also observed that there is some merit in changing the phrase "appropriate consent" to "limited authority". In their view, this would be consistent with guidance contained in the letter of written clarification issued to a reporter upon the granting of consent.[183]

Analysis

6.21 Statutory guidance would provide greater clarity and allow those subject to reporting obligations to have a clearer understanding of the existing law. Existing guidance published by the NCA focusses primarily on good practice in the submission of a SAR. Statutory guidance would provide reporters with one definitive source to consult on the law. This would reduce the burden and cost on reporters by avoiding the need to consult multiple sources of information.

6.22 As we set out in chapter 3, statutory guidance would be produced under the oversight of an Advisory Board to ensure that it is most effective. As guidance can be amended and developed to respond to changing circumstances, it can provide an effective response in a dynamic area of law. It would ensure that the regime is resilient enough to cope with the continual change in this dynamic area. It would do so without overburdening reporters and the UKFIU. It would create a system which would be more responsive to developments in anti-money laundering and terrorist financing strategy.

6.23 The suggestion by some consultees that the scheme is working well is undermined by our data analysis discussed in chapter 2. Additionally, the responses of the members of the regulated sector quoted above demonstrate a clear demand for guidance.

6.24 The objection to guidance on this topic raised by the NCA appears to arise from a misunderstanding of what we provisionally proposed. The NCA identified a need for

---

[183] Referring to the terminology adopted in a grant letter sent from the UKFIU to a reporter, for further information see National Crime Agency, *Requesting a defence from the NCA under POCA and TACT* (April 2018) p 3.

guidance on this issue because of misunderstandings by reporters in the application of the consent regime. We did not suggest in our Consultation Paper that such guidance should address the merits of a decision on consent which remains an operational matter and subject to the principles outlined in Home Office Circular 029/2008. We intend that guidance would be explanatory and focus on a grant of consent. In that way it would educate reporters before they lodge an authorised disclosure. Educating reporters in this way would help guard against unwarranted disclosures and the risk of inadvertently committing a criminal offence.

RECOMMENDATIONS FOR REFORM

6.25 We recommend that statutory guidance is issued on appropriate consent and that similar guidance be produced for the parallel provisions in 21ZA of the Terrorism Act 2000. This can be incorporated into a single authoritative source of guidance which we recommend should include the statutory concepts of suspicion and reasonable excuse.

Recommendation 10.

6.26 In accordance with recommendation 3, we recommend that statutory guidance is issued on appropriate consent within Part 7 of the Proceeds of Crime Act 2002 and arrangements with prior consent in accordance with section 21ZA of the Terrorism Act 2000.

Chapter 7: Reasonable Excuse

INTRODUCTION

7.1 In chapter 3, we set out our recommendations in respect of statutory guidance. In this section, we examine how statutory guidance on reasonable excuse could be used to support our overall objective of improving the prevention, detection and investigation of money laundering and terrorist financing by reducing the scope of unnecessary and unhelpful reporting.

THE CURRENT LAW

7.2 As we discussed in chapter 4, reporters have an obligation under the Proceeds of Crime Act 2002 ("POCA") to disclose a suspicion of criminal property or a suspicion that another person is engaged in money laundering subject to specific exemptions and defences. In relation to both the principal money laundering offences and the disclosure offences, a reasonable excuse defence is provided for in POCA.

7.3 First, a money laundering offence will not be committed if a reporter makes an authorised disclosure and obtains appropriate consent in accordance with the exemption.[184] If the reporter fails to make an authorised disclosure and obtain appropriate consent, the individual reporter could rely on a reasonable excuse defence for not making such a disclosure. Sections 327 to 329 provide that if the individual intended to make such a disclosure but had a reasonable excuse for not doing so, an offence would not be committed.[185]

7.4 Secondly, the same defence exists in relation to the disclosure offences, although it is expressed differently. Under sections 330 to 332, the individual would not commit an offence if he or she had a reasonable excuse for not making the required disclosure.[186]

EVALUATION OF THE CURRENT LAW

7.5 In the next section, we will summarise some of the problems that arise from the breadth of the United Kingdom's reporting obligations. We will then set out the different sets of circumstances that we provisionally proposed might amount to a reasonable excuse not to make a disclosure and could therefore be included in statutory guidance. We will go on to consider how consultees responded to the substantive proposals in our Consultation Paper. Finally, we will outline our recommendations for reform.

7.6 We observed in our Consultation Paper that the combined effect of a low reporting threshold (suspicion), an "all-crimes" approach and a broad definition of criminal

---

184 Proceeds of Crime Act 2002, ss 327(2)(a), 328(2)(a), 329(2)(a).

185 Proceeds of Crime Act 2002, ss 327 to 329(2)(b).

186 Proceeds of Crime Act 2002, s 330(6)(a), s 331(6), s 332(6).

property is to capture a wide range of activity which banks and businesses are required to report, backed by the threat of criminal sanction.[187] We had pre-consultation discussions with reporters, those who represent them and law enforcement agencies. They identified a number of situations triggering authorised disclosures (DAML SARs) that generate little intelligence or useful raw data, but which still impose a burden on resources to report. Presently there is no means of exempting categories of case from the reporting obligation even in circumstances where both the reporter and the UKFIU consider that it is unlikely to be useful.

7.7 In our Consultation Paper, we explained that stakeholders with reporting obligations felt that there was scope to take greater responsibility for the quality of disclosures by making common sense judgements about the usefulness of a report. Stakeholders told us that there was a gap between the legislative provisions and industry guidance on what may constitute a "reasonable excuse". Sector-specific guidance differed in the way it approached the reasonable excuse defence which made it difficult for reporters to make a sensible judgement on whether to make a disclosure with sufficient confidence.[188] This lack of confidence, in their view, created significant numbers of unhelpful or low intelligence value disclosures.

7.8 A number of examples illustrate this point. For instance, many stakeholders argued that in relation to low value transactions, the burden of reporting was disproportionate to the value of intelligence gleaned and should not result in an authorised disclosure obligation. Additionally, a substantial number of consultees saw no benefits from lodging authorised disclosures in relation to funds which were moved internally within a bank solely for administrative reasons. Likewise, few considered it to be beneficial for duplicate reports to be lodged with the UKFIU, for example where a fraud was committed and reporters also reported the crime directly to Action Fraud.

7.9 We provisionally proposed that statutory guidance should be issued to provide examples of circumstances which may amount to a reasonable excuse for not making a disclosure to the UKFIU. Statutory guidance would assist reporters in making important decisions on how best to comply with their obligations under POCA. We focussed exclusively on authorised disclosures as they are more resource intensive for both reporters and the FIU and are time-sensitive. However, our provisional proposal was that in all these instances a required disclosure would still be made. This would have a number of significant benefits. First it would ensure that time was not devoted to processing authorised disclosures which are necessarily generated because of the breadth of the current legislation but are, in fact, of little intelligence value. Secondly, it makes the system more proportionate as the subjects of such marginal disclosures will not be denied access to funds pending a decision on consent. Thirdly, it stops law enforcement agencies apportioning time and resources to considering these disclosures where action is unlikely to follow as a result. Finally, it prevents unnecessary duplication of work. In our Consultation Paper we set out a non-exhaustive list of the types of authorised disclosure which, it was generally agreed by stakeholders, generated low intelligence value. The list was as follows:

---

187 Anti-Money Laundering: the SARs Regime, Law Comm Consultation Paper 236 (2018) ("CP 236") Chapter 11.

188 See para 3.17 above.

(1) low value transactions;

(2) internal movements of funds within a bank or business with the intention of preserving criminal property;

(3) duplicate reporting;

(4) information in the public domain;

(5) property transactions within the UK;

(6) multiple transactions on the same account or related transactions such as those relating to the same individual or business;

(7) repayments to victims of fraud;

(8) historical crime;

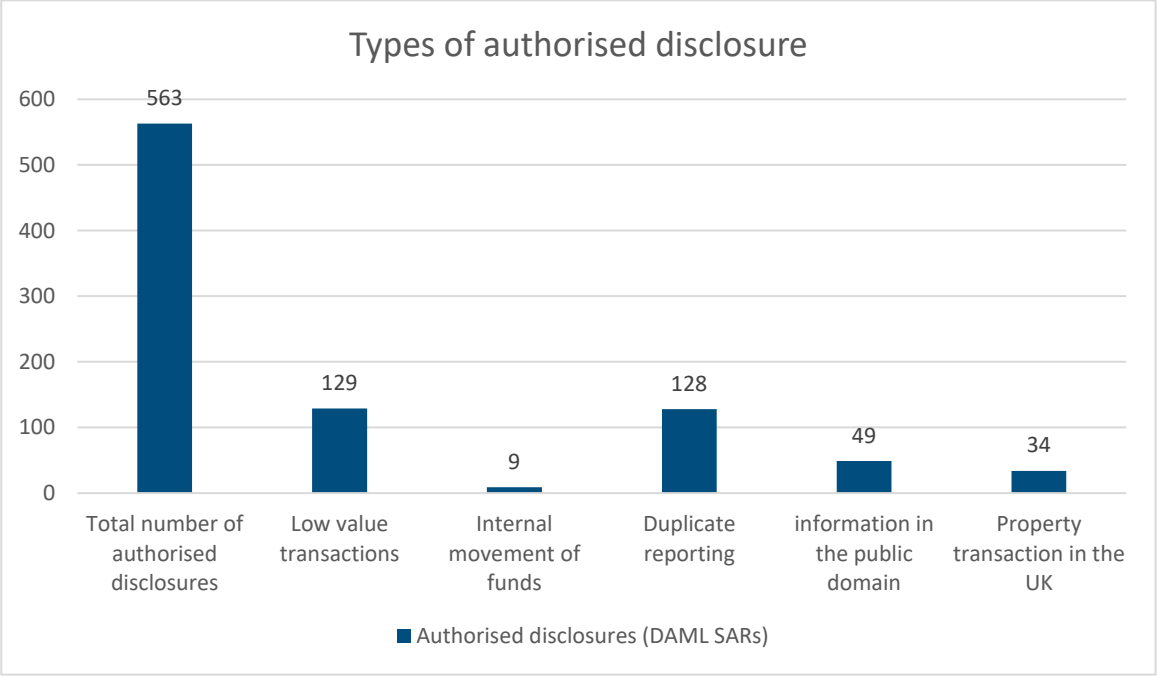
(9) transactions with no UK nexus; and

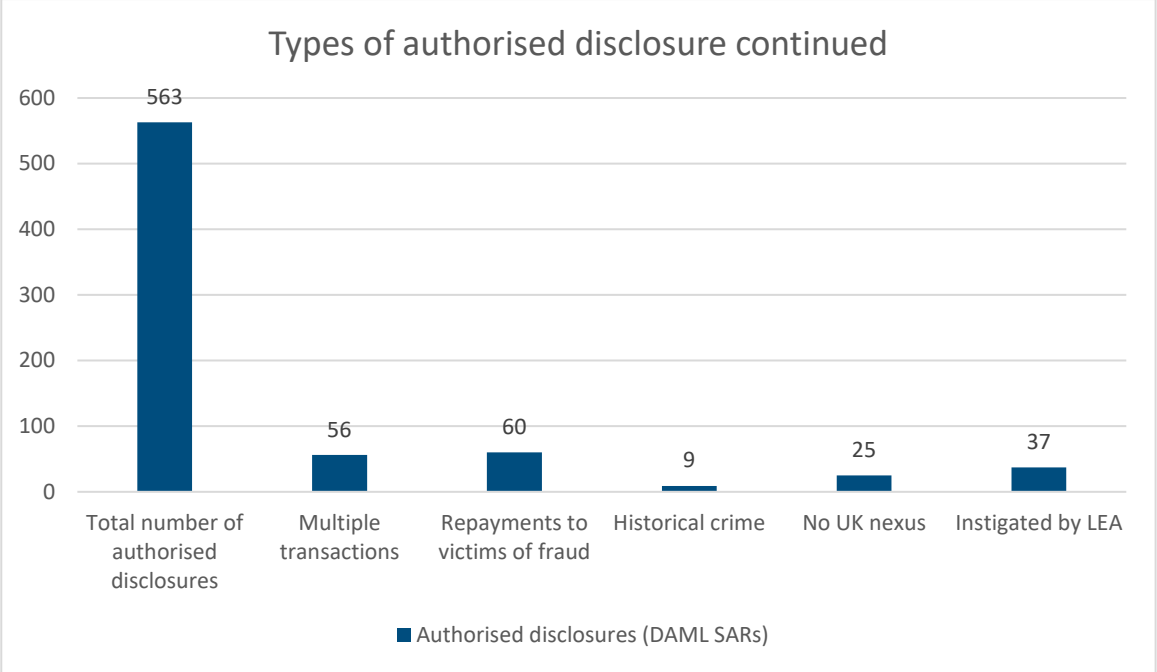
(10) disclosures instigated by law enforcement agencies.

Data analysis

7.10 During our examination of authorised disclosures, we recorded how many SARs fell within each of these categories out of our sample of 563 to understand what the impact might be on UKFIU resources were these categories to be exempted from authorised disclosure obligations.

7.11 The following charts show the quantities of each type of authorised disclosure:





7.12 Below we summarise the relevant proportion of disclosures for each category that we identified in the Consultation Paper:[189]

(1) low value transactions under £1000 accounted for 129 authorised disclosures out of 563; approximately 24% of the total number of authorised disclosures we analysed;

(2) those in which funds were simply being moved internally without any risk of dissipation of criminal property amounted to nine out of our sample of 563; approximately 1.5% of the total number of authorised disclosures we considered;

(3) duplicate reporting occurred in 128 disclosures in our sample; approximately 23% of the total number of authorised disclosures we reviewed;

(4) 49 authorised disclosures in our overall sample contained information that was already in the public domain without any additional intelligence being provided by the reporter; 8.7% of the total number of authorised disclosures we considered;

(5) property transactions within the UK accounted for 34 disclosures in our sample; approximately 6% of the total number of authorised disclosures we analysed;

(6) there were 56 authorised disclosures which, although lodged separately, involved related transactions; approximately 10% of the total number of authorised disclosures we analysed;

[189] Percentages have been rounded.

(7) 60 authorised disclosures were lodged solely to repay victims of fraud; approximately 11% of the total;

(8) only 9 authorised disclosures related to historical crime (defined as a criminal offence which occurred more than five years prior to the date of the disclosure); approximately 1.6% of the total number of authorised disclosures we examined;

(9) there were 25 authorised disclosures which had no UK nexus but where the investigation took place within a UK office; approximately 4% of the total number of authorised disclosures we analysed; and

(10) 37 authorised disclosures were instigated by law enforcement agencies; approximately 7% of the total number of authorised disclosures we considered.

7.13 Given that a substantial amount (23%) of disclosures are duplicates we can infer that a significant proportion of disclosures are of little intelligence value to law enforcement agencies.

7.14 Notwithstanding the other categories of disclosure that we identified in our Consultation Paper on which consultees may take differing views, the proportion of duplicate disclosures in our sample provides evidence of a large number of SARs which are of negligible value to law enforcement agencies.

CONSULTATION

7.15 In this section, we consider how consultees responded to our non-exhaustive list of examples of circumstances which may amount to a reasonable excuse for failing to lodge an authorised disclosure. We were particularly interested to see if there was any consensus about the categories of authorised disclosure which were of least value.

7.16 In relation to our general proposal that statutory guidance on reasonable excuse should be issued, 36 out of 40 consultees that responded were in favour of such guidance; this amounted to 90% of consultees overall.

7.17 There was clear agreement across the regulated sector, law enforcement agencies and supervisory authorities. All consultees who fell into these categories agreed that statutory guidance on reasonable excuse should be issued in principle.

7.18 Of those who disagreed with our proposal for statutory guidance on reasonable excuse, the Solicitors Regulation Authority ("SRA") suggested that guidance would create confusion, make enforcement more difficult and would not succeed in changing behaviour:

> In this instance, if a change to the reporting requirements would be beneficial then we believe this is such an important area that guidance would be insufficient to drive the desired type of behaviour.

7.19 The Crown Prosecution Service ("CPS") expressed some reservations about our provisional proposal in their written response:

> We express some doubt about this proposal. It bears the risk of non-reporting being tailored to meet examples which have the force of statutory guidance. It risks moving

the focus away from the facts and circumstances of the specific case to the general ability to claim that the reasonable excuse falls within an example provided by the statutory guidance. Providing broad categories for non-reporting risks the efficacy of the reporting regime.

7.20 However, the CPS indicated that there may be some circumstances in which guidance might rightly address "technical" fixes:

> If there are genuinely common areas where there is plainly a reasonable excuse for non-reporting then we agree that these should be openly and transparently stated and be overseen and permitted by way of statutory guidance, but we are unclear about the case for this in contrast to the risks it presents.

ANALYSIS

7.21 In chapter 3, we set out the case for statutory guidance in principle. Such guidance would relate to persons carrying on business in the regulated sector about how to comply with their obligations under Part 7 of POCA. While those arguments are not repeated here, we identify points in favour of statutory guidance covering the reasonable excuse defence in POCA. In the next section we consider a number of specific instances in which a reasonable excuse defence might be relied upon and analyse consultees' responses.

Low value transactions

7.22 We observed in our Consultation Paper that money laundering offences can be committed in relation to criminal property of any value; there is no provision to exclude low value transactions. While banks ("deposit taking bodies") enjoy a limited exemption for transactions under £250 and can apply for a higher threshold to be authorised, this exemption does not apply to any other reporter.

7.23 However, despite the initial attraction of removing such an administrative burden for all reporters, we highlighted a number of problems that would arise were a threshold created to prevent disclosures being made in low value cases:

(1) there are legal barriers to creating such a threshold. Article 33 of the Fourth Money Laundering Directive ("4AMLD") requires reports "regardless of the amount involved" where the obliged entity knows, suspects or has reasonable grounds to suspect that funds are the proceeds of crime or are related to terrorist financing.

(2) in some situations, low value transactions can provide useful intelligence, for example if a vulnerable person was being defrauded of a relatively small sum, an authorised disclosure would be more likely to trigger a quick response from the police than a required disclosure.

(3) in terrorism cases, vital intelligence may be generated from small transactions which seem innocuous but have much greater significance. Reporters would not be in a position to distinguish what was potentially valuable from that which was of little consequence.

7.24 We provisionally concluded that introducing a minimum financial threshold would be undesirable for the reasons outlined above.

Consultation response

7.25 Of the 33 consultees who responded to this question, 27 agreed with our provision conclusion (81%). Six consultees disagreed (18%).

7.26 Many consultees echoed concerns regarding the possibility that criminals would adapt to and exploit any threshold that was imposed. The Law Society of Scotland specifically referenced practices of "structuring" and "smurfing" in which transactions are deliberately broken down into smaller ones beneath any financial threshold to pass undetected.

7.27 Northumbria University agreed and observed that introducing a minimum threshold could also be highly burdensome for the regulated sector, "requiring significant additional enquiry and attracting significant risk of error".

7.28 The National Crime Agency ("NCA") and the Crown Prosecution Service ("CPS") warned that a minimum threshold risked allowing criminality, especially terrorist financing, to go unreported. The NCA noted:

> The risks of a threshold are that opportunities for law enforcement to act against criminal assets under the threshold, even where the offending is serious are lost. For example, we receive DAML SARs that relate to potential terrorist financing activity there is a strong risk we would miss some of these opportunities and the ability to safeguard individuals where the harm is significant even though the amount is below a threshold.

7.29 However, the NCA concluded that it would be beneficial for the UKFIU to set a threshold at their discretion for authorised disclosures only:

> We do not support a minimum threshold for required disclosures. We would support a capability for the FIU to specify threshold or circumstances for authorised disclosures but with discretion for reporters to report under the threshold where they deem appropriate, e.g. vulnerable person, terrorist financing, etc.

7.30 We also asked consultees whether the current threshold amount should be raised. Of the 17 consultees who answered this question, only six were in favour and 10 were opposed. We observe at this point that there is a statutory mechanism in place to allow individual variation requests and this may be reflected in the responses.

Analysis

7.31 The weight of consultee responses was in favour of maintaining the status quo and not introducing a minimum threshold. The most compelling argument is perhaps that the value of criminal property generated by criminal activity does not necessarily correspond with how serious the crime is or the value of the intelligence gathered from a report. If the victim is vulnerable, defrauding them of a small amount of funds could have devastating consequences. Equally the nature of modern methods of terrorist financing means that small value transactions can have significant intelligence value.

7.32 The broad discretionary arrangement proposed by the NCA would introduce a new layer of complexity for reporters without providing clarity or certainty for reporters unless it could be more clearly defined. However, if guidance could be drafted overseen by an Advisory Board that we recommended, based on relevant factors identified by the NCA in collaboration with other law enforcement agencies and the regulated sector, this may provide reporters with greater clarity regarding the reasonable excuse defence. It may reduce low value authorised disclosures in non-serious and non-urgent cases while still retaining the intelligence in the form of a required disclosure. This recommendation could be considered by tan Advisory Board when drafting statutory guidance.

Recommendation 11.

7.33 We recommend that the existing regime in respect of low value transactions should be retained and conclude that introducing a minimum financial threshold would be undesirable.

7.34 We recommend that the Advisory, inboard, in drafting statutory guidance to assist those in the regulated sector in complying with their obligations under Part 7 of POCA, should consider addressing low value transactions.

Internal movement of funds

7.35 As we outlined in our Consultation Paper, a bank may need to move funds internally with the aim of preserving suspected criminal property. Under the current law, there is a risk of a money laundering offence being committed by such an internal transaction unless an authorised disclosure is made.

Consultation response

7.36 Of the 26 consultees that responded to this question, 22 were in favour of including this situation in guidance on reasonable excuse. Only four consultees disagreed with our proposal. There was agreement across law enforcement agencies, the regulated sector and those with supervisory responsibilities that an authorised disclosure should not be required but a required disclosure should still be lodged with the UKFIU. The NCA added one further clarification, that the funds must remain in the UK.

7.37 Of the small number of consultees who disagreed with this proposal, the Proceeds of Crime Lawyers Association ("POCLA") suggested reconsideration of the broader question of prohibited conduct in sections 327 to 329 of POCA. Some consultees misunderstood the limited nature of the proposal and were mistakenly concerned that criminal property was being dissipated.

Analysis

7.38 Our data analysis exercise confirmed that internal movements of funds are resulting in authorised disclosures; 1.5% of our sample. While this is a small number it is not insignificant. The breadth of the prohibited conduct set out in sections 327 to 329 is intended to capture any movement of criminal property. However, as we have recommended a legislative amendment in recommendation 13 coupled with guidance

on its operation in recommendation 14, we make no further recommendations on this point.

Duplicate reporting obligations

7.39 Reporters may have obligations to report criminal activity in addition to those contained in POCA. One example of this is suspected fraudulent transactions where a report would also be made to Action Fraud, which is the reporting mechanism for the National Fraud Intelligence Bureau within the City of London Police. Stakeholders identified this duplication as a problem, and some were unclear about the appropriate reporting routes.

7.40 However, not all reports to law enforcement agencies provide the same opportunities to intervene in criminal activity. An authorised disclosure has the effect of pausing a transaction which means criminal property does not move until the UKFIU or a relevant law enforcement agency have been able to consider the matter. We acknowledged in our Consultation Paper that that there may well be circumstances in which an authorised disclosure is the preferred mechanism for notifying law enforcement agencies as to fraud.

7.41 We provisionally proposed that statutory guidance on reasonable excuse should include advice on the appropriate reporting routes in different types of cases.

Consultation response

7.42 Twenty-five out of 35 consultees who responded to this question believed that there was insufficient intelligence value in disclosures to justify making duplicate reports; 71% overall. However, in analysing where the differences arise it seems that there are differing views on the appropriate reporting route.

7.43 In summary, consultees made the following general points in favour of eliminating duplicate reporting through guidance on reasonable excuse:

(1) it is costly and time consuming;

(2) if a fraud loss is significant the reporting institution will be actively working with an appropriate police service providing information for the investigation; and

(3) this issue is already covered in the Legal Affinity Group ("LAG") guidance to the legal sector. As this is already happening it raises concerns that different sectors are adopting different approaches.

7.44 For those who disagreed with the proposal or simply expressed concerns that required further consideration, the following issues were raised:

(1) there should continue to be a central repository for reports and clarity about that unequivocal requirement;

(2) the implication of allowing reporters to choose to disclose to different agencies might result in unexpected challenges in the form of an increased volume for those agencies;

(3) there would have to be appropriate mechanisms and gateways between the different law enforcement agencies, to ensure that the information was shared appropriately; and

(4) it would require a detailed assessment of what data is collected by whom for what purpose, as well as the legal basis for pooling or sharing information.

Analysis

7.45 Most importantly, while there is a broad consensus that duplicate reporting should be reduced and guidance in principle is a sensible solution, it is unclear following our consultation what the best approach might be to achieve this. There is still uncertainty amongst consultees as to what the most appropriate reporting route is in any given circumstances. For example, while a fraud might be reported to Action Fraud, if it relates to a vulnerable person, an authorised disclosure may trigger a faster response.

7.46 Moreover, it is unclear whether there are sufficient arrangements in place to ensure that information can be shared between law enforcement agencies. As we observed in chapter 1, there is ongoing work in relation to information technology solutions which would need to inform any final recommendations for reform.

7.47 Any guidance on reporting routes will require further dialogue between the relevant law enforcement agencies and the UKFIU to determine the most appropriate place to lodge a disclosure. It will also require further consideration of IT systems, the existing arrangements for sharing information between law enforcement agencies and a thorough and detailed examination of the different types of reports that might be included. Given that there are several outstanding issues to resolve, we recommend that the Advisory Board should undertake further work to explore whether guidance on this issue would be beneficial.

Recommendation 12.

7.48 We recommend that the Advisory Board should explore including appropriate reporting routes within statutory guidance to assist reporters on complying with their obligations.

Information in the public domain

7.49 In some instances, a reporter's suspicion may only be aroused by what they have read in a newspaper or by information from another media source. They may have no additional information beyond what is included in the media report. One example of when this might arise is where a property transaction by a high net worth individual is reported in the press.

7.50 We observed in our Consultation Paper that there were difficulties with seeking to eliminate these types of reports entirely. We questioned how a reporter could be confident that the information was in the public domain and what sources of information would meet this criterion. We queried whether one source would be sufficient or whether multiple sources would be required. Moreover, some sources

may be less reliable than others, for example a personal blog might be considered a less credible source than a broadsheet newspaper.

7.51 We also noted the practical difficulties that may arise. Any exception would be difficult to apply where a reporter may have been in possession of more facts than those in the relevant media source. It would also place an additional burden on law enforcement agencies to monitor information in the public domain.

7.52 We provisionally proposed a short-form report as a proportionate compromise which would provide information to law enforcement agencies while recognising its limited value.

7.53 During our data analysis work, we discovered that 49 authorised disclosures out of our overall sample of 563 contained information that was already in the public domain without the provision of any additional intelligence from the reporter. This amounts to 8.7% of the total number of authorised disclosures we considered.

Consultation response

7.54 Consultees were divided on whether there was insufficient value in a report which only provides information which is already in the public domain given the cost of reporting. Of the 36 consultees who responded to this question, 21 were in in favour of our provisional proposal and 15 were against. However, some of those who argued against the proposal did so on the basis that they favoured no disclosure at all. Given a choice between full disclosure or the limited disclosure that we proposed, these consultees might have favoured our proposal.

7.55 Some consultees, such as the Financial Conduct Authority ("FCA") felt that our proposal represented a good compromise. City of London Police thought it would be helpful if any redesigned form still holds enough information to make it fully searchable and also that it includes a requirement to include the source of the publicly available information.

7.56 Of those who disagreed, some consultees argued that no disclosure should be required where the information was in the public domain. A general concern that came from law enforcement agencies was that there was no way for the reporter to know that the information had come to the attention of the NCA. The sole fact of a link between the reporter and the person in the media might itself be useful and otherwise unknown. The NCA stated:

> While a reporter might see some information in the public domain relating to one of their customers, law enforcement still need to know about the reporter's suspicion and the detail of the suspicious activity. The link between the information in the public domain and the suspected activity, as provided by the reporter, may in fact be new and previously unknown element for law enforcement.

7.57 Others felt that it was too difficult to delineate precisely what information was known only to the reporter and what information was in the public domain which could lead to factual disputes. The CPS in particular were concerned about this distinction:

> We do not agree. It is not possible to know what information and to what degree of detail is in the public domain and regardless of what is in the public domain there

may be greater information which the reporter can give and should be prompted/require by the report to address.

Analysis

7.58 Views on this issue were wide-ranging but a common theme emerged that there was no clear line between public information and information only known to the reporter and this was information which law enforcement agencies wished to have.

7.59 In light of our recommendation that the creation of a tailored online form should be a priority, such a form should also be designed to accommodate reporters who can only provide minimal information. Any prescribed form in digital format could make use of drop-down options to allow a reporter to signpost the source of their information. It could also allow a reporter to provide hyperlinks to the relevant media sources and not penalise the reporter for empty data fields. This would reduce the burden on the reporter while still ensuring that law enforcement agencies are receiving relevant information and intelligence.

Recommendation

7.60 In light of the above, we make no further recommendation and conclude that a prescribed form tailored to the specific circumstances of the reporter is the best approach in these cases.[190]

Property transactions within the UK

7.61 Where criminal funds are to be invested in a property within the UK or applied to mortgage payments, that activity creates an audit trail which leads back to the asset. In our Consultation Paper we questioned whether such transactions required law enforcement to have an opportunity to intervene at an early stage or whether it was sufficient for a required disclosure alone to be made.

7.62 During our examination of authorised disclosures, we found that 34 SARs out of our total sample of 563 (6%) related to UK property transactions or mortgage payments.

7.63 We provisionally proposed that it could amount to a reasonable excuse not to lodge an authorised disclosure where it related to a property transaction within the UK. This proposal originated from discussions with law enforcement agencies. Some observed that while the intelligence that such a report provides was essential, there was not necessarily a reason to pause the transaction as the money was not in flight and was being applied to an identifiable and immovable asset.

7.64 Despite initial support, consultation responses were more mixed. Fifteen consultees agreed that there was no need for an authorised disclosure in these circumstances and 18 disagreed. We proposed that a required disclosure should still be made and 28 consultees agreed with this, only four disagreed.

Consultation response

7.65 Law enforcement agencies were divided on the issue of how to treat these types of SARs. The City of London Police gave detailed consideration to this proposal and

---

190 See recommendation 5 at para 5.84.

concluded that, whereas property purchases could be problematic, regular mortgage payments should require an authorised disclosure:

> This question addresses two different types of transaction – property purchases and mortgage payments. Whilst property transactions are traditionally slower than other forms of financial transaction they are still a way of moving a large amount of money and feature regularly in money laundering, confiscation and civil recovery investigations. Concerns in relation to property purchases not only relate to the funds being used to purchase the property but where they are going (is the transaction in itself a way of moving funds away from the subject of interest to another third party / out of the jurisdiction). A purchase may use funds from a single subject but may result in a joint property purchase, for example between a subject and their spouse. This could then cause further complications further down the line.
>
> Regular monthly mortgage payments in themselves are less problematic, however paying off large chunks of the mortgage to increase equity raises questions both about the funds available to make such additional payments and whether or not the increased equity will be used, for example as security for another loan allowing the funds to be used in a form with a more legitimate appearance.
>
> The required disclosure provisions should, therefore, remain in relation to property transactions and mortgage payments, however regular monthly mortgage payments from a known source of legitimate income by way of direct debit may amount to a reasonable excuse to a money laundering offence not to make an authorised disclosure.

7.66 The Metropolitan Police Service ("MPS") and the NCA both agreed that property transactions might require an early opportunity to intervene before the proceeds of crime were placed into a fixed asset such as a house. Their responses did not specifically address whether mortgage payments created the same problems. However, the general observation was made that money in a bank account might be subject to an Account Freezing Order.[191] Early warning of an impending transaction could allow law enforcement agencies to intervene and disrupt criminal activity.

7.67 Other consultees, such as the Proceeds of Crime Lawyers Association ("POCLA") whilst seeing the pragmatic benefits of such a change were also wary due to the potential for unintended consequences.

Analysis

7.68 Law enforcement agencies broadly agree that there will be some circumstances in which they will want to intervene at an early stage of a transaction in relation to real property in the UK. Given that it is impossible to delineate those transactions which

---

[191] Account freezing orders (AFOs) were introduced by the Criminal Finances Act 2017 in the context of civil recovery under Part 5 of POCA. The new section 303Z1 of POCA allows an application to be made in the magistrates' court for an AFO in respect of a bank or building society account, where an enforcement officer is satisfied that there are reasonable grounds to suspect that the money in the account is recoverable property (as 2 defined in sections 304-310 of POCA) or is intended by any person for use in unlawful conduct. For more information see Home Officer Circular 005/2018, *Forfeiture of money held in bank and building society accounts – sections 303Z1-303Z19*.

will require early intervention, the risks identified by law enforcement agencies weigh against pursuing this proposal.

Recommendation

7.69 In light of the above, we do not make any recommendation in relation to purchases of real property within the UK and mortgage payments. However, we observe that regular mortgage payments would also fall to be considered within our discussion of multiple transactions below. An alternative approach is addressed in that section.

Multiple transactions and related accounts

7.70 Where an account contains suspected criminal funds and multiple transactions are anticipated, the current law demands one authorised disclosure for each transaction. This can also occur where an individual or company has more than one account and a series of inter-linked transactions could result in multiple disclosures where information is simply repeated and recycled.

7.71 We provisionally proposed that reporters should be able to submit one SAR instead of many in such circumstances.

Consultation response

7.72 Consultees were overwhelmingly in favour of our proposal for one SAR for multiple transactions. Twenty-nine consultees were in favour and only two were against this proposal.

7.73 The MPS and the NCA disagreed with this proposal. The concern they identified was that this would prevent disclosures being made in a timely manner. We are not persuaded by this argument. There was no suggestion in our Consultation Paper that reporters would be permitted to delay their disclosure. It would be possible to flesh out in guidance what the expectations for disclosure would be. As we identified in our Consultation Paper, large banks for example do operate retrospectively, using algorithms to identify unusual activity which may become suspicious once an investigation has been completed. Inevitably some activity will only come to light after it has occurred.

7.74 However, the responses from the law enforcement agencies do raise a practical issue: whether it is desirable for blanket consent to be given where future similar transactions are anticipated, as would be the case, for example, with regular mortgage payments. This point was also raised by POCLA.

Analysis

7.75 Where further transactions, similar to that which has aroused suspicion are anticipated, one way forward might be for the UKFIU to grant a “blanket” consent. This may prevent the submission of multiple authorised disclosures which provide no further useful intelligence. This is a matter that the Advisory Board, that we recommend, could consider although we make no specific recommendation on this point.

7.76 Given the burden on reporters and the UKFIU, despite the lack of apparent value to law enforcement agencies, the common-sense approach is to allow reporters to lodge

one authorised disclosure in the circumstances. There was overwhelming support for this approach amongst consultees. Concerns about timely disclosure can be dealt with in guidance.

Recommendation

7.77 We recommend that reporters should be permitted to submit one SAR for multiple transactions on the same account and for multiple transactions for the same company or individual.

7.78 We have also recommended the creation of an online form in chapter 5 that can be tailored to assist both the reporter, the UKFIU and law enforcement agencies. Such a form should allow reporters to indicate that there are multiple transactions or inter-linked transactions. This would make for one SAR which was richer in intelligence rather than several where information is repeated.[192]

Recommendation 13.

7.79 We recommend that reporters should be permitted to submit one SAR for multiple transactions on the same account and for multiple transactions for the same company or individual and that this may be addressed in statutory guidance assisting reporters on how to comply with their obligations under Part 7 of POCA.

Repayments to victims of fraud

7.80 A bank may identify that a fraud has been committed by monitoring customer transactions. Under the current law, consent would be required before the bank could repay the defrauded customer. This process would generate an authorised disclosure simply to allow for repayment. The defrauded customer would have to wait for their funds to be repaid while a decision on consent was taken.

7.81 We provisionally proposed that a bank should not have to seek consent to pay back funds to a victim of fraud. During our data analysis work, we identified 60 authorised disclosures out of our sample of 563 in which the reporter was seeking consent in order to repay a victim of fraud. This amounted to approximately 11% of authorised disclosures that we analysed. Removing these authorised disclosures would therefore have a significant impact on both reporters and the UKFIU.

Consultation response

7.82 Of the 23 consultees who responded, 18 were in favour of our proposal (76%) and four (17%) were against. One consultee did not come to a final conclusion.

7.83 Law enforcement agencies including the MPS and NCA were in agreement. A need for clear guidance on when it would be appropriate to make a repayment without lodging an authorised disclosure was identified by the City of London Police. They stated:

---

192 See recommendation 5, para 5.84.

Where there is a clear case of fraud and the funds in the account can clearly and directly be attributed to a specific victim then there should be no barrier to the repatriation of those funds to the victim as long as the matter has already been reported. That being said there should be clear guidelines as to the circumstances in which this would be considered an acceptable course of action and clear and cogent evidence to support the allegation of fraud. Where there are mixed funds (eg from more than one victim), where there is layering, where there is no supporting evidence to support the allegation of fraud then for the protection of the bank and to ensure that no other third party is disadvantaged (however unwittingly) there should still be a DAML SAR submitted to allow sufficient scrutiny of the claim.

7.84 Of those against the proposal, three individuals offered responses. Anand Doobay concerned that this left it up to a bank to determine who is a victim and may in fact lead to the bank acquiring additional potential liability. Anna Sulkowska made the opposite argument that a bank might not be liable for its own negligence in allowing the criminal fraud to take place. Bobby Hussain believed that applying for consent was good procedure and allowed checks to be made.

7.85 POCLA's objection stemmed from the authorities losing control of criminal property. However, it must be noted that this was not a view echoed by law enforcement agencies.

Analysis

7.86 A significant number of SARs fall into this category. Our proposal was to create a narrow exception for banks to repay victims of fraud while still making a report about the fraud to law enforcement agencies. There is no basis to suggest that a bank's liability to its customer would be affected by our proposal. It is limited to providing an exemption from making an authorised disclosure in circumstances where one would ordinarily be required. It is of note that law enforcement agencies and banks were united in their support of this proposal. There is a need for clear guidance to address in what circumstances a repayment could be made without lodging an authorised disclosure. In any event, a required disclosure would still be lodged in all such cases, thereby ensuring that intelligence was not lost.

Recommendation 14.

7.87 We recommend that banks should not have to seek consent to repay funds to a victim of fraud and that this may be addressed in statutory guidance to assist the reporter in complying with their obligations. We recommend that the obligation to lodge a required disclosure should remain.

Historical crime

7.88 As there is no temporal limit on disclosing suspicions of criminal property or money laundering, disclosures can be triggered when a crime is historical and it is difficult for a reporter to gather information. In our Consultation Paper, we observed that it was

unclear whether disclosures of historical crime were useful, and asked consultees for their views. We also asked for views on how long after the commission of an offence a disclosure would be considered historical for the purposes of law enforcement agencies.

7.89 During our data analysis work on SARs, we looked for SARs where the crime had been committed more than five years prior to the date of the disclosure. This amounted to nine authorised disclosures out of our sample of 563; 1.6% overall.

Consultation response

7.90 Consultees were in broad agreement that there is a value in disclosing historical crime. Twenty-seven out of the 31 consultees who responded believed there was value in these disclosures; (87% overall). Only four consultees disagreed (13%).

7.91 Consultees offered a wide range of responses to the consultation question we posed regarding the length of time before a crime would be considered historical. Answers ranged from six months to 20 years. There was no agreement on the issue of when a crime was considered historical.

Analysis

7.92 There was consensus amongst consultees and particularly law enforcement agencies as to the potential value of this intelligence.

Recommendation

7.93 In light of consultees agreement that there is value in disclosing historical crimes we make no recommendations.

No UK nexus

7.94 Some authorised disclosures result from transactions where there is no UK nexus. As we set out in our Consultation Paper, POCA criminalises acts of laundering that take place anywhere in the world.[193] As a result of this, disclosures are required even where the only link with the UK might be the fact that the investigator happens to be based in the UK. We provisionally proposed that guidance on reasonable excuse might address cases where the conduct itself takes place outside of the UK to avoid authorised disclosures in these circumstances.

7.95 During our data analysis of SARs, we found that 25 out of our sample of 563 had no UK nexus; approximately 4% of the overall number of authorised disclosures that we examined. Our approach was to record instances where the reporter perceived there to be an absence of a connection to the UK or where, on the facts presented, there appeared to us to be no UK nexus.

Consultation response

7.96 While the overall response of consultees was in favour of guidance on reasonable excuse to address SARs with no UK nexus, law enforcement agencies in particular disagreed with this approach. Twenty-one consultees out of the 36 who responded

[193] *R v Rogers* [2014] EWCA Crim 1680; [2015] 1 WLR 1017; Proceeds of Crime Act 2002, s 340(2)(b) and s 340(11)(d).

(58%) were in favour, 14 were against (39%) and one consultee did not come to a conclusion.

7.97 UK Finance agreed with the proposal, noting that some industry guidance already suggests that this could be a reasonable excuse for not making a disclosure and stated:

> As the consultation notes, the relevant teams and nominated officer of a global institution may be based in the UK and take the view that the transactions they review need to be reported to the NCA, even if they have no UK nexus whatsoever. It would help if reporting requirements in such scenarios were clearly expressed so this proposal would reduce reporting of no value to UK law enforcement and reduce burdens on the industry. Some members felt that this change would be better reflected in a change of law rather than guidance, but guidance would be a helpful first step. Any such law/guidance should also be clear what a "UK" nexus means in this context.

7.98 The NCA disagreed with our proposal and stated that:

> The lack of a UK nexus as perceived by the reporter does not mean that there is necessarily no UK nexus. We would want to be able to share that information reciprocally with partner FIUs in the relevant countries.

Analysis

7.99 The transnational nature of many crimes means that transactions which, on their face appear to have no UK nexus may still, upon further investigation, affect the UK. Equally, as the NCA identified, the UKFIU's ability to engage in mutual cooperation with other jurisdictions can provide relevant intelligence to foreign partners where appropriate.

7.100 In chapter 11 we discuss the implications of the decision of the Court of Appeal in *R v Rogers* and the principles of jurisdiction, legal conduct overseas and extraterritoriality.[194] As the law currently stands, it is difficult to sustain a suggestion that many suspicious transactions can be genuinely said to have "no UK nexus". As such, we make no recommendation in respect of transactions which are perceived to have no UK nexus.

Recommendation 15.

7.101 We recommend that the current approach to authorised disclosures on international criminality is maintained.

CONCLUSION

7.102 In conclusion, we recommend that statutory guidance aimed at assisting the regulated sector about how to comply with their obligations should deal with the topic of

[194] *R v Rogers* [2014] EWCA Crim 1680; [2015] 1 WLR 1017.

reasonable excuse. Such guidance would need to be drafted with care having regard to the different references to “reasonable excuse” in Part 7 and the limits of what can be achieved through guidance. At the very least such guidance could, in line with our aims, reduce inconsistency across sectors of the kind identified above at 3.17. Because of this need for caution, the drafting of such guidance should be overseen by an Advisory Board in accordance with recommendation 3.

7.103 We also suggest that the Advisory Board consider whether other issues highlighted in this chapter ought to be addressed in guidance where there is a broad consensus that particular SARs are of limited value.

Chapter 8: Criminal property and mixed funds

INTRODUCTION

8.1 In our Consultation Paper we discussed the problems that can arise when the proceeds of crime become mixed with legitimately obtained or "clean" funds.

8.2 As we outlined in our Consultation Paper, once a bank employee becomes suspicious that the bank is holding criminal funds in a customer's account, the employee is at risk of committing one of the three principal money laundering offences by continuing to hold the funds or deal with them, for example by making a transfer.[195] The employee can make an authorised disclosure (DAML SAR) and seek consent to continue to hold the funds or do one of the acts prohibited in sections 327 to 329 of the Proceeds of Crime Act 2002 ("POCA").

8.3 When a Suspicious Activity Report ("SAR") is used to make an authorised disclosure, this triggers a statutory seven-working-day notice period during which the United Kingdom Financial Intelligence Unit ("UKFIU") processes the report and decides whether to grant or refuse consent. If a request for consent is refused during the seven-day notice period, a statutory moratorium period of 31 calendar days begins. The reporter remains prohibited from taking any further action and, in practice, the account is frozen. Freezing the account prevents the subject of a disclosure form dissipating property which may be criminal in origin.

8.4 The practice of freezing entire bank accounts, regardless of the proportion of the funds in that account which it is suspected may be criminal or represent criminal property, can have severe economic consequences for the individual or business whose account is affected.

8.5 In the next section we will summarise how criminal property is defined in POCA. We will also consider how the law has been interpreted and what the practical consequences are for banks and the subjects of disclosures when their employees report their suspicions. We go on to set out how we analysed a sample of authorised disclosures to record those cases in which there was an issue relating to mixing funds. We will also consider consultees' responses to our provisional proposals and make recommendations for reform.

THE CURRENT LAW

8.6 There are two reasons why mixed funds create practical problems for banks and those who are the subject of a disclosure in the operation of the consent regime. First, money is "fungible"; in economic terms, this means that money is considered to be an asset capable of mutual substitution. For example, one £5 note can be substituted for any other £5 note. Therefore, when a customer deposits their money with their bank, the bank's obligation is to return an equivalent amount when requested to do so by the customer in accordance with their mandate. The relationship between a customer

[195] Anti-Money Laundering: the SARs Regime, Law Comm Consultation Paper 236 (2018) ("CP 236") p 129.

and their bank is essentially a debtor-creditor relationship. Applying the legal concept of fungibility in the money laundering context means that when criminal property is mixed with legitimate income in, for example, someone's bank account, the bank is unable to isolate the criminal property.

8.7 In addition to the economic principle of fungibility, POCA gives a broad and all-encompassing definition of criminal property:

> Property is criminal property if—
>
> (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
>
> (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.[196]

8.8 In effect, once a bank employee suspects that funds in an account represent a person's benefit from criminal activity, they are compelled to make a disclosure or risk committing a principal money laundering offence if they cannot avail themselves of another exemption or defence in Part 7 of POCA. For example, if a reporter fails to make an authorised disclosure, they may be able to rely on the defence of reasonable excuse after the fact but the risk falls squarely on the reporter.[197] This risk is exacerbated by the divergent interpretations across the regulated sector of circumstances which may amount to a reasonable excuse. While it is possible to lodge an authorised disclosure while, for instance, a financial transaction is being undertaken, the reporter cannot have known or suspected that the property was criminal in origin when he or she began to transfer or otherwise deal with the property.[198]

8.9 In our Consultation Paper we observed that confusion has resulted among reporters and practitioners as to what happens to legitimate funds when they are mixed with criminal property. This is mainly because the phrase "in whole or in part and whether directly or indirectly" has proven difficult to unravel. The courts have addressed the issue of mixed funds in a small number of unrelated cases. This has created a knotty legal issue for those working with mixed funds in the consent regime.

8.10 In our Consultation Paper we set out how the courts have approached the definition of criminal property in POCA focussing on the decision of the Court of Appeal in the case of *Causey*.[199] In *Causey*,[200] the Court held that the expression "proceeds of criminal conduct" was broad, and even without the addition in the section of the words "in whole or in part, directly or indirectly", it appeared to cover any property of financial

---

196 Proceeds of Crime Act 2002, s 340(3).

197 Proceeds of Crime Act 2002, ss 327(2)(b), 328(2)(b), 329(2)(b) and 338(3).

198 Proceeds of Crime Act 2002, ss 338(2A).

199 *R v Causey*, Court of Appeal (Criminal Division); unreported, 18 October 1999. The court was interpreting Criminal Justice Act 1988, s 93C which has the same definition of criminal property as the Proceeds of Crime Act 2002, s 340.

200 *R v Causey*, Court of Appeal (Criminal Division); unreported, 18 October 1999.

advantage even if it was only partly obtained in connection with the criminal conduct. To put this in plain English, the prosecution submitted (and the Court accepted) that "if one penny or penny's worth of the property dealt with is the proceeds of criminal conduct then the section is satisfied."[201]

EVALUATION OF THE CURRENT LAW

8.11 After *Causey*,[202] the idea that the act of pooling legitimate and illicit funds transforms the whole into criminal property has taken root. Although we considered other case law that offered some support for mixed funds being separable and distinguishable in our Consultation Paper, uncertainty remains.[203] We also observed that a different approach is taken in respect of the civil recovery and restraint provisions in POCA.[204]

8.12 The consequence of these different legal approaches within POCA, and the application of the economic principle of fungibility, is that the banks have tended to freeze the whole account pending a grant of consent. In other words, once a transaction is made which involves property which is suspected to be criminal, that transaction can be viewed as tainting the rest of the account as the funds are indistinguishable once they are mixed. However, the practice of freezing whole accounts, even for a very short period of time, can have a severe economic impact on the subject of an authorised disclosure. The risk of economic loss is exacerbated by recent provisions to allow for a Crown Court judge to authorise extensions to the moratorium period on application. Under the original Proceeds of Crime Act 2002 ("POCA") provisions, the UKFIU had a statutory maximum of 38 days to respond to an authorised disclosure consisting of the initial seven-day notice period and the 31-day moratorium period.

8.13 As we observed in the Consultation Paper, the Criminal Finances Act 2017 introduced new powers to extend the moratorium period at the discretion of a judge sitting in the Crown Court. The amendments provide a judge sitting in the Crown Court with a power to authorise the extension of the moratorium period for periods of up to 31 days. This process can be repeated up to a total of 186 calendar days from the end of the initial 31-day moratorium period.[205] This is a considerable length of time for any bank customer to be without access to funds. The impact can be devastating.

8.14 According to stakeholders, some banks take a pragmatic approach and "ringfence" the property that is suspected to be criminal, assuming that it can be identified, or a sum equivalent in value to that property, by moving that portion of funds into another account within the same bank, and freezing only that portion.

8.15 However, in the absence of specific legal protection, stakeholders were concerned about the risk of committing a money laundering offence by ringfencing in this way,

---

201 Above. See Proceeds of Crime Act 2002, s 340(7), "References to property or a pecuniary advantage obtained in both that connection and some other."

202 *R v Causey*, Court of Appeal (Criminal Division); unreported, 18 October 1999.

203 CP 236, paras 10.22 to10.28;. *R v Smallman* [2010] EWCA Crim 548, *Moran* [2001] EWCA Crim 1770; [2002] 1 Cr App R (S) 95 *R v Ho Ling Mo* [2013] NICA 49;

204 CP 236, paras 10.29-10.31.

205 CP 236, para 2.26.

despite their good intentions. Many stakeholders lacked the confidence to ringfence because of the legal uncertainty surrounding the legitimacy of this practice.

8.16 Seeking an authorised disclosure would become unnecessary, although the obligation to lodge a required disclosure would remain unchanged and law enforcement agencies would still receive the intelligence.

DATA ANALYSIS

8.17 During our examination of authorised disclosures, we wanted to record how many authorised disclosures involved ringfencing. We looked for cases when the reporter explained that the bank had made an internal transfer of funds. We identified nine cases out of our total sample of 563 (1.6%) that met this criterion.

8.18 Between April 2017 and March 2018, the UKFIU received 22,619 authorised disclosures. Using this most recent figure, if 1.6% of these authorised disclosures relate to internal transfers. In these circumstances, we can infer that approximately 362 authorised disclosures would be affected by any legislative amendment to exempt the reporter from criminal liability, or by guidance on reasonable excuse.

8.19 Moreover, this figure is likely to be conservative. As we identified in our Consultation Paper, not all stakeholders felt confident enough to ringfence funds as the law was considered to be unclear on this issue. It is possible that banks would ringfence more often or that more would make use of the ability to do so if the law was reformed.

CONSULTATION

8.20 We concluded that there was a lack of clarity and uncertainty about how banks should approach the problems of mixed funds. In the absence of clarity and certainty on this issue, and the risk of economic harm to the subjects of disclosures, we considered that one way forward was to create a specific exemption to the principal money laundering offences for banks to allow them to separate and distinguish criminal property by ringfencing it.

8.21 We considered two methods of ringfencing. First, the bank might choose to divide the funds into two by placing that portion which was suspected to be criminal property into an alternative account so that it could not be dissipated. The account holder could continue to access any legitimate funds that remained. Secondly, the bank could restrict the account to ensure that the balance did not fall below a level equal to the value of any criminal funds. While the second method might be preferable, as the account holder would not be “tipped off” that a disclosure had been made, we observed that either method would mitigate the consequences of an authorised disclosure in the short-term. It might also prevent severe economic loss in some cases.

8.22 We provisionally proposed that, where the value of the suspected criminal property is clear and readily ascertainable, banks should be permitted to ringfence funds to that amount without having to seek consent. We proposed a legislative amendment to provide banks with legal protection where they chose to ringfence criminal property to allow an account to continue to operate using either method outlined above. We

argued that this exemption would serve to mitigate the risks of economic harm to a potentially innocent party.

8.23 As the exemption would only apply to the principal money laundering offences, although there would be no need to make an authorised disclosure and seek consent, the obligation to make a required disclosure would still remain.[206]

8.24 We proposed amending sections 327, 328 and 329 of POCA to provide that no criminal offence is committed by an individual where:

(1) they are an employee of a credit institution;

(2) they suspect or know[207] that funds in their possession constitute a person's benefit from criminal conduct;

(3) the suspicion or knowledge relates to some but not all of the funds in their possession;

(4) the funds which they suspect constitute a person's benefit from criminal conduct are either:

(a) transferred by them into an account within the same credit institution;

(b) the balance is not allowed to fall below the level of the suspected funds;

(5) they conduct the transaction in the course of business in the regulated sector (as defined in Schedule 9 of POCA); and

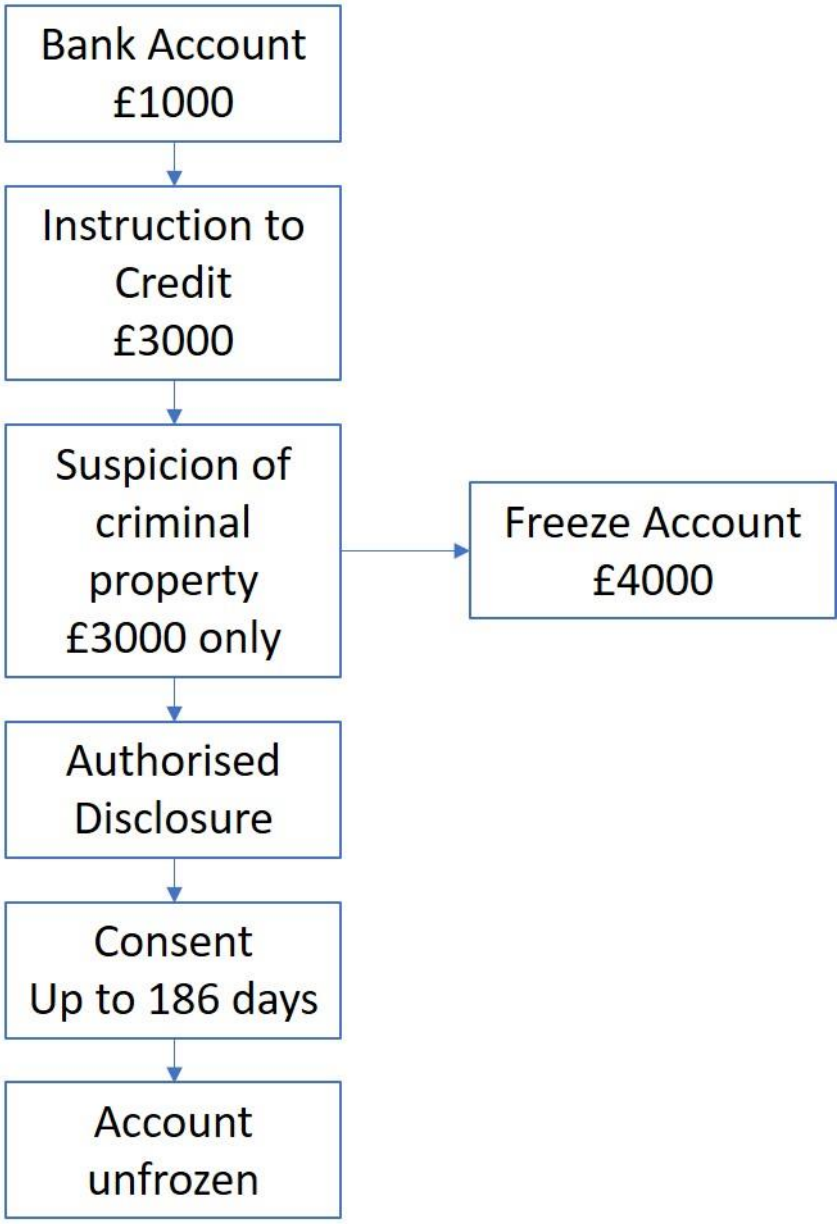
(6) the transfer is done with the intention of preserving criminal property.

8.25 In order to illustrate the process, we have set out how ringfencing would work under the proposed exemption and contrasted this with the current law. The first flow chart below sets out how the current law operates when banks elect to freeze the whole account. The second flowchart shows how our proposed legislative exemption would work.

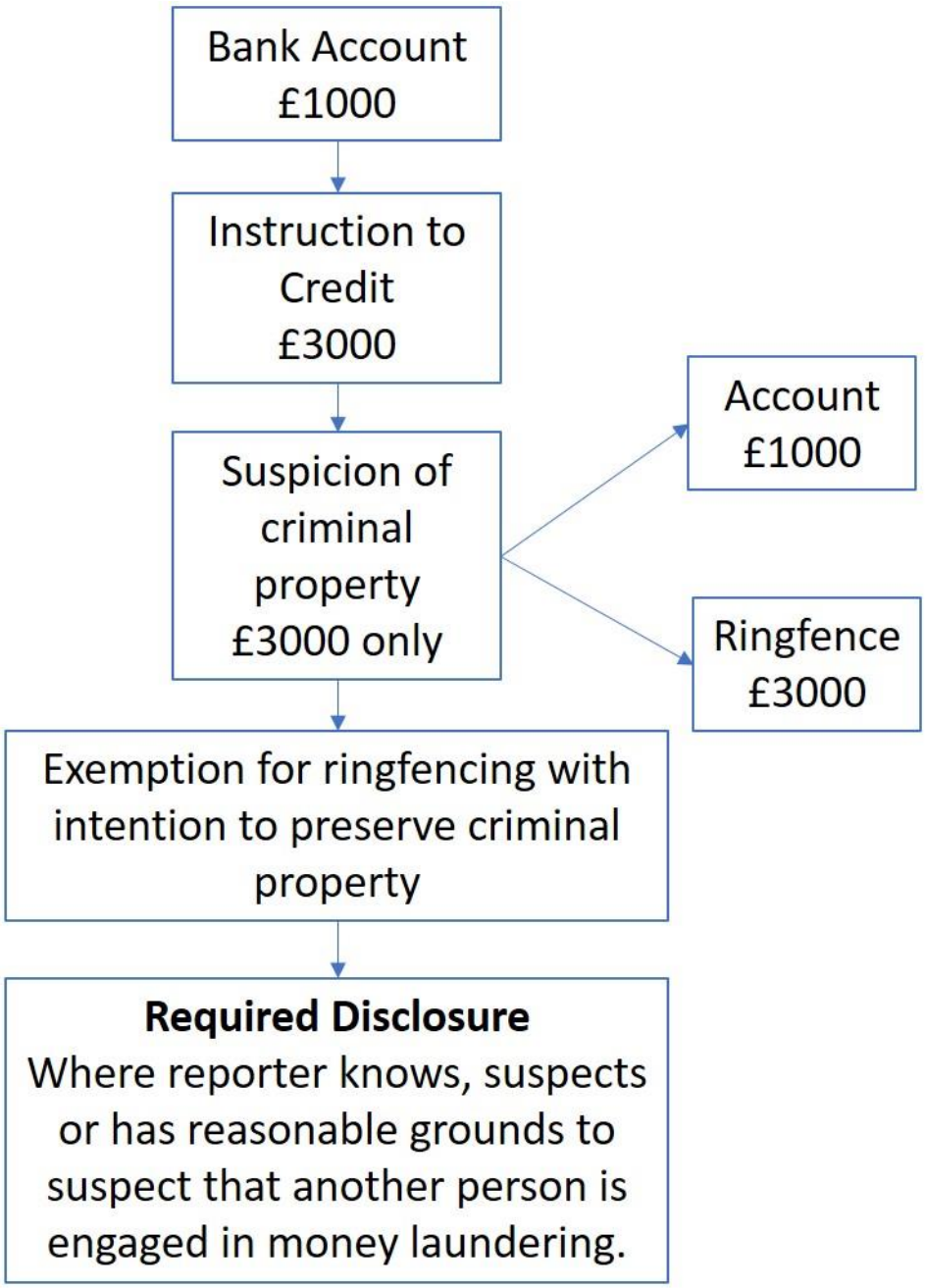
206 Proceeds of Crime Act 2002, ss 330-331.

207 Our provisional draft also referenced our proposal to change the threshold to reasonable grounds to suspect. We have omitted that in this chapter given our recommendations in Chapter {5}.

Option 1: The current law



Option 2: Ringfencing under the proposed legislative exemption



8.26 It is difficult to estimate how many cases might benefit if reporters who chose to ringfence criminal property were protected from liability for a principal money laundering offence. Therefore, we asked consultees whether our summary of the problems presented by mixed funds accord with consultees' experience of how the law operates in practice. UK Finance provided a detailed and considered response that confirmed the practical implications of Part 7 for their members:

> Members strongly agreed that there is a significant and unfortunate lack of clarity as to the impact of the consent regime on mixed funds. In practice, some firms already feel forced to take a pragmatic approach and isolate or ring-fence suspect funds

Members strongly agree it would be helpful if they could isolate and restrain the value of the criminal property only, so ensuring that funds are available for restraint, but without disproportionate impacts on customers. Firms agree they should have certainty they are not at legal risk if adopting this approach and should have an obligation to make a required disclosure.

Some members believe that, due to the technical legal framework under which the assets are held, it is not possible for guidance to address this – a change in the law would be necessary.

8.27 UK Finance also highlighted that the problems created by mixed funds affect other financial institutions:

For example, an investment bank operating as a broker-dealer. Such firms can experience the same problem as retail banks with mixed funds. For example, if a broker-dealer suspects that a customer may have committed a criminal market manipulation/insider dealing offence, the proceeds of that conduct are likely to be suspected criminal property but will be mixed with (and may be a tiny proportion of) the customer's other funds and securities. The client may actively trade in securities, meaning that the mixed funds/securities will be used on an ongoing basis.

In such circumstances, under the same logic as applied to retail banks, the firm should be able to isolate funds/assets of equivalent value to the suspected criminal property, without being required to freeze the entire account and not be at risk of tipping off.

8.28 The Solicitors Regulation Authority ("SRA") observed that the same issues of mixed funds do not affect the legal sector:

Some solicitors do operate general client accounts in which the monies of several different client s are held. For these accounts, the funds of each individual client must be accounted for and we do not consider the money to be fungible between different clients.

8.29 In respect of our proposed legislative amendment to POCA, 22 consultees were in favour (73%) and 8 (27%) were against the proposal.

8.30 Support for our proposal came from a number of sources. UK Finance strongly agreed with our proposal and confirmed that its members were in favour of legal protection for ringfencing. The Metropolitan Police Service ("MPS") agreed with the proposal fully and the Home Office and HM Treasury were also in broad agreement in their joint response.

8.31 The Crown Prosecution Service ("CPS") saw merit in our proposal and observed that a required disclosure should still be made to prevent corrupt employees from relying on these defences when their criminality was subsequently discovered.

8.32 Of those consultees opposed to this proposal, Northumbria University were concerned about potential consequences on asset recovery:

> Our preference would be an ability to separate a suspicious/tainted funds to allow more straightforward recovery and to avoid unnecessary consequences in the case of freezing accounts.
>
> However, we have concerns about the legal interpretation of mixed funds and the impact an amendment may have on the ability of law enforcement to trace criminal proceeds effectively. The wider implications of changes to this procedure require extensive legal analysis.

8.33 The City of London Police offered an alternative to our proposal to allow for the release of funds during the moratorium period:

> The current DAML reporting mechanisms adopt an 'all or nothing' approach whereby everything referred to on the DAML gets frozen if consent is refused with no mechanism to allow for expenditure / separation of funds until such time as a restraint or other order is in place after which variations can be made to allow for the release of some of the funds. What would be helpful would be a mechanism within the moratorium period to allow for release of some of the funds if all parties consider it appropriate. This would, for example, assist in ensuring that mortgage payments are met (particularly pertinent if the property on which the mortgage is secured is also being considered for restraint) but is flexible enough to allow for all assets to remain frozen if there are still question marks over the source / intended use of the funds.

8.34 Some consultees, although not disagreeing with the proposal, were more tentative about the best way to deal with cases involving mixed funds. For example. the Proceeds of Crime Lawyers Association ("POCLA") suggested that perhaps a "blanket consent" following disclosure might be a better way forward. This would mean that an authorised disclosure would still be required but that consent would allow the bank to move funds accordingly without further disclosures. However, this would still require the whole account to be frozen pending an initial grant of consent, rather than just the portion about which the reporter had suspicion.

Drafting

8.35 Some consultees offered suggestions as to the drafting and scope of any provision designed to implement this policy. In this section we set out some of these suggestions but note that the drafting of any legislative amendment would be a matter for Parliamentary Counsel.[208]

8.36 UK Finance suggested that as the problem of mixed funds equally affects other financial institutions, the provisions should apply either to an employee of a credit or financial institution or potentially to an employee in the regulated sector:

> The current drafting is confined to credit institutions, but the problem of mixed funds equally affects other financial institutions. For example, an investment bank operating as a broker-dealer. Such firms can experience the same problem as retail banks with mixed funds. For example, if a broker-dealer suspects that a customer

[208] Parliamentary Counsel are lawyers working as civil servants in the Office of the Parliamentary Counsel and as such have responsibility for drafting legislation.

may have committed a criminal market manipulation/insider dealing offence, the proceeds of that conduct are likely to be suspected criminal property but will be mixed with (and may be a tiny proportion of) the customer's other funds and securities. The client may actively trade in securities, meaning that the mixed funds/securities will be used on an ongoing basis.

In such circumstances, under the same logic as applied to retail banks, the firm should be able to isolate funds/assets of equivalent value to the suspected criminal property, without being required to freeze the account and not be at risk of tipping off. As such, our strong view is that the provisions outlined should apply either to an employee of a "credit or financial institution" or potentially to an employee in the regulated sector more broadly (who would in any event be subject to a reporting requirement pursuant to section 330.

8.37 Additionally, UK Finance suggested that the term 'property' should replace funds to widen its application to include securities. This would extend ringfencing to include securities as well as currency and align with the broad definition of criminal property in section 340.

8.38 HM Treasury and the Home Office were concerned in their joint response that any solution needed to ensure that the right safeguards are in place to prevent any abuse of this mechanism. In its response, consideration was given as to whether other provisions should be added to make clear that funds must not be transferred outside the jurisdiction of the United Kingdom, and that the funds cannot be transferred to another customer.

8.39 On reflection, we also note that in relation to transfers conducted with the intention to preserve criminal property, 'transfer' might preclude ringfencing using method (b).[209] It may be more effective in drafting to accommodate the two methods of ringfencing set out in (a) and (b) above or indeed any other acts which might be undertaken to ringfence criminal property.[210]

Analysis

Ringfencing

8.40 Ringfencing funds offers a pragmatic approach to a difficult problem. It represents a proportionate solution to balance the interests of law enforcement agencies and the subjects of disclosure. As it would only apply where the value of the criminal property was clear and readily ascertainable, it is a limited measure which will protect the financial interests of potentially innocent third parties.

8.41 There was considerable support from consultees for this proposal. However, as some consultees were concerned that it may create different issues, this gave us cause to reflect carefully on the practical implications of ringfencing. Given the potential risk of unintended consequences, we have considered some of the practical issues which

---

209 The balance is not allowed to fall below the level of suspected funds. See para 8.24 above.

210 See para 8.24 above.

may arise as a result of the proposed amendment which will need to be taken into consideration in drafting.

8.42 If our provisional proposal were adopted, when funds are ringfenced, an authorised disclosure will not be required and consent will be unnecessary. This is because the proposed legislative exemption will operate to render the transfer and resulting possession of suspicious funds lawful if the criteria are met. Therefore, the act would not be prohibited by sections 327, 328 or 329 of POCA, and such behaviour would not amount to a principal money laundering offence.

8.43 As the risk of criminal liability is removed, the reporter will not need to rely on the authorised disclosure exemption. The obligation to lodge a required disclosure would remain and law enforcement agencies would still receive the details of the transaction and the intelligence provided in the SAR.

8.44 One practical consequence of ringfencing is that, although a required disclosure would still be made, those disclosures are not processed in the same way as authorised disclosures. It follows, law enforcement agencies may not be immediately alerted to the suspected criminal property. The majority of consultees were in agreement that a required disclosure would be sufficient. However, it is right to say that at the point at which a bank seeks to transfer funds back to the customer, an authorised disclosure would need to be made, if suspicion subsisted, as the proposed exemption would not bite in these circumstances. Therefore there would be no risk of dissipation without prior notice being given to the UKFIU and the relevant law enforcement agency that the bank intended to move the suspected criminal property back into the customer's possession.

8.45 In the circumstances, it would seem prudent to include a provision requiring the Secretary of State to issue statutory guidance on ringfencing, were the legislative exemption to be enacted. This could provide guidance on the types of cases suitable for ringfencing in order to ensure that any practical issues were fully considered. As we recommended in chapter 3, statutory guidance could be drafted and overseen by the Advisory Board we recommend.

8.46 Having heard from the experiences of those working with issues of mixed funds, there are compelling arguments made by UK Finance to extend the exemption to cover employees of credit and financial institutions. There are also good arguments in favour of extending this to regulated sector employees generally, albeit it remains unclear to what extent these issues affect other parts of the regulated sector. For example, the Solicitors Regulation Authority noted that the legal sector was relatively unaffected by the issue of mixed funds.

8.47 Likewise, we accept that the term "property" should replace "funds" to make the provision as effective as possible and align with the definition of property in POCA. In relation to "transfer", this should be amended to include other acts which might be used to ringfence criminal property.

Releasing funds pending consent

8.48 A third option for reform arose from a consultation response submitted by the City of London Police, which may have some merit. The City of London Police's suggestion

was to establish a mechanism for releasing funds similar to provisions on restraint during the moratorium period. This approach may serve to mitigate the risks of severe economic loss to the subjects of a disclosure pending a decision on consent where it is not possible to ringfence funds in accordance with statutory guidance. If the subject of a disclosure is able to access some funds pending consent, this may also reduce the likelihood that a subject will resort to commencing civil proceedings, thereby avoiding the associated cost and resource implications for all parties.

8.49 To some extent this would be analogous to restraint in confiscation proceedings under Part 2 of POCA. In those proceedings, assets can be restrained at an investigative stage on the basis of suspicion that a person has benefited from criminal conduct.[211] When such a person's assets are restrained, they may apply for the release of funds that are necessary to meet reasonable living expenses and reasonable business expenses.[212] The test for restraint of assets at the investigation stage ("reasonable suspicion") is a comparable test to the test for SARS as it is based on suspicion rather than belief or knowledge. However, the threshold for submitting a SAR is lower as it does not require a reasonable basis for the suspicion.

8.50 During the moratorium period the person who is subject to a SAR effectively has their funds under investigation for links to criminality. There is no reason why a person under investigation should be worse off during the moratorium period than a person against whom any other type of investigation has begun.

8.51 In *CBS United Kingdom Limited v Lambert*, the Court re-iterated the need for doing justice in the case:

> Even if a claimant has good reason for thinking that a defendant intends to dispose of assets so as to deprive him of his anticipated judgment, the court must always remember that rogues have to live and that all orders, particularly interlocutory ones, should as far as possible do justice to all parties.[213]

8.52 However, one complicating factor arises from the risk of informing the subject of a disclosure that they are potentially under investigation. As we noted in our Consultation Paper, reporters must not inform the subject of a disclosure that a SAR has been lodged or that an investigation is being contemplated or carried out, known as "tipping off".[214] During the initial 31-day moratorium period there is a risk of tipping off, so a person cannot be told of the fact that they can seek to have funds released under anti-money laundering provisions. One approach could be to amend POCA creating a provision to allow the release of funds up to a maximum threshold. The main argument against such a proposal is that it would not be possible in practice to say to a person, "I cannot tell you why your funds are restrained, but you can access some of your funds while this is resolved." This may amount to effectively tipping off the subject of a disclosure indirectly. It would be readily referable to any provision in POCA indicating the threshold for releasing funds during the moratorium period. A

---

211 Proceeds of Crime Act 2002, s 40(2)(b).

212 Proceeds of Crime Act 2002, s 41(3).

213 [1983] Ch 37 at43.

214 Proceeds of Crime Act 2002, s 333A.

statutory provision allowing for the release of funds up to a maximum threshold would be a very precise provision. It would be easy for a person told his or her account has been frozen to such a limit to identify the AML regime as the cause. That would itself suggest clearly to a person that they are under investigation.

8.53 An alternative is to create some discretion to grant permission to release funds during the initial moratorium period. The UKFIU might be best placed to make such a decision given its role in deciding issues of consent and as such, standing in-between reporters and law enforcement agencies. However, if it could seek to do so, it would put power that is in the hands of the court in restraint proceedings into the hands of a law enforcement agency which would be unsatisfactory. The same arguments in relation to tipping off would also apply.

8.54 However, during the extended moratorium period, the issue of tipping-off becomes less of a concern. As we observed in our Consultation Paper, applications to extend the moratorium period are made to a Crown Court judge. A judge must be satisfied that the investigation is being carried out diligently and expeditiously, but despite that expedition further time is needed for conducting the investigation, and it is reasonable in all the circumstances for the moratorium period to be extended.[215] Rule 47.64 of the Criminal Procedure Rules requires notice to be served on the respondent. While the respondent would usually be the person who made the disclosure, the definition of respondent includes any other person who appears to the applicant to have an interest in the property that is the subject of the disclosure. This may include the owner of the property or a third party such as the intended recipient of the funds.

8.55 Therefore, it is envisaged that the subject of the disclosure will be put on notice of such an application and tipping off concerns would fall away. Any applications could be dealt with in a way that is comparable with the provisions relating to restraint.[216] Indeed there is a comparable body of case law about when it might be appropriate to release funds which could be relied upon in deciding any such application.[217]

RECOMMENDATIONS FOR REFORM

8.56 We recommend amending POCA to provide credit and financial institutions with an exemption from the principal money laundering offences if they ringfence suspected criminal property in accordance with the following criteria:

215 Proceeds of Crime Act 2002, s 336A.

216 Criminal Procedure Rules 2015, r 33.53.

217 For example see *Re Peters* [1988] QB 871; [1988] 3 WLR 182.

Recommendation 16.

8.57 We recommend amending sections 327, 328 and 329 of the Proceeds of Crime Act 2002 ("POCA") to provide that no criminal offence is committed by an individual where:

(1) they are an employee of a credit or financial institution;

(2) they suspect or know that property in their possession constitutes a person's benefit from criminal conduct;

(3) the suspicion or knowledge relates to some but not all of the property in their possession;

(4) the property which they suspect constitutes a person's benefit from criminal conduct is either:

(a) transferred by them into an account within the same credit or financial institution; or

(b) the balance is not allowed to fall below the level equal to the value of the suspected funds;

(5) they conduct any transaction in the course of business in the regulated sector (as defined in Schedule 9 of POCA); and

(6) any transaction is done with the intention of preserving criminal property.

Recommendation 17.

8.58 We recommend that statutory guidance is issued on the operation of the ringfencing provision proposed by recommendation 16.

Recommendation 18

8.59 We recommend that POCA is amended to create a provision allowing for funds to be released by a judge sitting in the Crown Court for reasonable living expenses when an application for an extension to the moratorium period is made.

Chapter 9: Information Sharing

INTRODUCTION

9.1 Effective information sharing arrangements are a crucial element of a well-functioning anti-money laundering and counter-terrorist financing regime.[218]

9.2 Much of the discussion in this report has focussed on information flows in the form of suspicious activity reports ("SARs"), from the regulated sector to law enforcement agencies through the UK Financial Intelligence Unit ("UKFIU"). This chapter is concerned with the circumstances in which information sharing is, or could be, permitted between regulated sector entities themselves – with or without the direct involvement of law enforcement agencies.

9.3 In our Consultation Paper we pointed to two relatively recent reforms that permit information flows of this kind in certain circumstances:

(1) the Criminal Finances Act 2017 amended the Proceeds of Crime Act 2002 ("POCA") to make provision for voluntary information sharing among the regulated sector, in conjunction with the National Crime Agency ("NCA").[219]

(2) the Joint Money Laundering Intelligence Taskforce ("JMLIT") is a public-private partnership that facilitates sharing among some regulated sector actors and operates relying on the information gateway provisions in the Crime and Courts Act 2013.[220]

9.4 Information sharing of this kind seeks to improve the quality and volume of intelligence gathered. The information available to any individual entity in the private sector is necessarily limited. By increasing the opportunity for information sharing it is intended to assist each individual reporter to be more confident in making assessments about whether a transaction is suspicious and to provide more detail on the strength and basis for any relevant suspicion. By facilitating appropriate information exchanges, it is hoped that any intelligence ultimately derived might be more useful than the sum of its parts. Law enforcement agencies would be less likely to have to draw inferences and "to connect the dots" from what had been disclosed by different entities individually. In some circumstances, where information sharing alleviates concern about a customer, it may obviate the need for information to be passed onto law enforcement at all.

9.5 A simple example of a person who banks with both a high street bank and a digital bank is illustrative. Allowing both those banking entities to share and have regard to information held by the other about subsequent dealings with funds flowing between

---

218 Financial Action Task Force, *"Private Sector Information Sharing: Guidance"* (2017) p 2.

219 Proceeds of Crime Act 2002 ss 339ZB to 339ZG.

220 Crime and Courts Act 2013 s 7 enables a person to provide information to the NCA if the disclosure is for the purpose of the exercise of any NCA function. The provision also permits the NCA to disclose information it has obtained for specific permitted purposes that include the prevention and detection of crime and the investigation of offences.

the accounts or patterns of transactions identified as unusual might exacerbate or alleviate concerns about (potentially) suspicious conduct within a single account.

9.6 Absent consent, sharing details about an individual's financial dealings and their personal information with other private sector actors is necessarily invasive. It follows that although potentially useful, the circumstances in which this might be justified and appropriate must be examined carefully. Regard must be had to distinct, but overlapping, considerations of confidentiality, data protection, and privacy.[221]

9.7 As part of our consultation we sought views on the appropriateness and usefulness of extending existing information sharing practices among and between regulated sector entities. We did not make specific proposals in this regard, but sought views about:

(1) **Pre-suspicion sharing –** whether it might be appropriate to permit information sharing before a suspicion crystallises for one reporter, and if so how that might be achieved; and

(2) **Expanding JMLIT–** whether it might be desirable to expand the membership of the existing JMLIT model.

THE CURRENT LAW - VOLUNTARY INFORMATION SHARING

Information sharing in relation to a suspicion

9.8 Voluntary information sharing provisions were enacted as part of the Criminal Finances Act 2017 which introduced sections 339ZB to 339ZG of POCA and sections 21CA to 21CF of the Terrorism Act 2000. The provisions are designed to enable information to be shared between regulated sector entities or a regulated sector entity and the NCA. The aim is to ensure that the intelligence ultimately submitted to the NCA is as useful as possible.

9.9 The Government has adopted a phased approach to implementing these changes.[222] At present, the legislation is in force insofar as it relates to "financial" and "credit" institutions in the regulated sector.[223] This, in effect, permits "bank-to-bank" sharing arrangements while those involving other industries in the regulated sector are yet to be commenced.

9.10 The legislation establishes a mechanism by which a request for a bank to share information it holds can be initiated either by another bank or by the NCA.[224] The

---

221 The Financial Action Task Force, *"Private Sector Information Sharing: Guidance"* (2017) at pp 22 to 25 sets out these competing considerations and concludes "countries are encouraged to assess how such voluntary information sharing which is beyond what is required by the FATF Standards can improve their AML/CFT system, and to develop their legislative framework to enable such sharing of information."

222 Home Office, "Circular 007/2018: Criminal Finances Act 2017 – Money Laundering: Sharing of Information within the Regulated Sector sections 339ZB-339ZG.".

223 The Criminal Finances Act 2017 (Commencement No.3) Regulations SI 2017 No 881 reg 2(b); the Criminal Finances Act 2017 (Commencement No.3) Regulations SI 2017 No 1028 reg 2(a).

224 Proceeds of Crime Act 2002, s 339ZB(3). The flow charts at pp 8 to 9 of the Home Office, "*Circular 007/2018: Criminal Finances Act 2017 – Money Laundering: Sharing of Information within the Regulated*

system is entirely voluntary. Whether the receiving bank accedes to a request is a matter for its discretion. However, it may only share information where the preconditions in section 339ZB have been met and it is satisfied that the information to be shared "will or may assist in determining any matter in connection with a suspicion that a person is engaged in money laundering".[225] Where information is shared, and there are continuing reasons to hold the relevant suspicion, a joint disclosure (sometimes colloquially referred to as a "super SAR") should be filed with the NCA.

9.11 These voluntary disclosure provisions do not remove the obligation to file a SAR under either sections 330 or 331 of POCA. However, section 339ZD of POCA and section 21CA of the Terrorism Act 2000 clarify the circumstances in which a person who has, in good faith, made a joint disclosure or required notification, as appropriate, will be treated as having satisfied those obligations.[226]

9.12 Notably for present purposes, requests to share information may only be made where a suspicion of money laundering has been formed. The request must "state that it is made in connection with a suspicion that a person is engaged in money laundering" (or, as relevant, terrorist financing) and set out the grounds for that suspicion.[227] At present, a request cannot be made where a bank or bank employee detected something unusual but has not yet formed a relevant suspicion concerning money laundering or terrorist financing. In our stakeholder engagement, prior to the publication of the Consultation Paper, some stakeholders noted this may be of little assistance. The scheme serves only to allow the bank to ask to have its suspicion confirmed or denied by another bank on a voluntary basis. It does not provide for information to be shared where the banking activity is unusual but has not yet triggered a suspicion as that concept is understood under the *Da Silva* test.

Further information orders

9.13 In addition to voluntary sharing, further information orders ("FIOs") provide another means by which the UKFIU can obtain intelligence from multiple sources within the regulated sector. FIOs were also introduced by the Criminal Finances Act 2017. As amended by that Act, POCA now permits the NCA to make an application to the magistrates' court for an order for further information. The order will be binding upon a business that submitted a SAR or another entity in the regulated sector. The court will make the order where it is satisfied the information would assist:

(1) in investigating whether a person is engaged in money laundering; or

(2) in determining whether an investigation of that kind should be started; and

---

Sector. sections 339ZB-339ZG." set out these alternate processes and the different required notification procedures involved.

225 Proceeds of Crime Act 2002, s 339ZB(6); the equivalent provision in s 21CA(8) of the Terrorism Act 2000 requires the disclosing party to believe that the information "will or may assist" in determining any matter relating to "a suspicion that a person is involved in the commission of a terrorist financing offence" or "the identification of terrorist property or of its movement or use".

226 Proceeds of Crime Act 2002, s 339ZD, Terrorism Act 2000 s 21CC.

227 Proceeds of Crime Act 2002, s 339ZB, Terrorism Act 2000 s 21CA.

(3) it is reasonable in all the circumstances for the information to be provided.[228]

9.14 These powers complement those relating to Production Orders, Customer Information Orders, Account Monitoring Orders and Disclosure Orders provided for in POCA.[229]

Data protection legislation

9.15 As set out in our Consultation Paper,[230] these exceptional arrangements for facilitating information sharing must be considered in the context of data protection legislation generally. Regulated sector entities must ensure they have regard to both the EU's General Data Protection Regulation ("GDPR") and the Data Protection Act 2018 prior to making relevant disclosures.

CONSULTATION

9.16 In our Consultation Paper we asked whether information sharing *before* a suspicion of money laundering has been formed is:

(1) necessary; and/or

(2) desirable; or

(3) inappropriate.

9.17 Our preliminary view was that it was likely to be inappropriate and that there are practical challenges in devising an appropriate pre-suspicion threshold that would justify such sharing.[231] Of the 32 consultees that directly addressed this question, half were of the view that pre-suspicion information sharing is inappropriate. Of those remaining, four thought it was necessary, and 12 thought it would be desirable.

9.18 The arguments against pre-suspicion sharing were broadly twofold. First, in principle, most consultees were of the view that at a stage before a relevant suspicion is formed, the policy objective of detecting and preventing money laundering is too remote to justify the sharing of sensitive personal information, especially between private entities. Deloitte noted that having suspicion as the threshold for sharing with the NCA via the SARs regime or with another bank using the voluntary information sharing provisions, is already a low bar.

9.19 Secondly, many noted that greater sharing of information in this context may lead to unfairness. In our Consultation Paper we noted that there is a risk that information sharing among the regulated sector may lead to some customers having their access to banking and other financial services curtailed.[232] There were, however, differing

---

228 Proceeds of Crime Act 2002, s 339ZH.

229 Proceeds of Crime Act 2002, ss 346 (Production Orders), 365(4) (Customer Information Orders), 371(4) (Account Monitoring orders), and 358 (Disclosure Orders).

230 Anti-Money Laundering: the SARs Regime, Law Comm Consultation Paper 236 (2018) ("CP 236") paras 13.13 to 13.20.

231 CP 236 paras 13.27-13.41.

232 CP 236 paras 13.29-13.33.

views among consultees about whether a more permissive approach to information sharing might exacerbate or alleviate these concerns.

9.20 Some consultees agreed that pre-suspicion sharing might increase the risk that commercial relationships are terminated. This is likely where an individual is considered a risk by one or more financial institutions, but is not considered to be actively suspicious, and that perception becomes known to more than one such entity. Professor Liz Campbell noted the risk of "debanking", might, in practice, impact on "certain cohorts and communities particularly". Some customers that do not generate significant revenue in the regulated sector but become, on the basis of a pre-suspicion "inkling" of a person or an algorithm, a commercial risk, are likely to be affected. Given the scale of unusual activity detected in major financial institutions, it would necessarily only be a select sample of instances where additional information is sought. As we noted in our Consultation Paper, that may be especially true in terrorist finance related cases.[233] We also noted that, even in cases where there may be a real risk of money laundering, removing access to banking may ultimately only relocate rather than mitigate the risk, for example to the cash economy or to value transfer systems.[234]

9.21 Some stakeholders that favoured an approach that facilitated sharing more information at an earlier stage noted that this would need to be coupled with "safeguards to prevent bona fide customers from being denied access to financial services."[235] Although it may be possible to devise appropriate safeguards, there is a risk that they may create perverse incentives if that were the case. If, for example, a commercial entity were to be prohibited from ending their relationship with a customer unless a SAR followed from pre-suspicion sharing, then the information might not be shared in the first place, or a SAR filed unnecessarily simply to achieve that end.

9.22 UK Finance argued the information sharing may alleviate concerns, noting:

> Sharing pre-suspicion information is not only about developing more informed suspicions and intelligence for law enforcement; it is also about protecting customers from the effect of reports which may prove to be unnecessary once reporters have a fuller picture and are able to allay their concerns as most enquiries that would benefit from information sharing start at an 'unusual' transaction or a 'red flag', in circumstances where firms would be seeking to form a view if there is criminality involved.[236]

9.23 There are undoubtedly circumstances in which the information held by another regulated entity would alleviate a concern that might otherwise have led, at a later date, to a SAR being filed by a different regulated sector entity. However, on balance, given the remoteness of the risk of money laundering at that pre-suspicion stage and the harms to customers from the sharing of their information (whether or not any

---

233 CP 236 para 13.34.

234 CP 236 para 13.32.

235 Electronic Money Association.

236 This argument was also advanced by HSBC.

further action is taken), a cautious approach to any consideration of pre-suspicion sharing is required.

9.24 It is worth considering the ways such sharing may play out in practice where Bank A, having observed the unusual activity of Customer C, requests that Bank B shares information about that customer (and potentially also requests information from Banks D, E, F etc). Each of the following is possible:

(1) Information is shared between the banks. That additional information leads to the filing of a SAR or a joint disclosure (or equivalent). The SAR ought to be richer in data or at least stronger in its assessment of suspicion, even if only by any doubts being negated or diminished.

(2) Information is shared between the banks. That additional information leads to Bank A alleviating its concerns about the customer's unusual activity, and no SAR is filed. Bank A, erring on the side of caution, may have otherwise filed a SAR and instead the NCA's resources are preserved for more appropriate cases.

(3) Information is shared. That additional information does not clarify or assist sufficiently to resolve Bank A's concerns. If, at a later point, Bank A forms a suspicion of money laundering the SAR filed is no more rich or confident than at present.

(4) Information is not shared because Bank B does not have or does not want to share relevant additional information. As above, if, at a later point, Bank A forms a suspicion of money laundering the SAR filed is no more rich or confident than at present.

9.25 In each instance Customer C suffers in the sense that he or she is linked to pre-suspicion money laundering concerns and flagged up to another financial institution as such. In either of scenario (1) and (2) the potential justifications for that harm are stronger. However, the outcome that is most likely may be difficult to predict where sharing is voluntary and the extent and usefulness of the information held by another party not certain.

9.26 It is also worth bearing in mind that prior to a SAR being filed or an investigation being commenced the tipping-off provisions do not apply and therefore there is nothing to stop the bank from seeking further information or clarification directly from its customer.

9.27 In addition to avoiding unintended consequences for innocent customers who might otherwise be caught in the SARs regime (scenario 2), those that favoured earlier information sharing extended the logic that justifies voluntary information sharing. They noted it may enhance detection of money laundering and deliver more useful intelligence to law enforcement agencies (scenario 1). So, for example, Ashurst argued:

> Criminal organisations rapidly share information across their networks and use the inability or reluctance of institutions in the regulated sector to share information as a competitive edge to avoid or delay detection.

9.28 To assess the force of this argument may require consideration of the uptake and operation of existing voluntary information sharing provisions and whether there is A case to extend what is currently permitted. As many stakeholders highlighted, the powers provided for by the Criminal Finances Act 2017 are recently introduced and the better approach would, in due course, be to evaluate their effectiveness and consider refinements as appropriate.

How might further information sharing be achieved

9.29 Where consultees thought it was necessary and/or desirable, we asked if it could be achieved in a way which is compatible with legislation governing data protection. Specifically, we invited consultees' views on the following formulations:

(1) allowing information to be shared for the purposes of determining whether there is a suspicion that a person is engaged in money laundering;

(2) allowing information to be shared for the purpose of preventing and detecting economic crime;

(3) allowing information to be shared in order to determine whether a disclosure under sections 330 or 331 of the Proceeds of Crime Act 2002 would be required; or

(4) some other formulation that would be compatible with our obligations under the General Data Protection Regulation?

9.30 In our Consultation Paper we noted there was some tension between accommodating pre-suspicion information sharing as enabled by any of options (1), (2) or (3) and the existing exceptions under data protection legislation.[237] Many consultees agreed, and although the weight of opinion was against pre-information sharing, the plurality of those that expressed a view on this question favoured option (4). The City of London Police suggested an alternative approach would be for the regulated sector to seek consent contractually.

9.31 If consideration were to be given to enabling pre-suspicion sharing, Simmons & Simmons suggested two potential formulations that might assist:

(1) allowing information sharing for the purposes of compliance with regulation 19(1) of the Money Laundering, Terrorist Financing, and Transfer of Funds (Information on the Payer) Regulations 2017. Article 6(1)(c) GDPR permits the processing of personal information where the processing is necessary for compliance with a legal obligation to which the data controller is subject. It was suggested the regulated sector ought to be able to rely on Article (6)(1)(c) for the purpose of complying with the money laundering regulation 19(1) concerning the obligation of regulated sector entities to establish and maintain policies, controls and procedures to mitigate the risks of money laundering; or

(2) in pursuit of the legitimate interest that banks have in determining whether unusual customer activity gives rise to a suspicion of money laundering. Reliant on Article 6(1)(f) GDPR where processing is necessary for the purposes of the

[237] CP 236 para 13.41.

legitimate interests of the data controller. Article 6(1)(f) does not apply where "such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data."

9.32 Ultimately, however, the creation of any legislative gateway to permit such sharing would require significant further consultation having regard to the precise reach of the sharing envisaged and the mechanism by which it is likely to be achieved. In light of the consensus expressed in response to this consultation, it is unnecessary to present a firm view on what that gateway might look like.

THE CURRENT LAW - JMLIT

Public-private information sharing partnership

9.33 JMLIT is a partnership between law enforcement agencies and the financial sector which provides a forum to share information in relation to significant anti-money laundering priorities. Initially run as a pilot, in April 2016 the Government committed to moving JMLIT to a more permanent footing.[238]

9.34 The taskforce model allows information held across financial sector stakeholders to be combined with law enforcement intelligence to increase the efficiency and effectiveness of investigations, especially where suspected money laundering crosses multiple financial institutions. The necessary exchanges of information are facilitated by broad provisions in the Crime and Courts Act 2013 that enable information to be disclosed in connection with the NCA's functions.

9.35 In the recent mutual evaluation report for the United Kingdom, the FATF cited JMLIT as "an innovative model for public/private information sharing" and example of "best practice."[239] The FATF noted:

> Through the JMLIT, law enforcement agencies can, with one request, obtain information from multiple institutions, which is an efficient means to develop a comprehensive intelligence picture... JMLIT SARs are considered to be of a very high standard. While the JMLIT provides an excellent resource to competent authorities in accessing information held by the largest institutions in relation to high priority cases, it is not an appropriate avenue for the majority of cases and only provides access to a limited number of the biggest financial institutions. That said, there are flow-on benefits for other reporting entities. JMLIT has developed alerts that are distributed to a wider audience and non-JMLIT banks have filed SARs based on the information learnt from these alerts.[240]

9.36 To appreciate the direct operational advantages and "flow-on" benefits to the wider regulated sector identified by FATF it is important to differentiate two aspects of the present JMLIT model: the Operations Group and the Expert Working Groups.

---

238 Home Office, HM Treasury, *Action Plan for anti-money laundering and counter-terrorist finance* (2016).

239 Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures: United Kingdom Mutual Evaluation Report* (December 2018) p 6.

240 Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures: United Kingdom Mutual Evaluation Report* (December 2018) p 51.

(1) The Operations Group deals with live case information to develop SARs that, in turn, produce intelligence that may be acted on by law enforcement agencies. These operations may also lead to specific follow-up actions for private sector members, including the conduct of internal investigations. Alerts can be distributed to the wider financial sector to highlight trends identified through JMLIT operations.

(2) The Expert Working Groups draw upon a broader membership to aid in the assessment and identification of emerging threats and develop materials such as "red-flag indicators".[241]

9.37 At present, owing in part to the sensitivity of the information shared, participation in the Operations Group is limited to vetted persons from certain financial institutions. In our consultation we sought views on the potential benefits that might be derived from expanding the membership in the Operations Group among either or both the regulated sector and the law enforcement community.

CONSULTATION

Regulated sector participation

9.38 We asked whether consultees consider that significant benefit would be derived from expanding the JMLIT model among:

(1) additional regulated sector members;

(2) the regulated sector as a whole; or

(3) an alternative composition not outlined in (1) or (2)?

9.39 Responses to this question were mixed. Some consultees expressed interest in participating and many saw the merit in having participation from across the regulated sector. However, there were concerns that JMLIT operations might be hampered by expansion in practice.

9.40 Consultees doubted whether expansion could be achieved without placing strain on the effectiveness of operations. They noted that JMLIT may become bureaucratic, unwieldy and, in turn, less effective. For some consultees the current relatively small size of the taskforce was a feature of the design of the taskforce because it ensured adequate security and instilled trust and confidence among JMLIT members.

9.41 To the extent that consultees favoured a broader approach, no clear consensus emerged about which entities ought to be included in the JMLIT membership. There was some support for expansion to the regulated sector generally. Others noted the concerns about the logistics of taskforce operations that would apply with greater force to that option. That complexity would be exacerbated by variations in:

(1) the different number of entities in each regulated sector industry;

---

[241] N Maxwell and D Artingstall, Royal United Service Institute for Defence and Security Studies (RUSI) *The Role of Financial Information-Sharing Partnerships in the Disruption of Crime* (2017) pp 13 to 14.

(2) the degree of risk of money laundering between industries; and

(3) differences in confidentiality obligations across industries.

9.42 It follows that the expansion of JMLIT contemplated by option (2) would be likely to require the establishment of more complex governance arrangements or sub-committees of some sort. Instead, as the NCA argued, it may be more appropriate to consider incremental expansion, on an industry by industry basis, as appropriate. Although most consultees that expressed a view favoured either option (1) or (2), there were also suggestions there would be merit in expanding membership to draw in relevant expertise beyond the regulated sector.[242]

9.43 Some consultees doubted whether they were well placed to comment and felt that the resolution of this question should be left to law enforcement agencies. The law enforcement agencies that addressed this question were cautious about expansion, at least in either of the forms proposed. The City of London Police shared many of the concerns outlined above, while noting there may be other options:

> Alternatives could be to have sub-sets of JMLIT concentrating on different sectors thereby allowing full access or the ability for JMLIT to co-opt additional members on a short-term basis to allow for their resources / expertise in connection with a particular piece of work.

9.44 The NCA noted:

> Whilst we are strongly in favour of extending the public/private partnership approach to tackling serious crime, including financial crime, we do not believe that a simple expansion of the current JMLIT would be the most effective mechanism for wider engagement. The NCA is actively working on the expansion of the JMLIT concept, but that will have significant implications for the current operating model.

Law enforcement participation

9.45 We also asked whether there may be benefit in expanding the participation of law enforcement agencies in JMLIT. Again, the views were mixed between those who favoured expansion, those who thought there may be practical disadvantages to having a wider group and those who would defer to existing JMLIT participants.

9.46 There was some support for including the Crown Prosecution Service,[243] and other law enforcement stakeholders provided they had an interest in similar serious crime targets and would be active participants, or participated on a case-by-case basis.[244]

9.47 The NCA submitted that this was unnecessary. It noted that law enforcement stakeholders with significant interests in financial crime already participate, that cases can be developed on behalf of local police forces and that JMLIT can accommodate

---

242 Consultation responses of the Proceeds of Crime Lawyers Association and Anna Sulkowska.

243 Consultation responses of the Proceeds of Crime Lawyers Association, Anna Sulkowska, Deloitte

244 Consultation responses of the National Casino Forum, Building Societies Association and Investment & Life Assurance Group, respectively.

those case-by-case circumstances where there is alignment between JMLIT priorities and investigations of a specific law enforcement agency.

CONCLUSION

9.48 Having regard to the views expressed in this consultation and the conclusions of the FATF regarding JMLIT, we do not make any specific recommendations about changes to membership or the current information sharing arrangements. This decision is especially important considering the ongoing work that the NCA has identified which may affect the current operating model.

Chapter 10: Enhancing Consent

INTRODUCTION

10.1 The preceding chapters have focussed on reforms that leave the broad outlines of the consent regime intact. As we discuss below, the consent regime has clear benefits and stakeholders' support for its retention was virtually unanimous. Accordingly, we make no recommendations which would radically alter the principles of the consent regime. However, we consider additional reporting requirements which may be introduced to complement and improve the existing regime.

RETAINING THE CONSENT REGIME

10.2 As discussed in chapter 1 Part 7 of the Proceeds of Crime Act 2002 ("POCA") creates both obligations to report and exemptions from reporting. A disclosure obligation is triggered when a reporter has, in the course of business, developed a suspicion of criminal property or a suspicion that another person is engaged in money laundering.

10.3 Relying on an individual reporter's judgement in determining whether the suspicion test – as defined in *R v Da Silva*[245] - has been met, is central to the United Kingdom's anti-money laundering strategy.

10.4 The key attraction of the consent regime is that the threshold for reporting is set in such a way as to provide law enforcement agencies with intelligence at an early stage. As transactions are paused once an authorised disclosure (DAML SAR) has been made, law enforcement agencies can prevent the dissipation of criminal property by intervening before it moves or changes ownership.

10.5 The information provided in Suspicious Activity Reports ("SARs") plays an important role in crime control. It may lead to the commencement of an investigation, or provide additional support for an existing investigation. Data from multiple reporters can be cross-referenced using software analytics and computing technologies.[246] This enables law enforcement agencies to create a profile of local communities based on this transactional data and begin to identify potential criminality. Law enforcement agencies argue that SARs give them access to a considerable amount of intelligence that they would otherwise struggle to obtain.[247]

10.6 This risk-based approach which places the burden on the reporter to identify suspicious activity is embedded in European law and international anti-money laundering policy.[248]

---

245 [1996] 2 Cr. App. R. 35.

246 Law enforcement agencies are able to merge intelligence gathered from SARs with intelligence stored on other databases such as the Police National Database.

247 Consultation response of Metropolitan Police Service.

248 Anti-Money Laundering: the SARs Regime, Law Comm Consultation Paper 236 (2018); ("CP 236") Chapter 6; Directive (EU) 2015/849 of 20 May 2015 the European Parliament and of the Council on the prevention of

Consultation

10.7 As we made clear in our Consultation Paper, the primary focus of our review is reform that can be achieved within the current legislative system. Although our Terms of Reference were limited to improving the operation of the existing regime, we examined what a non-consent regime might look like. We concluded that, while imperfect, there were significant disadvantages to changing to a non-consent model:

(1) it would place the onus on the United Kingdom Financial Intelligence Unit ("UKFIU") to make the most pressing suspicious activity reports available to law enforcement agencies as quickly as possible. This would represent a significant change to the current system, and the UKFIU would require greater resources in order to analyse reports;

(2) a non-consent scheme would be a new regime that was not sought by those in the regulated sector;

(3) it would remove legal protection from reporters when they are dealing with criminal property;

(4) loss of protection and consequential legal uncertainty might increase defensive reporting among reporters;

(5) the onus would fall to civilian reporters to flag the most time pressing disclosures for the UKFIU's attention. These reporters are not best placed to decide what law enforcement agencies should prioritise; and

(6) removal of the authorised disclosure exemption could impact negatively on the police and Crown Prosecution Service ("CPS") and their ability to investigate and prosecute money laundering by raising the threshold for criminality.

10.8 Having set out the case for retaining the consent regime, and in the absence of any obviously superior replacement, we asked consultees whether they agreed that it should be retained.

10.9 Of those consultees who responded to this question, 32 (86.5%) were in favour of retaining the current regime and four (11%) were against. One consultee provided a response but did not directly answer the question.

10.10 The Law Society of England and Wales fully agreed with our conclusion that the consent regime ought to be retained:

> We cannot envisage a satisfactory alternative regime that would match the balance of protection (to the reporter) and information provision (to law enforcement). If consent were to be removed, there would be situations where solicitors suspected

---

the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC; and Financial Action Task Force, International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation 2012, http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf (last visited 21 May 2019).

that the funds they were holding were the proceeds of crime but would be compelled by their professional obligations to return the funds to the client upon withdrawing from acting for that client. The fact that three quarters of legal sector consent SARs are currently approved suggests that the regime is working well.

10.11 The CPS were unequivocal in their support for the consent regime:

> We strongly consider that the consent regime should be retained. Whether greater capacity and resources are needed when reports are made is a separate question; the operation of this regime however in principle is desirable.

10.12 The Solicitors Regulation Authority ("SRA") advocated retaining the consent regime and identified a need for improvement rather than "wholesale change":

> An effective regime for reporting suspicious activity must balance a number of competing rights and needs. The regime must provide timely information to law enforcement, allow law enforcement to disrupt money laundering and terrorist financing, whilst minimising burdens on businesses in the reporting sector and unintended consequences on innocent persons whose actions might appear suspicious. We feel that the current regime strikes a good balance between these competing priorities, and importantly, is well understood by the regulated sector. The consent regime in particular can present challenges for reporters if they must delay a transaction without being able to explain the reasons why to their client, however we believe that this is a reasonable price to pay for the benefits offered to the reporter by receiving consent.

10.13 The Government's response welcomed proposals for improvements to the regime without any "diminution of our ability to prosecute money launderers and temporarily freeze suspicious transactions to enable law enforcement action to be taken before funds are dissipated."

10.14 Of those who offered constructive criticism of the current regime, the National Crime Agency ("NCA") proposed a more joined-up approach, while observing that the essential components of the system should still be retained:

> Law enforcement partners derive significant operational benefit from the ability to stop transactions before the money is dissipated. While this capability must be maintained, and built upon, we do not see that the current consent regime is easily compatible with the modern financial services business. It also drives reporting behaviour in ways that can be unhelpful and is not the best use of resources.
>
> We would wish to see a system in which SARs are submitted in a timely manner, allowing law enforcement intervention on assets where that is appropriate. This needs to be enabled by a whole system approach, involving the UKFIU, law enforcement and supervisors.

10.15 We also invited consultees to suggest any alternative regime that would balance the interests of reporters, law enforcement agencies and the subject of disclosures. Consultees were almost unanimous that a satisfactory alternative could not be identified.

10.16 Only one consultee proposed an alternative solution. Alistair Craig, a solicitor, was against retaining the consent regime and proposed an alternative scheme in which criminal responsibility shifted away from the individual and onto commercial organisations:

> The current reporting and consent system should be scrapped and replaced by offences requiring individuals to have actual or constructive knowledge of money laundering from specified serious crimes, a strict liability offence for commercial organisations failing to prevent money laundering subject to a reasonable precautions defence, as exists under the current Bribery Act, and a financial system based on a bedrock or transparent beneficial ownership. Critically, enforcement agencies cannot operate effectively without proper resources.[249]

10.17 UK Finance suggested further exploratory work was needed to assess what an optimal regime might look like. UK Finance proposed a cross-sector (public and private) working group to identify what aims the regime is seeking to achieve and how best to accomplish these objectives.

Analysis

10.18 The great majority of consultees supported retaining the consent regime. Consultees acknowledged that it was difficult to identify an alternative solution that was workable and which balanced the competing interests that we identified in our Consultation Paper. The distinctive advantage that the consent regime provides is the ability to pause any transactions before suspected criminal property is dissipated. Critically, no consultee advanced an effective solution that met this challenge. There was also considerable support for the legal protection provided by the authorised disclosure exemption. If individual criminal liability of those responsible for filing the authorised disclosure were to be removed, a programme of radical restructuring and the input of substantial resources would be required to create a fully co-ordinated and effective partnership between the private sector, the UKFIU and law enforcement agencies.

10.19 Undoubtedly, there is scope for ongoing reflection on the value of the regime and where it can be improved. The Advisory Board that we recommend in chapter 3 would be able to provide continuing oversight of the consent regime. Many of our recommendations seek to address consultees' individual concerns within the limited scope of our review.

10.20 In the next section we consider the merits and disadvantages of additional thematic reporting requirements, which would supplement the existing reporting regime.

THEMATIC REPORTING

10.21 In our Consultation Paper we observed that it would be inappropriate to replace entirely the suspicion-based approach to reporting with thematic reporting or Geographical Targeting Orders ("GTOs"). Restricting reporters' freedoms to assess and determine risk would mean that the UK's anti-money laundering regime operated

---

[249] A Craig, Letter to the Financial Times dated 26th (September 2018) https://www.ft.com/content/f120cb12-c0b0-11e8-95b1-d36dfef1b89a (last visited 21 May 2019).

in a way that undermined the Fourth Anti-Money Laundering Directive ("4AMLD")[250] and FATF 1st Recommendation.[251]

10.22 We also set out alternative methods for gathering intelligence about potential money laundering which could be used to enhance the existing regime: thematic reporting, broadly, and specifically GTOs, a subset or theme of reporting.[252]

10.23 Thematic reporting removes reporters' discretion to assess suspicion, instead requiring them to make reports if certain specified criteria are met. Law enforcement agencies identify patterns or typologies of financial behaviour which are of intelligence interest, and then translate them into specific criteria which are used as the criteria dictating when reports are to be submitted. The point of introducing thematic reporting, fundamentally, would be to increase intelligence on a specific investigative theme.

10.24 Thematic reporting could be used in a variety of circumstances to enhance the intelligence available to law enforcement. For example, a reporting obligation could be triggered when a prescribed threshold is crossed. One illustration of that could be that estate agents could be compelled to notify the UKFIU of the sale of all properties over the value of £1 million, regardless of whether the individual reporter dealing with the sale considers it to be suspicious or not.

10.25 Thematic reporting could also be used to capture intelligence from entities that fall outside of the definition of the regulated sector. For example, payments to fee-paying schools, deemed to be at high risk of exploitation by money launderers, could trigger automatic reporting obligations.[253] Equally, cash transactions could, under set circumstances, require a report. While transactions in cash are not a reliable indicator of the proceeds of crime, they do impair the UK's ability to detect money laundering and terrorist financing. The origin of the funds is often untraceable and the payee anonymous.[254] Information generated by an automatic requirement to record details of cash payees of sums over specified amounts, irrespective of suspicion, would remove

---

250 The European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, (EU) 2015/849 Official Journal L141 of 5.6.2015.

251 Financial Action Task Force, International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation 2012, http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf (last visited 21 May 2019).

252 CP 236, Chapter 14.

253 Speaking at the launch of the Serious Organised Crime Strategy 2018, Rt Hon Ben Wallace MP urged public schools to report irregularities, "Illicit finance crops up in many places where people should be asking questions. London property, public schools, sports teams and purveyors of luxury goods. For too long this has gone unchallenged". Full speech available at https://www.gov.uk/government/speeches/minister-launches-updated-serious-and-organised-crime-strategy. See also, Donald Toon Head of the Economic Crime centre at the National Crime Agency comments, "There is an overarching responsibility here to do more… We have a number of areas where I am identifying very, very high-risk individuals, suspect individuals, who have children in public schools." Full text article available at https://www.telegraph.co.uk/education/2018/12/03/private-schools-should-flag-parents-try-pay-fees-cash-police/.

254 HM Treasury and Home Office, *National risk assessment of money laundering and terrorist financing* (2017) p 65.

anonymity from users of cash, so that it is no longer obstacle to the disruption of illicit money flows.

10.26 The principal argument for the introduction of thematic reporting is the opportunities it creates to investigate criminality where there are gaps in the intelligence picture. Reports can be focussed and target weaknesses in the system where there is limited or no reporting.

CASE STUDY

The Netherlands has established a thematic approach to reporting suspicious activity. The Money Laundering and Terrorism Financing (Prevention) Act ("Wwft") Act 2008 imposes a duty on regulated entities to report "unusual transactions" to the Financial Intelligence Unit. A transaction is considered to be unusual if it meets one or more of the prescribed indicators listed in the Wwft.

A distinction can be drawn between objective and subjective indicators. The latter create a duty to report only if, in addition to meeting a prescribed typology, a reporter is personally suspicious that the transaction has a connection to money laundering or terrorist financing. By comparison, an objective indicator triggers a report without regard to the reporter's assessment of the facts. For instance, electronic money entities have a duty to notify the Financial Intelligence Unit ("FIU")I of all transactions exceeding €2,000.[255]

Unusual transactions are recorded on a secure database to restrict the visibility of reports. Only when further investigations have confirmed that a transaction has a suspicious element, will the head of the FIU disseminate those report to the relevant law enforcement agencies. In 2017 the Dutch FIU received 360,015 unusual reports, of which 40,546 were declared as suspicious.[256]

Geographic Targeting Orders

10.27 A specific form of thematic reporting, focussing on a particular location in which a transaction or activity is occurring, has been used successfully in the USA.[257] A GTO would trigger an obligation to report if a transaction occurs within a prescribed geographical location. We explained in our Consultation Paper that the US Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN"), the equivalent of the UKFIU in the United States, can authorise a GTO if there are reasonable grounds for concluding that additional record keeping and reporting requirements are necessary to support the existing anti-money laundering regime.[258] A similar power in the UK could be used to gather additional intelligence from

---

255 See https://www.fiu-nederland.nl/en/legislation/general-legislation/wwft (last visited 21 May 2019).

256 FIU (Netherlands) – The Netherlands Annual Report (2017) pp 4-5.

257 CP 236, para 14.27.

258 Pursuant to 31 USC 5326.

geographical areas perceived to be at greater risk of money laundering or terrorist financing.

10.28 The high-value property market where a single purchase allows large sums of money to be concealed in few transactions is a prime example. Properties located in London's affluent boroughs regularly feature in law enforcement agencies' investigations into corruption and money laundering.[259] Estate agents acting in the purchase or sale of such properties may be naively, or knowingly, complicit. A GTO would not only generate a focussed pool of intelligence for law enforcement agencies to analyse, it would also inform the regulated sector about locations vulnerable to money laundering. A GTO targeting estate agents, for example, would emphasise the need to be meticulous when carrying out customer due diligence checks.

CASE STUDY

A money laundering investigation in the United States involving money service businesses (remitters of funds to recipients often based overseas) confirmed suspicions that Columbian cartels were using these services to receive the proceeds of their crimes. A GTO was successfully used to target transactions intended to reach Columbia. New York based remitters were subject to a requirement to report information about the senders and recipients of cash transactions exceeding $750. As a result, FinCEN reported an immediate and dramatic reduction in the flow of narcotics proceeds to Columbia and noted a significant increase in currency seizures.[260]

Addressing problems with the current regime

10.29 Thematic reporting may have a role to play in addressing problems of underreporting within the existing system.

10.30 Under the current regime, some of those to whom POCA applies do not report on the grounds that they do not have a suspicion. A weakness in the current model is that where a reporter misapplies the test, is careless or, in some cases, wilfully blind, relevant activity will not be reported to the UKFIU.

10.31 Some sectors have invested substantially in the identification of suspicious activity and have developed robust training mechanisms as a result. Yet, within the reporting sector, a number of smaller organisations are unable to make a similar investment in the training of their employees. Notwithstanding their best efforts, the complexity of

---

259 HM Treasury and Home Office, National risk assessment of money laundering and terrorist financing (2017) p 55.

260 Financial Crimes Enforcement Network, "*Treasury Acts Against Flow of Dirty Money to Colombia*"" https://www.fincen.gov/news/news-releases/treasury-acts-against-flow-dirty-money-colombia (last visited 21 May 2019).

the regime means that some reporters will not feel able to engage fully with their obligations.

10.32 It should also be noted that reporting is not evenly distributed across the regulated sector. Credit institutions are by far the largest reporters, accounting for 87.26% of the total volume of SARs submitted between the period of March 2017 to April 2018.[261] However, this number reflects the many millions of transactions that they perform daily.

10.33 By comparison, estate agents accounted for 0.15% of the total volume of SARs submitted during the same period, and high value dealers accounted for just 0.05% of SARs.[262] This difference can be largely, but not necessarily exclusively, attributed to differences in the nature of each sector.

10.34 In chapter 3 we recommend that guidance may assist reporters to understand the risks and their obligations to report. However, guidance would not be a panacea – there will still be gaps in the intelligence provided by SARs.

10.35 The effectiveness of the regime is also hindered by those who actively fail to engage with their obligations under POCA and report suspicious activity to the UKFIU. The National Crime Agency's strategic assessment of serious and organised crime highlights the significance of the threat posed by enablers:

> Professional enablers (PEs) can be complicit, negligent or unwitting but are key facilitators in the money laundering process and often crucial in integrating illicit funds into the UK and global banking systems… the criminal exploitation of accounting and legal professionals, particularly those involved with trust and company service provision, poses the greatest money laundering threat, as these professionals are used to set up corporate structures which are often key enablers in high-end money laundering. Corrupt individuals inside financial institutions also pose a threat.[263]

10.36 The Government has previously recognised the facilitative role of professionals in the financial, legal and accounting sectors who launder proceeds of crimes into, through and out of the UK, as one of the most significant money laundering threats.[264]

10.37 Reporters are required to engage with the risk-based approach proactively to identify and report a suspicion of criminal property. The advantage of supplementing the reporting regime with some form of thematic reporting is that it would remove discretion from the reporter. This would be much less challenging for those who find it difficult to understand their reporting obligations. As such it may provide a baseline of raw data from sectors which have to date engaged less with the regime.

10.38 Specific orders requiring particular information would provide law enforcement agencies with the means of obtaining focussed and targeted intelligence. The UKFIU

---

261 National Crime Agency, *Suspicious Activity Reports (SARs) Annual Report* (2018) p 6.

262 National Crime Agency, *Suspicious Activity Reports (SARs) Annual Report* (2018) p 6.

263 National Crime Agency, *National Strategic Assessment Serious and Organised Crime* (2018) p 39.

264 Home Office, *Action Plan for anti-money laundering and counter-terrorist financing* (2016) p 10.

would not be dependent on the individual reporter perceiving activity to be suspicious before it received information.

10.39 GTOs or additional thematic reporting requirements may even be fulfilled by automated systems, therefore reducing the burden on the reporter.

Consultation

10.40 In the Consultation Paper we asked stakeholders two questions. First, we asked whether a power to require additional reporting and record keeping requirements targeted at specific transactions would be beneficial in the UK. Secondly, we asked whether consultees saw value in introducing a form of GTO. These were questions on which not all consultees expressed a view.

Thematic reporting

10.41 Twenty-seven consultees responded to the first of our two questions; 13 (48%) thought a power to require thematic reporting would be beneficial and 14 (52%) did not.

10.42 Law enforcement agencies favoured the introduction of new powers to require additional reporting and record keeping requirements. They argued that this capacity could enhance the UK's capabilities in the fight against money laundering and terrorist financing.[265] The Metropolitan Police Service ("MPS") suggested that:

> there are a number of potential benefits to law enforcement in gaining access to specific transactions. The MPS are willing to support any future scoping exercise.

10.43 The NCA proposed that experiences from overseas partners should be considered. However, they also noted the need for proportionality to be built into any reform. They suggested that further research would be necessary to establish the appropriate balance between the opportunity costs to reporters and law enforcement agencies, and the improved understanding of the threat of money laundering and the ability to protect the public.[266] This nuanced approach recognises that additional reporting comes at a cost.

10.44 The additional sifting and analysis which would fall to either the UKFIU or law enforcement agencies was also noted by the Financial Conduct Authority ("FCA"). They warned that the scale of reports generated by new thematic reporting requirements would require careful consideration to ensure the additional data could be used effectively to enhance the UK's capabilities.

> Whilst the analytical tools available are improving this increased volume of reports will result in many not being fully considered and languishing in a database unread unless someone happens to be particularly searching for information about that individual.

---

265 Consultation responses of the National Crime Agency, the Metropolitan Police Service and City of London Police.

266 Consultation response of the National Crime Agency.

10.45 The need for a proportionate approach was also a recurring theme in the responses of consultees who opposed the introduction of thematic reporting. Those who did not consider additional powers to be necessary thought that the greater burdens and compliance costs far outweighed the possible advantages of additional reporting.

10.46 Zurich, the Council for Licensed Conveyancers and Investment & Life Assurance Group and Northumbria University Financial Crime Compliance Research Group shared the concern that law enforcement agencies might struggle to handle the proposed volumes of reports under the changes contemplated by this question.

10.47 Simmons & Simmons went beyond arguments based on good use of resources, arguing instead that thematic reporting was unnecessary, noting that its desired effect could be achieved by other means. For example, the prescribed form for SARs could be improved to capture additional information which was deemed essential.

10.48 Professor Liz Campbell's concerns also extended beyond the cost effectiveness of thematic reporting. She acknowledged a point raised in our Consultation Paper that, although transactional reporting would free the regulated sector from the need to identify suspicious transactions, it may have the unintended result of reducing the quality of reporting in "untargeted" transactions. This would clearly be an undesirable consequence.

Geographic Targeting Orders

10.49 Twenty-four consultees responded on GTOs, of whom 12 (50%) saw value in introducing them in some form and 12 (50%) did not.

10.50 The consultees who saw value in considering a form of GTO represented a broad cross-section of interests. They included insurers such as Investment Life Assurance Group, law enforcement agencies such as the National Crime Agency and the Metropolitan Police, think-tanks such as Corruption Watch, and supervisors, namely the Law Society of Scotland and the Association of Foreign Banks.

10.51 However, as with thematic reporting, the need to ensure that the burden on reporters and law enforcement was proportionate to the benefits to be gained featured heavily in the responses. UK Finance stated:

> There may be some benefits in terms of law enforcement intelligence, and the legal protection for reporting a far wider range of activity, but it would have a significant operational impact to implement and, potentially systems changes at firms to be able to identify/isolate required transactions. Overall this could require disproportionate effect unless used very sparingly and in a very targeted fashion.

10.52 The Government's response stated that HMRC are currently investigating the utility of GTOs and the analysis of the results will inform their decision on the suitability of this as a tool. They observed that, "their potential cost to businesses and the cost-effectiveness of these measures will need to be central to any consideration." The NCA also favoured a cost-benefit analysis before any further decision was taken about such a scheme.

10.53 The City of London Police doubted whether the additional volume of reports would achieve a greater understanding of the overall intelligence picture. Instead, they

suggested it may be preferable to inform reporters on the thematic and geographical typologies so as to encourage their incorporation into the risk-based decision-making process.

10.54 The concerns of the legal sector were neatly summarised by the Law Society of England and Wales:

> The UK's reporting regime is among the most comprehensive in the world. We are unconvinced of the value or utility of additional reporting requirements, which inevitably come at a cost to both reporters and to law enforcement.

10.55 Other legal sector consultees shared the view that additional powers were not necessary. The Proceeds of Crime Lawyers Association ("POCLA") felt that it would be difficult to identify examples of geographical areas that could be usefully targeted. Others suggested that new powers were unnecessary because they already exist. In particular, Shearman & Sterling argued that the concept is covered by the "high risk jurisdiction rules".[267] Similarly, Simmons & Simmons noted "the NCA has a variety of enforcement and investigative powers at its disposal to target certain transactions involving a certain sector or geography".[268]

10.56 The FCA agreed, noting that a similar power already exists under section 7 the Counter-Terrorism Act 2008 ("CTA") to require financial firms to take specified action in relation to a country of concern or counterparties based in that country.[269] Therefore there is precedent for targeted reporting. The question is whether any expanded powers are necessary and proportionate.

ANALYSIS

Costs

10.57 Given that the likely cost of new reporting requirements was at the forefront of the minds of many consultees, it is important to consider whether new powers would be proportionate. Notwithstanding the benefits that would be gained from an additional

---

267 The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017 No 692, reg 33 (1)(b) and reg 33 (6)(6)(c) introduce requirements for regulated businesses to apply Enhanced Due Diligence measures in higher risk jurisdictions; Financial Action Task Force statements that identify high-risk countries based on assessments of the anti-money laundering and counter-terrorism financing regimes, http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/?hf=10&b=0&s=desc(fatf_releasedate) (last visited 21 May 2019).

268 Consultation response of Shearman & Sterling.

269 The Treasury is permitted to give a direction if one of more conditions contained in s 1(2) of the Counter-Terrorism Act 2008 are met. The first condition is that the Financial Action Task Force has advised that measures should be taken in relation to the country because of the risk of terrorist financing or money laundering activities being carried out in the country, by the government of the country, or by persons resident or incorporated in the country. The second condition is that the Treasury reasonably believes that there is a risk that terrorist financing or money laundering activities are being carried on in the country, by the government of the country, or by persons resident or incorporated in the country; and that this poses a significant risk to the national interests of the United Kingdom. The third condition is that the Treasury reasonably believes that the development or production to nuclear, radiological, biological or chemical weapons in the country, or the doing in the country of anything facilitates the development or production of any such weapons, or poses a significant risk to the national interests of the United Kingdom.

pool of data that would be acquired, there would be significant compliance costs to all parties involved. Therefore, any new power to impose additional reporting requirements requires careful consideration of the impact on the UKFIU, law enforcement agencies and reporters.

Impact on the UKFIU and law enforcement agencies

10.58 The true extent of any burden from thematic reporting on the UKFIU and law enforcement agencies is difficult to quantify.

10.59 Inevitably, its introduction would mean additional costs. Within risk-based reporting, reporters act as an initial filter on the transactional data. The UKFIU receive only those reports where a reporter has a suspicion, either of the existence of criminal property or that another person is engaged in money laundering.[270] In contrast, with thematic reports, the responsibility would pass to law enforcement to filter the reports and identify those with intelligence value. This would mean more reports, and new systems to process them. There has been no practical assessment of how thematic reporting would work if introduced into the existing regime, how much it would cost and whether any new technology would be required to make it work.

10.60 If we take the Netherlands as an example of how thematic reporting might operate, we can see the approximate scale of the task that would fall to the UKFIU. The Dutch FIU were responsible for analysing 360,015 unusual reports to isolate some 40,546 transactions as suspicious. If the UKFIU undertook this analysis of this type, sufficient numbers of trained intelligence analysts would be required to process these reports. If the UKFIU could not take on this burden, additional reports would need to be distributed to law enforcement agencies without further analysis. Those agencies would have to devote time and resources to searching for relevant data and intelligence amongst these reports. It follows, the resource impact would be likely to be significant.

Impact on reporters

10.61 If thematic reporting is understood as a supplement to the standard approach then it will inevitably mean that reporters will incur additional costs as they set up new systems to identify the need for reports under the new requirements. Any burden from additional reporting requirements may, however, be less onerous if there is scope for automated systems to assess transactional data against the prescribed requirements. The success of automated systems would depend on a number of factors:

(1) whether existing databases would be deemed suitable to store reports with potentially no suspicion or connection to money laundering and/or terrorist financing and comply with data protection requirements;

(2) the nature of the prescribed typology; for example, whether it is transactional or based on a particular location;

---

[270] Authorised disclosures as per Proceeds of Crime Act 2002, ss 327 to 329 and required disclosures as per Proceeds of Crime Act 2002, s 338.

(3) the parameters of the prescribed typology. The volume of reports the typology is likely to generate may have an impact on the ease with which reports can be submitted to the UKFIU;

(4) the type of reporter subject to the additional requirements;

(5) the size of the entity on whose behalf that the reporter is acting. For example, larger organisations with a budget for compliance with anti-money laundering requirements may find it easier to absorb any potential costs; and

(6) reconciliation with data protection principles and requirements.

10.62 It may be that reports fitting certain patterns could fit neatly within existing systems and follow a similar format to that of required disclosures.[271] The additional mechanisms would only be for the purpose of gathering intelligence. Transactions would not be paused and the impact on the subject of a disclosure would also be minimised.

Other arguments

Improved intelligence

10.63 As we have discussed above, the fundamental benefit that thematic reporting would bring would be to allow law enforcement to identify and plug gaps in the intelligence picture. As we describe above, this could address existing problems with under-reporting, as well as allowing law enforcement agencies access to new intelligence.

10.64 However, there may be more cost-effective ways of achieving these aims. Prescribing the form in which a SAR is submitted could go some way towards addressing perceived gaps in the intelligence picture, at considerably less cost. Prompting reporters to record their suspicions in a manner that encourages consistency and the provision of particular sorts of information may improve the quality of the information sent to the UKFIU. An efficient use of closed and clear questions on a prescribed form may discourage reporters submitting reports defensively as the actual level of detail required is clarified. Coupled with guidance to assist reporters in identifying suspicious activity, this would significantly enhance the regime. Further and continuing training and education would also be essential.

Simplifying the regime

10.65 Thematic reporting could simplify and clarify the regime, making it easier for reporters to understand their obligations. For example, prescribing particular circumstances in which a SAR is required, irrespective of suspicion, may assist those reporters who feel uncomfortable making assessments of the ill-defined concept of suspicion. It would address the complexity created by POCA's intersecting set of reporting obligations by asking directly for reports based on a particular type of transaction.

10.66 It would also shift the burden of identifying suspicious behaviour or relevant reports back to law enforcement agencies, who are arguably better placed to make that

[271] As any number of reports generate by a thematic reporting, or GTO obligation, may have no evidence of a suspicion of criminal property it would be an inappropriate follow a format similar to authorised disclosures which immediately freezes a transaction and potentially a bank account.

assessment. This could have the effect of improving the quality of intelligence available to law enforcement agencies.

10.67 Of course, as the new requirements would be in addition to the old, reporters would continue to have to understand their obligations and identify suspicion as they do currently. Moreover, we make recommendations earlier in this report which are designed to alleviate some of these problems. It might make sense to consider the effect of any such changes before introducing new reporting requirements.

Feedback

10.68 New requirements specifying particular patterns or locations could also operate as a simple feedback mechanism between law enforcement agencies and those to whom the reporting obligations apply. They could provide a forum for law enforcement agencies to inform reporters about current trends in money laundering, as well as other issues of particular concern to the UK intelligence community.

10.69 On the other hand, an alternative feedback mechanism could be created without the need for new reporting obligations.

Unintended consequences

10.70 As Professor Liz Campbell noted, thematic reporting requirements risk unintended consequences. The introduction of prescriptive reporting on the basis of set criteria might narrow the scope of reporting. It may lead to negative behavioural change if reporters become complacent about assessing and identifying risks of money laundering or terrorist financing if they have not been directed to address it by a reporting requirement. As a result, there may be instances where the UKFIU fails to be notified of suspicious activity.

RECOMMENDATIONS FOR REFORM

10.71 Without a clear evidence-base from which to infer the utility of thematic reporting and GTOs, it would be unreasonable to make recommendations that are likely to burden the regulated sector with new costs. Likewise, it would be unreasonable to burden law enforcement agencies with the cost of filtering reports to identify those which have intelligence value. At a time when UKFIU resources are stretched, there is a compelling argument against creating reporting requirements to operate in tandem with the consent regime, without at least having a good idea of the costs and benefits of such a change.

10.72 Moreover, we have made a number of recommendations in the preceding chapters capable of enriching the overall intelligence picture in a way similar to additional reporting mechanisms. Prescribing the form and manner in which a SAR is logged is a cost-effective way to improve the quality of reports.[272] Similarly, statutory guidance, a proposal heavily favoured by consultees, is likely to resolve some of the issues that

[272] See Chapter 5.

arise from the concept of suspicion.[273] Additional reporting mechanisms may prove unnecessary once these improvements have been established.

10.73 Likewise, until steps are taken to resolve existing misperceptions about Part 7 of POCA it may be premature to support new obligations.

10.74 However, we can see strength in the arguments made by law enforcement that the capacity to impose additional reporting requirements would enhance their intelligence gathering capability. We agree with the MPS and the NCA that further research to particularise the benefits that new powers would bring would be helpful.

10.75 Accordingly, we make no recommendations for the introduction of new powers to require thematic reporting or GTOs. We recommend instead that further research into the utility of targeted reporting should be undertaken, coupled with a detailed cost-benefit analysis. Any such new order could be piloted to assess its effectiveness. This is a task, which we recommend, should be overseen by the Advisory Board as part of its remit.

Recommendation 19.

10.76 We recommend that further research is conducted into the utility of targeted reporting and that a cost-benefit analysis is undertaken to ensure proportionality within the reporting regime.

[273] See Chapter 3.

Chapter 11: Future Reforms

INTRODUCTION

11.1 The focus of this reform project was, as explained in chapter 1, to analyse and make recommendations regarding Part 7 of the Proceeds of Crime Act 2002 ("POCA") and equivalents under the Terrorism Act 2000, and particularly the Suspicious Activity Reports ("SARs"). Inevitably, in our own research and in the responses of consultees, other issues have arisen.

11.2 In this chapter we set out some of those issues that provide potential avenues of future reform. Three areas of potential reform are most significant:

(1) changes to corporate criminal liability;

(2) the extraterritorial jurisdiction of the principal money laundering offences; and

(3) exceptions relating to conduct that is legal in the jurisdiction where it takes place, but illegal under the law of the United Kingdom ("UK").

11.3 In this chapter we also link this Report to other work already underway across Government on anti-money laundering.

CORPORATE CRIMINAL LIABILITY

The current law

11.4 Corporate entities have a distinct and separate legal identity from the people who work for the organisation. While individuals within a corporation can be prosecuted for their own wrongdoing, the corporate entity can also be held responsible.

11.5 There are potentially two ways in which a corporate entity could be held criminally liable in the context of money laundering. First, by use of the identification doctrine, a corporate entity could be prosecuted for an offence under Part 7 of POCA if the managers and/or directors can be shown to be at fault as the "directing mind and will" of the company. This doctrine requires a controlling officer of the company to be proved to have had the fault element of the offence.

11.6 Secondly, there are existing criminal liability provisions in the Money Laundering, Terrorist Financing and Transfer for Funds (Information on the Payer) Regulations 2017 ("the Regulations"). The Regulations transpose the Fourth Money Laundering Directive ("4MLD") into law of the UK.[274]

11.7 The Regulations apply to "relevant persons" acting in the course of business in the UK, including the regulated sector.[275] Part 2 of the Regulations imposes a variety of

---

[274] Fourth Money Laundering Directive, (EU) No 2015/849 Official Journal L141 of 5.6.2015 p 73, art 58.

[275] Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017 No 692, reg 8.

obligations on businesses to identify and mitigate the risk of money laundering. These include obligations to:

(1) identify and assess the risks of money laundering and terrorist financing for their business;[276]

(2) establish and maintain policies, controls and procedures to mitigate and manage the risks of money laundering;[277]

(3) establish appropriate internal controls: having regard to the size and nature of the business;[278]

11.8 Under regulation 86, a corporation can be held criminally liable for breaches of any of these "relevant requirements" (among others).[279] The offence is subject to a due diligence defence. Under regulation 86(3), where a person, which here includes a corporation, took all reasonable steps and exercised all due diligence to avoid committing the offence, they will not be guilty of an offence.[280] Regulation 92 extends imposes personal criminal liability where directors or officers consent to or connive in the relevant breach, or to whose neglect the breach is attributable.

11.9 These criminal penalties are in addition to civil penalties also provided for in Part 9 of the Regulations.

11.10 In addition to criminal liability, a regulatory framework overseen by the Office for Professional Body Anti-Money Laundering Supervision ("OPBAS") exists. OPBAS oversees accountancy and legal professional body anti-money laundering supervisors in the UK to ensure they meet the standards set out in the Regulations. The cost of operating OPBAS is shared between these professional body supervisory authorities.[281]

11.11 Corporate criminal liability in the context of economic crime is currently under review. In 2017, the Ministry of Justice ("MOJ") published a call for evidence regarding economic crime and corporate criminal liability. One of the options put to consultees was to expand the 'failure to prevent' approach adopted in the Bribery Act 2010 to economic crimes more generally. Among the offences listed as potentially being part of a new failure to prevent economic crime offence were the offences in sections 327-

---

276 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017 No 692, reg 18.

277 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017 No 692, regs19-20.

278 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017 No 692, reg 21.

279 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017 No 692, reg 86; sch 6 para 5.

280 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017 No 692, reg 86.

281 Anti-Money Laundering: the SARs Regime, Law Comm Consultation Paper 236 (2018) ("CP 236"), pp 47-48.

333 of POCA.[282] The MOJ is currently considering the responses received as part of that consultation process.

EVALUATION OF THE CURRENT LAW

11.12 In our Consultation Paper, we sought consultees' views on whether it might be appropriate to consider making changes to the balance of individual and corporate criminal liability for offences relating to the prevention and detection of money laundering.

11.13 There are a number of sensible reasons for considering this issue. Prosecuting corporations for money laundering offences is challenging. The identification doctrine can operate to make it easier to convict smaller corporate entities for offences committed by its employees compared to larger corporate entities. This is because the directors in a smaller organisation are more likely to be involved, for example by explicitly or implicitly authorising the commission of a criminal offence. The identification doctrine can provide an incentive for companies to operate with devolved structures in order to protect directors and senior management from liability. As Corruption Watch observed in their response to our Consultation Paper:

> In practice, very few corporates appear to have been prosecuted for money laundering, whether under the principal offences, for failure to disclose offences or for criminal offences under the Money Laundering Regulations.
>
> We also strongly believe that the way in which the identification doctrine impacts on the fairness of prosecution must be considered properly and fully whether in the context of money laundering offences, of economic crime or more broadly…

11.14 Lisa Osofsky, the Director of the Serious Fraud Office ("SFO"), observed that the identification doctrine had a detrimental effect on prosecutions by the SFO:

> If there was an extension of these rules in terms of corporate criminal liability or vicarious liability, we might find ourselves less hamstrung by the identification principles. We might make better progress against some of the larger, fair-fight opponents of the SFO. I am willing to take them on. I wish the law was completely in my court, because I would like to be able to show just how much that is a challenge I welcome. But for now it is harder.[283]

11.15 Additionally, we are concerned that the retention of personal criminal liability of an employee in the regulated sector has a detrimental effect on the SARs regime in two ways. First, as we set out in our Consultation Paper, we believe that it is one of the fundamental causes of the large volume of reports. Secondly, as a consequence, it does not encourage or incentivise the filing of reports providing good quality intelligence.

11.16 In our Consultation Paper, we considered the value of narrowing individual criminal liability and creating a new offence for commercial organisations, shifting the

---

[282] Ministry of Justice, *Corporate Liability for Economic Crime – Call for Evidence* (2017), p 22.

[283] Bribery Act Committee: Oral Evidence, (13 November 2018) Q 157.

emphasis to criminalising the corporate entity rather than the individual. This offence would be based on liability for the commercial organisation when individuals fail to report and it is commercially advantageous to the organisation they work for to do so.[284]

11.17 Two potential models for reform were examined in our Consultation Paper: a vicarious liability model and a failure to prevent model.

(1) **Vicarious liability** – vicarious liability operates, largely in a civil rather than a criminal context, by directly attributing blame for the acts of another.[285] In the context of a company, a new offence could impose liability on the company when one of its employees failed to report a suspicion of money laundering. Effectively, the commercial organisation would be held criminally liable for its employees' or associates' failure to report suspicions of money laundering or terrorist financing as long as they acted within the scope of their employment and the actions were intended, at least in part, to benefit the corporate entity.

(2) **Failure to prevent** – this model would, in this context, operate to hold the corporate body to account for a general failure to prevent money laundering or terrorist financing, rather than the individual acts of an employee. For example**,** a new offence could seek to hold commercial organisations criminally liable for its employees' or associates' failure to report suspicions of money laundering or terrorist financing, unless the commercial entity could demonstrate that it had taken all reasonable steps to prevent such occurrences. We observed that the failure to prevent model has been used in the Bribery Act 2010 and the Criminal Finances Act 2017 in relation to bribery and the facilitation of tax evasion offences respectively. Each Act varies in how the offence and the due diligence defence are constructed.[286]

11.18 A change in focus to liability for the corporate entity, whether it is a bank, a casino or an estate agency, could have a positive effect by changing the corporate ethos and moving away from devolved decision-making practices where more junior members of staff bear the burden of responsibility. It would help to embed the risk-based approach at all levels of the organisation and enhance training provision for employees and associates. Coupled with our recommendations on the provision of statutory guidance, it could have a positive impact on the reporting regime by improving knowledge of obligations and their practical application in everyday life. Removing the risk of individual criminal liability for employees and associates of an organisation may serve to rebalance the reporting regime by discouraging the current defensive reporting culture.

11.19 Regulation 21 of the Regulations currently requires a member of the board of directors or named senior manager of AML-regulated firms to be responsible for the firm's compliance with the Regulations, where appropriate with regard to the size and nature of its business. This seeks to ensure that senior members of staff within AML-regulated firms are responsible for compliance. Any changes to corporate liability

---

284 CP 236, Chapter 14.

285 CP 236, p 184.

286 CP 236, p 185.

would need to take account of this existing framework, but could have a positive impact on the reporting regime by improving knowledge of obligations and their practical application in everyday life

CONSULTATION

11.20 In relation to the vicarious liability model, out of 37 consultees who responded to the relevant question, 16 (43%) were in favour of a new offence whereby a commercial organisation would be criminally liable for their employees' or associates' failure to report suspicions of money laundering and 19 (51%) were opposed. Two consultees responded but did not offer an opinion.

11.21 In relation to the failure to prevent model, out of 36 consultees who responded to the relevant question, 18 (50%) were in favour and 16 (44%) were opposed.

11.22 A number of supportive responses highlighted the potential benefits to corporate culture of focussing on corporate liability.

11.23 The Crown Prosecution Service ("CPS") saw merit in a new corporate offence and favoured the Bribery Act 2010 model on the basis that it would "act to increase awareness of money laundering by corporate bodies and the need to address it."

11.24 Professor Liz Campbell argued:

> Failure to prevent is far less restrictive than the identification doctrine in its ability to penetrate the breath of corporate entities and in its conception of the corporation as a multi-dimensional organisation. Yet it is not as indiscriminate as pure vicarious liability in allowing the organisation to show that has addressed the risks of its employees and agents engaging in criminal activity on its behalf…Indirect omissions liability and the associated defences aim to ensure that corporate management fosters a culture of compliance.[287]

11.25 As noted above, most responses focussed on the merits of expanding criminal liability generally rather than commenting on the appropriateness of replacing individual liability under the present law with corporate liability. Among those consultees who disagreed, most responses did not express a firm preference between the two models identified above but expressed an opposition to extending corporate criminal liability generally. Broadly those stakeholders viewed the extension of extending corporate liability as unnecessary, undesirable, and, in any case, premature. These stakeholders were in favour of maintaining the status quo.

11.26 Most stakeholders who expressed concern with either model were of the view that a new offence is not necessary, citing the extensive existing measures targeting corporate entities in the regulated sector including a form of corporate criminal liability.[288] It was suggested that absent evidence of systemic underreporting in

---

287 L Campbell, "Corporate Liability and the Criminalisation of Failure"; (2018) *Law and Financial Markets Review* 57 p 61.

288 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017 No 692, regs 86 and 92.

practice, further criminal sanctions were unwarranted. Instead, existing measures "strike the appropriate balance of regulatory burden and criminal responsibility against demonstrated risk."[289]

11.27 Both the Law Society of England and Wales and the Northumbria Financial Crime Compliance Research Group pointed to the extent of existing regulation in anti-money laundering. They noted this was a basis on which a distinction might be drawn from part of the justification given for the introduction of the failure to prevent bribery offence. Whereas the Bribery Act 2010 sought to address a historical gap and the absence of significant sanctions that might engender good corporate governance to prevent bribery, the obligations of the regulated sector under existing money laundering law (domestic and EU) and through international FATF recommendations are already significant.

11.28 Most consultees pointed to the Regulations as evidence of the sufficiency of the current approach. The Proceeds of Crime Lawyers Association argued the Regulations "already amount, in effect, to a sophisticated 'failure to prevent' model."[290]

11.29 Consultees noted the various sanctions in the regulations of increasing severity available to supervisors, regulators and prosecutors. They suggested, in light of these sanctions, the marginal value of any extension of corporate liability was limited as extensive deterrence is in place and the prospect of additional prosecutions slight.[291]

11.30 However, to the extent that the proposal would go any further than the existing law, many consultees thought that expanded corporate criminal liability would be undesirable and even counterproductive because the measures may lead to an increase in defensive reporting.[292] In turn, that may increase the regularity with which innocent customers or clients are unnecessarily inconvenienced by the SARs regime.[293]

11.31 One manner in which a failure to prevent or vicarious liability offence may go further than the Regulations would be for the law to apply to "commercial organisations" generally, including those outside the regulated sector. Some consultees noted that this would be inconsistent with the risk-based approach to the detection of money laundering and that legislative intervention, to that extent, may be unwarranted.[294] POCLA raised legitimate doubts about what an employer outside the regulated sector could proportionately be expected to do, to ensure an employee does not fail to report a suspicion of money laundering, and whether criminal consequences should follow if they do not act sufficiently.[295] For reasons set out in the Consultation Paper, this

---

289 Consultation response of Ashurst.

290 Consultation response of the Proceeds of Crime Lawyers Association.

291 Consultation responses of the Solicitors Regulation Authority; Peter Alldridge.

292 Consultation responses of the Law Society of England and Wales, the Law Society of Scotland, UK Finance and the Solicitors Regulation Authority.

293 Consultation response of UK Finance.

294 Consultation response of Ashurst.

295 Consultation response of the Proceeds of Crime Lawyers Association.

would point against any proposed vicarious liability model.[296] It is also reasonable to expect that the potential increase in the number of SARs filed, as discussed above, would be substantially larger if all commercial entities were in scope.[297] Without parallel changes to the consent regime this may be counterproductive.

11.32 Finally, many stakeholders suggested consideration of such a change would be premature, particularly given the MOJ's work on corporate liability for economic crime has not yet concluded.

ANALYSIS

11.33 The advantage of an offence of failing to prevent (that is, an omission offence) is that it circumvents the difficulties of the identification doctrine that we referred to at the beginning of this chapter. As Professor Ashworth observes:

> As an offence of omission not requiring proof of fault, it does not rely on the identification doctrine: all it needs is proof that the corporation failed to do (or prevent) a specified act.[298]

11.34 Given the mixed responses of consultees, it is arguable that adding another layer of criminal offence to the complex and expansive regulatory scheme for money laundering may be undesirable. However, we believe the most important question to decide is who is to be held criminally responsible and to what extent that might have an impact on preventing or reducing defensive reporting. The impact of individual criminal liability is evident in the large volume of reports received by the UKFIU and concerns as to the quality of some of those reports. We have presented evidence from stakeholders and our own data analysis which supports these concerns.

11.35 Any corporate liability offences and penalties, both civil and criminal, should operate to ensure corporate entities in the regulated sector put appropriate systems, training and measures in place to enable their staff to identify and report suspected money laundering in the course of their work. This requires the law to be as clear and precise as it can be, underpinned by accessible guidance which is meaningful and consistent as between sources of guidance.

11.36 Two outstanding matters warrant further consideration:

(1) whether the extent of corporate criminal liability might obviate the need for individual criminal liability or narrow its remit in some circumstances;

(2) whether the "failure to prevent" or "vicarious liability" options set out in our Consultation Paper and as part of the MOJ consultation might be preferable to the strict liability offence with a due diligence defence model presently adopted in the Regulations.

---

296 CP 236, para 14.46.

297 Consultation response of the Proceeds of Crime Lawyers Association.

298 A Ashworth, "A new generation of omissions offences" [2018] 5 *Criminal Law Review* 354.

11.37 A corporate liability model combined with narrowing or removing criminal liability for individuals who fail to disclose would be fairer to people who are simply doing their job. The threat of personal liability for a *deliberate* failure to report is a powerful one and justified in the circumstances. However, there is a question about whether the regime is fair in cases of a negligent failure to report. In the absence of any change to a failure to prevent model, there may be a case for abolishing the offence, or splitting the offence to allow for the maximum penalty to be reduced in cases of negligence. As outlined in our Consultation Paper, this option was debated as a proposed amendment to the Proceeds of Crime Bill. The amendment would have created two separate and distinct offences and limited the maximum penalty to a fine in the case of negligence.[299]

11.38 This may be a principled basis on which to justify the present approach which criminalises the failure to fulfil positive obligations on the part of corporations, subject to the defence, rather than the failure to stop a failure. Yet there is support from some consultees for a failure to prevent model.[300]

11.39 Ultimately, the degrees of difference between these proposed approaches to corporate liability would require detailed consideration of the proposed drafting and the extent to which any change would depart from the offence created by section 86 of the Regulations (for example "all reasonable steps and all due diligence" as opposed to "reasonable measures").[301]

CONCLUSION

11.40 As many consultees noted, any overall decision is probably best made having regard to both the responses to our consultation and to the responses received to the MOJ consultation. The latter is currently being considered and a response is awaited.[302]

11.41 If any changes were to be made, any corporate liability offence could be introduced by primary legislation, changes to the Regulations or (post-Brexit) through the regulation-making power provided by section 49 of the Sanctions and Money-Laundering Act 2018.[303]

11.42 In light of the responses received in our consultation process and the work ongoing by other parts of Government following the MOJ consultation, we do not recommend any changes at this time.

---

299 CP 236 para 8.53.

300 Consultation response of Professor Liz Campbell; see also L Campbell, "Corporate Liability and the Criminalisation of Failure"; (2018) *Law and Financial Markets Review* 57; A Ashworth, "A new generation of omissions offences?" [2018] 5 *Criminal Law Review* 354.

301 See, Criminal Liability in Regulatory Contexts, Law Comm Consultation Paper 195 (2010) ("CP 195").

302 Consultation response of HM Government.

303 Sanctions and Anti-Money Laundering Act 2018 s 49, sch 2 paras 15 and 18-19. This provision (not yet in force) confers a regulation-making power on an appropriate Minister to make and amend equivalent regulations, including creating criminal offences for enforcement purposes.

JURISDICTION, EXTRATERRITORIALITY AND LEGAL CONDUCT OVERSEAS

11.43 Consultees also highlighted two further issues of concern relating to the complexity of the application of POCA where suspected or actual criminal property moves across international borders. Those issues relate to the jurisdictional scope of the principal money laundering offences and the challenges that have arisen in the application of the legal conduct overseas exception.

Extraterritorial jurisdiction

11.44 Consultees identified doubts about the jurisdictional scope of the money laundering provisions. They regarded this as an area potentially ripe for legislative intervention. The uncertainty in the present law stems in part from the ramifications of the decision of the Court of Appeal in *R v Rogers* ("*Rogers*").[304]

11.45 In *Rogers*, the Court of Appeal rejected an appeal against conviction for a section 327(1)(c) conversion offence. The case concerned a UK national, resident in Spain, alleged to have converted criminal property. Although the underlying fraud was completed in this jurisdiction, with English and Welsh victims, all aspects of the charged money laundering offence occurred outside the UK and exclusively through a Spanish bank account. The appeal concerned jurisdiction. The Court held, by reference to sections 327(2A), 340(2) and 340(11) of POCA, that Parliament had intended section 327 to have extraterritorial effect.[305] The fact that the conversion had taken place in Spain, of itself, was no barrier to prosecution in UK Courts. Alternatively, and in *obiter,* the court held there was jurisdiction in reliance on the principles enunciated in *R v Smith (Wallace Duncan) (No.4)* ("*Smith*").[306]

11.46 Both bases for the decision in *Rogers* have been criticised.[307] In the absence of further judicial consideration, the full implications of the decision remain unclear. The High Court, bound by the decision, has applied *Rogers* in two cases concerning extradition.[308] As Freshfields Bruckhaus Deringer ("Freshfields") note:

> The effect of this line of authorities is that where both the underlying criminality and the money laundering offence take place outside of the UK, it could be argued that it may still potentially be caught by POCA.[309]

---

304 [2014] EWCA Crim 1680; [2015] 1 WLR 1017.

305 [2014] EWCA Crim 1680; [2015] 1 WLR 1017 at [48].

306 [2004] EWCA Crim 631; [2004] QB 1418 where the Court of Appeal held that where "a substantial part of the offence" was committed within England and Wales it may be regarded as committed within the jurisdiction even if the last constituent element took place abroad.

307 For criticism, see for example: J Fisher "Case to Answer: R v Rogers – implications for practitioners", *Money Laundering Bulletin* May 2015; D Ormerod and D Perry (ed), *Blackstone's Criminal Practice* (2019) A8.5; J Richardson (ed) "New Cases: Substantive Law – Money Laundering" *Criminal Law Week* 14/31/7; R Fortson, "R v Rogers – Case commentary" [2014] *Criminal Law Review* 910.

308 *Sulaiman v Tribunal de Grande Instance* [2016] EWHC 2868 (Admin); *Jedinak v District Court in Pardubice (Czech Republic)* [2016] EWHC 3525 (Admin).

309 Consultation response of Freshfields Bruckhaus Deringer. This issue was also raised by UK Finance.

11.47 Specifically, what remains unclear is the extent to which the decision in *Rogers* turns on the close connection on the facts between the predicate offending and the UK. The Court of Appeal concluded:

> This is not a case where the conversion of criminal property relates to the mechanics of a fraud which took place in Spain and which impacted upon Spanish victims. In those circumstances our courts would not claim jurisdiction…. This is not an offence in which the Spanish authorities would have an interest.[310]

11.48 That was true in *Rogers.* However, part of the uncertainty is that there are likely to be circumstances where the two bases of jurisdiction cited in the case conflict rather than align.[311] Specifically, there are questions regarding whether a foreign national in Rogers' shoes would equally be liable to be prosecuted, or how the case would be resolved if the funds had come, at least in part, from criminal conduct that took place outside the UK.[312] In those circumstances, what might or might not fall within the UK's jurisdiction remains unclear.

11.49 To address the uncertainty, Freshfields proposed that POCA should be amended to clarify its jurisdictional reach through a two-part test. They suggested the principal money laundering offences should only be engaged where:

(1) the underlying criminal conduct "touches upon" the UK; and/or

(2) the money laundering occurs in the UK.

11.50 We consider that there is merit in resolving the current uncertainty. If it is accepted both that the approach in *Rogers* was flawed, but that the UK should be able to prosecute these offences for acts that take place beyond the territorial jurisdiction, then explicit statutory authorisation should provide for it. That is especially the case if the intent is to criminalise the conduct of people who are neither residents or citizens of the UK. That might be achieved by treating money laundering as exceptional by implementing an ad hoc assertion of extraterritorial jurisdiction, subject to appropriate limits. Those appropriate limits might refine what amounts to criminal conduct "touching upon" the UK. It may also be necessary to consider whether, in the context of modern financial crime, there is a need to reconcile the approach to jurisdiction more generally having regard to the *Smith* principles and the jurisdiction provisions of the Criminal Justice Act 1993. Alternately, POCA could be amended specifically to overturn *Rogers* and clarify that the principal money laundering offences do not apply where the relevant conduct occurs entirely overseas.

11.51 We do not express a final view on which of these (or other)[313] options might be the best course of action. This is not a proposal on which all consultees had the

---

310 [2014] EWCA Crim 1680; [2015] 1 WLR 1017 at [48].

311 J Fisher "Case to Answer: R v Rogers – implications for practitioners", *Money Laundering Bulletin* (May 2015).

312 J Fisher "Case to Answer: R v Rogers – implications for practitioners", *Money Laundering Bulletin* (May 2015).

313 See, for example, the approach in art 10 of the Sixth Money Laundering Directive (EU) No 2018/1673 Official Journal L284 of 12.11.2018 p 22.

opportunity to express an opinion, and, at least on one view, the appropriate resolution may involve a consideration of the limits of criminal jurisdiction generally, and not simply for money laundering.

11.52 Finally, for completeness, it is worth noting that this discussion of extraterritoriality relates also to our discussion in relation to guidance on transactions with no UK nexus in chapter 7. In our Consultation Paper we asked whether statutory guidance should be issued to ensure that where a transaction has no UK nexus this may amount to a reasonable excuse for a reporter not to make a required or authorised disclosure. The Consultation Paper offered the example of a case where a UK-based investigative team or nominated officer within the regulated sector makes a report on a transaction they encounter in the course of their work that has no other connection to the UK.[314]

11.53 We provisionally concluded in chapter 7 that, insofar as the reporting obligations are concerned, the current position should be retained. That conclusion is bolstered by the current law on extraterritoriality. The obligation to report these transactions stems from sections 340(3) and 340(11)(d) of POCA. However, as the law presently stands, those dealings are arguably also within the criminal jurisdiction of the UK Courts due to the extraterritorial reach of sections 327-329. Either overturning *Rogers* or placing explicit limitations on where principal offences occurring overseas may be prosecuted may also aid in clarifying what amounts to a UK nexus.

Legal conduct overseas

11.54 There has always been complexity under money laundering law where dealings involve conduct illegal in the UK, but not unlawful under the criminal law of a foreign jurisdiction. These “Spanish bullfighter” issues (a shorthand for these type of concerns referring to the case of a Spanish matador spending his or her income in the UK), have become more pressing with the growth of the legal cannabis industry.[315]

11.55 An exception from the application of the money laundering offences for legal conduct overseas was introduced by the Serious Organised Crime and Police Act 2005.[316] Whereas section 340 of POCA has the effect that predicate criminal conduct to which the money laundering offences apply can occur anywhere, the legal conduct overseas exception reverses that position to an extent. It has the effect of putting dealings with criminal property or suspicions of money laundering beyond the reach of the money laundering offences where a person knows, or believes on reasonable grounds, that the relevant criminal conduct occurred in a country or territory outside the UK and:

(1) is not unlawful under the criminal law then applying in that country or territory; and

---

314 CP 236, para 11.54.

315 In addition to those consultation responses we have received, this issue has been the subject of considerable discussion online, see for example D Hardstaff, D Jackson, *A Green Light for Business? The Rescheduling of Cannabis-Derived Medicinal Products and the UK’s Anti-Money Laundering Regime*, (December 2018); R Fortson, *Money Laundering and the Re-Scheduling of Cannabis Based Medicinal Products*, (November 2018);T Daniel, *Green Signal! Proceeds With Caution*, (November 2018).

316 Serious Organised Crime and Police Act 2005, s 102.

(2) is not of a description prescribed in an order made by the Secretary of State.[317]

11.56 In 2006, the Secretary of State made such an order for the purposes of the principal money laundering offences in sections 327-329 of POCA. The Money Laundering: Exceptions to Overseas Conduct Defence Order 2006/1070 has, in effect, narrowed the defences so that they are only available for dealings with property derived from criminal conduct which would amount to a minor offence under UK law. The order provides a defence is not available where the conduct in question, if it occurred in the UK, would be punishable by 12 months' imprisonment or more.[318]

11.57 Consultees noted these provisions create some practical difficulties. UK Finance argued they are "too narrowly drawn" and in effect "exacerbate rather than resolve" the challenges created by the breadth of the definitions in section 340. It pointed to the legalisation of cannabis in some jurisdictions as a contemporary example of the issue. With the passage of the Cannabis Act 2018, Canada became one of only a few countries to permit the licenced sale of cannabis for recreational purposes. Licenced production and sale of medicinal cannabis (subject to specific regulations) has been legal in Canada for some time. UK Finance argue:

> A large number of businesses are now operating entirely lawfully (as a matter of local law) in this sector. However… it is possible that the proceeds of such businesses could be regarded as "criminal property" for POCA purposes (and would not be covered by the 'lawful overseas conduct' defence, given the relevant sentence lengths).
>
> Where persons in the UK have dealings with property representing the proceeds of such businesses, common sense would suggest that reports about dealings with the proceeds of such lawful businesses would be of no actionable or intelligence value to law enforcement, but the legal position is less clear.[319]

11.58 Although not the only circumstance in which this issue arises, the anticipated scale of the legal cannabis industry means these difficulties are likely to arise more often and with additional complexity in this context. The primary difficulty concerns how the UK's drug regime might be compared to those elsewhere to determine when an authorised disclosure is required.[320] In addition, there are likely to be complicated questions about mixed funds in cases other than direct investments in a business that profits from (legally under local law) recreational cannabis.

11.59 We highlight these questions because it was noted by consultees as a concern that has arisen in practice. During our data analysis we also encountered a number of authorised disclosures (Defence Against Money Laundering or "DAML" SARs) on the subject. Ultimately, however, the policy questions raised by the application of the legal

---

317 Proceeds of Crime Act 2002 ss 327(2A), 328(3) and 329(2A) 330(7A)(b)(ii), 331(6A)(b)(ii), 332(7)(b)(ii).

318 Money Laundering: Exceptions to Overseas Conduct Defence Order SI 2006 No 1070, art 2(2).

319 Consultation response of UK Finance.

320 R Fortson, *Money Laundering and the Re-Scheduling of Cannabis Based Medicinal Products* (November 2018).

conduct overseas exceptions are broader than the remit of this review and extend beyond the example of legal cannabis.

SARS REFORM PROGRAMME

11.60 Our review of the law concerning suspicious activity reporting is only one part of a broader body of reform relating to anti-money laundering. The Government has also announced reforms to the SARs regime through a public-private partnership. As the Serious and Organised Crime Strategy 2018 sets out, by 2020 the Government intends to "renew and replace the existing IT system with a more sophisticated system that is better able to meet today's challenges."[321]

11.61 There are natural synergies between these two bodies of work. The reform programme will enhance the way that SARs intelligence is used by law enforcement and improve feedback loops between law enforcement and the regulated sector. Like many of the proposals in this Report, this should allow the usefulness of SARs to be maximised and for resources in the public and private sector to be targeted more effectively to have the greatest impact. The Government has also announced, in support of these measures that the NCA will increase the size of the UK Financial Intelligence Unit.

321 HM Government, *Serious and Organised Crime Strategy* (2018), p 29.

Chapter 12: Recommendations

Recommendation 1.

12.1 We recommend that the consent regime is retained.

Paragraph 1.52

Recommendation 2.

12.2 We recommend that further analysis on the quality of SARs is conducted at regular intervals in consultation with an Advisory Board.

Paragraph 2.30

Recommendation 3.

12.3 We recommend that POCA is amended to impose an obligation on the Secretary of State to issue guidance covering the operation of Part 7 of POCA so far as it relates to businesses in the regulated sector. In particular, guidance should be provided on the suspicion threshold, appropriate consent and reasonable excuse to assist the regulated sector in complying with their legal obligations.

Paragraph 3.77

Recommendation 4.

12.4 We recommend that an Advisory Board is created, the constitution of which should include relevant experts such as representatives from the reporting sector, law enforcement agencies, Government and other relevant experts. Its role should be:

(1) to assist in the production of statutory guidance;

(2) to consult on monitoring the effectiveness of the reporting regime and to make recommendations to the Secretary of State as appropriate.

Paragraph 3.79

Recommendation 5.

12.5 We recommend maintaining the "all-crimes" approach to reporting suspicious activity.

Paragraph 4.75

Recommendation 6.

12.6 We do not recommend that an amendment should be made to the Part 7 of the Proceeds of Crime Act 2002 to define suspicion.

Paragraph 5.50

Recommendation 7.

12.7 In accordance with recommendation 3, we recommend that POCA is amended to require the Secretary of State to issue guidance on suspicion.

Paragraph 5.84

Recommendation 8.

12.8 We recommend that the Secretary of State should introduce a prescribed form pursuant to section 339 of the Proceeds of Crime Act 2002 for Suspicious Activity Reports.

Paragraph 5.85

Recommendation 9.

12.9 We recommend that an Advisory Board should undertake a review as to whether to increase the threshold after further empirical research on the quality of required and authorised disclosures is completed.

Paragraph 5.117

Recommendation 10.

12.10 In accordance with recommendation 3, we recommend that statutory guidance is issued on appropriate consent within Part 7 of the Proceeds of Crime Act 2002 and arrangements with prior consent in accordance with section 21ZA of the Terrorism Act 2000.

Paragraph 6.26

Recommendation 11.

12.11 We recommend that the existing regime in respect of low value transactions should be retained and conclude that introducing a minimum financial threshold would be undesirable.

12.12 We recommend that the Advisory, inboard, in drafting statutory guidance to assist those in the regulated sector in complying with their obligations under Part 7 of POCA, should consider addressing low value transactions.

Paragraph 7.33

Recommendation 12.

12.13 We recommend that the Advisory Board should explore including appropriate reporting routes within statutory guidance to assist reporters on complying with their obligations.

Paragraph 7.48

Recommendation 13.

12.14 We recommend that reporters should be permitted to submit one SAR for multiple transactions on the same account and for multiple transactions for the same company or individual and that this may be addressed in statutory guidance assisting reporters on how to comply with their obligations under Part 7 of POCA.

Paragraph 7.79

Recommendation 14.

12.15 We recommend that banks should not have to seek consent to repay funds to a victim of fraud and that this may be addressed in statutory guidance to assist the reporter in complying with their obligations. We recommend that the obligation to lodge a required disclosure should remain.

Paragraph 7.87

Recommendation 15.

12.16 We recommend that the current approach to authorised disclosures on international criminality is maintained.

Paragraph 7.101

Recommendation 16.

12.17 We recommend amending sections 327, 328 and 329 of the Proceeds of Crime Act 2002 ("POCA") to provide that no criminal offence is committed by an individual where:

(1) they are an employee of a credit or financial institution;

(2) they suspect or know that property in their possession constitutes a person's benefit from criminal conduct;

(3) the suspicion or knowledge relates to some but not all of the property in their possession;

(4) the property which they suspect constitutes a person's benefit from criminal conduct is either:

(a) transferred by them into an account within the same credit or financial institution; or

(b) the balance is not allowed to fall below the level equal to the value of the suspected funds;

(5) they conduct any transaction in the course of business in the regulated sector (as defined in Schedule 9 of POCA); and

(6) any transaction is done with the intention of preserving criminal property.

Paragraph 8.57

Recommendation 17.

12.18 We recommend that statutory guidance is issued on the operation of the ringfencing provision proposed by recommendation 16.

Paragraph 8.58

Recommendation 18.

12.19 We recommend that POCA is amended to create a provision allowing for funds to be released by a judge sitting in the Crown Court for reasonable living expenses when an application for an extension to the moratorium period is made.

Paragraph 8.59

Recommendation 19.

12.20 We recommend that further research is conducted into the utility of targeted reporting and that a cost-benefit analysis is undertaken to ensure proportionality within the reporting regime.

Paragraph 10.76

Appendix 1: Non-exhaustive list of guidance

Type of industry	Legal Framework	Guidance published by supervisors and professional bodied	Other appropriate bodies (As per s.330(13)	Additional Guidance
Credit institutions - **Banks** - **Building societies**	Proceeds of Crime Act 2002, Part 7 FATF Recommendations. Money Laundering, Terrorist financing and Transfer of Funds (Information on the Payer) Regulations 2017.	Financial Conduct Authority guidance	Joint Money Laundering Steering Group guidance European Banking Authority guidance	NCA guidance - SARs Reporter Booklet - Incorrect use of SAR Glossary Codes - SAR Online User Guidance - SARs Regime Good Practice Frequently Asked Questions - Guidance on Submitting Better Quality SARs. - Guidance on reporting routes relating to vulnerable persons - Submitting a Suspicious Activity Report (SAR) within the regulated Sector

Financial institutions - **Currency exchange offices** - **Money Transmission businesses** - **Cheque encashment businesses**	Proceeds of Crime Act 2002, Part 7 FATF Recommendations. FAFT Money or Value Transfer Services. Money Laundering, Terrorist financing and Transfer of Funds (Information on the Payer) Regulations 2017.	HMRC guidance	JMLSG Money Service Business Guidance Department for Business Innovation & Skill guidance for foreign exchange providers	NCA guidance - SARs Reporter Booklet - Incorrect use of SAR Glossary Codes - SAR Online User Guidance - SARs Regime Good Practice Frequently Asked Questions - Guidance on Submitting Better Quality SARs. - Guidance on reporting routes relating to vulnerable persons - Submitting a Suspicious Activity Report (SAR) within the regulated Sector
Auditors, insolvency practitioners, external accountants and tax advisers.	Proceeds of Crime Act 2002, Part 7 FATF Recommendations. Money Laundering, Terrorist financing and Transfer of Funds (Information on the Payer) Regulations 2017.	Consultative Committee of Accountancy Bodies guidance.		NCA guidance - SARs Reporter Booklet - Incorrect use of SAR Glossary Codes - SAR Online User Guidance - SARs Regime Good Practice Frequently

				Asked Questions - Guidance on Submitting Better Quality SARs. - Guidance on reporting routes relating to vulnerable persons - Submitting a Suspicious Activity Report (SAR) within the regulated Sector
Independent legal professionals	Proceeds of Crime Act 2002, Part 7 FATF Recommendations. Money Laundering, Terrorist financing and Transfer of Funds (Information on the Payer) Regulations 2017.	Legal Sector Affinity Group guidance.	Solicitors Regulation Authority Chancery Bar Association Money Laundering explanatory note The Faculty Guidance for notaries	NCA guidance - SARs Reporter Booklet - Incorrect use of SAR Glossary Codes - SAR Online User Guidance - SARs Regime Good Practice Frequently Asked Questions - Guidance on Submitting Better Quality SARs. - Guidance on reporting routes relating to vulnerable persons - Submitting a Suspicious Activity Report

				(SAR) within the regulated Sector
Trust or company service providers	Proceeds of Crime Act 2002, Part 7 FATF Recommendations. Money Laundering, Terrorist financing and Transfer of Funds (Information on the Payer) Regulations 2017.	HMRC Financial Conduct Authority guidance Consultative Committee of Accountancy Bodies guidance.	Joint Money Laundering Steering Group guidance	NCA guidance - SARs Reporter Booklet - Incorrect use of SAR Glossary Codes - SAR Online User Guidance - SARs Regime Good Practice Frequently Asked Questions - Guidance on Submitting Better Quality SARs. - Guidance on reporting routes relating to vulnerable persons - Submitting a Suspicious Activity Report (SAR) within the regulated Sector
Estate agents	Proceeds of Crime Act 2002, Part 7 FATF Recommendations. Money Laundering, Terrorist financing and Transfer of Funds (Information on the Payer) Regulations 2017.	HMRC Financial Conduct Authority guidance – guidance on politically exposed persons		NCA guidance - SARs Reporter Booklet - Incorrect use of SAR Glossary Codes - SAR Online User Guidance

				- SARs Regime Good Practice Frequently Asked Questions - Guidance on Submitting Better Quality SARs. - Guidance on reporting routes relating to vulnerable persons - Submitting a Suspicious Activity Report (SAR) within the regulated Sector
High-value dealers	Proceeds of Crime Act 2002, Part 7 FATF Recommendations. Money Laundering, Terrorist financing and Transfer of Funds (Information on the Payer) Regulations 2017.	HMRC Financial Conduct Authority guidance – Part 1	Joint Money Laundering Steering Group guidance	NCA guidance - SARs Reporter Booklet - Incorrect use of SAR Glossary Codes - SAR Online User Guidance - SARs Regime Good Practice Frequently Asked Questions - Guidance on Submitting Better Quality SARs. - Guidance on reporting routes relating to vulnerable persons

				- Submitting a Suspicious Activity Report (SAR) within the regulated Sector
Casinos and gambling bodies.	Proceeds of Crime Act 2002, Part 7 FATF Recommendations. Money Laundering, Terrorist financing and Transfer of Funds (Information on the Payer) Regulations 2017.	Gambling Commission guidance	Remote Gambling Association guidance Gambling Anti-Money Laundering Group Good Practice Guidelines	NCA guidance - SARs Reporter Booklet - Incorrect use of SAR Glossary Codes - SAR Online User Guidance - SARs Regime Good Practice Frequently Asked Questions - Guidance on Submitting Better Quality SARs. - Guidance on reporting routes relating to vulnerable persons - Submitting a Suspicious Activity Report (SAR) within the regulated Sector

Appendix 2: List of those who responded to the Consultation Paper

12.20 In total we received 57 responses to the Consultation Paper from a broad cross-section of stakeholders. We drew upon the information and comment in these responses to formulate our final recommendations for reform of Part 7 of the Proceeds of Crime Act 2002.

MEMBERS OF THE REGULATED SECTOR

12.21 Shearman & Sterling

12.22 Zurich

12.23 Dickinson Minto

12.24 Linklaters

12.25 Norton Rose Fulbright

12.26 American Express

12.27 Ashurst

12.28 Deloitte

12.29 Slaughter and May

12.30 Simmons & Simmons

12.31 Freshfields Bruckhaus Derringer

12.32 HSBC

GOVERNMENT DEPARTMENTS

12.33 Home Office and HM Treasury

SUPERVISORY AUTHORITIES, OTHER APPROPRIATE BODIES AND TRADE ORGANISATIONS

12.34 Solicitors Regulation Authority

12.35 Building Societies Association

12.36 National Casino Forum

12.37 The Chartered Institute of Credit Management

12.38 Association of Accounting Technicians

12.39 Council for Licensed Conveyancers

12.40 Association of Foreign Banks

12.41 Personal Investment Management & Financial Advice Association

12.42 Association of British Insurers

12.43 Gambling Commission

12.44 The Investment Association

12.45 Investment & Life Assurance Group

12.46 The Federation of Small Businesses

12.47 The Electronic Money Association

12.48 The Law Society of England and Wales

12.49 British Private Equity and Venture Capital Association

12.50 The Law Society of Scotland

12.51 Financial Conduct Authority

12.52 UK Finance

12.53 Institute of Chartered Accountants in England and Wales

AGENCIES, POLICE AND PROSECUTING AUTHORITIES

12.54 City of London Police

12.55 Crown Prosecution Service

12.56 Metropolitan Police Service

12.57 National Crime Agency

12.58 Serious Fraud Office

INDIVIDUALS, PRACTITIONERS AND ACADEMICS

12.59 David Fitzpatrick

12.60 Andrew Kaye

12.61 Mark Holland

12.62 Alistair Craig (Baker and Mackenzie)

12.63 Arnold Rosen

12.64 Sarah Hitchins and Robin Marshall (Allen & Overy)

12.65 Professor Liz Campbell (Monash University)

12.66 Dr Sarah Kebbell (Sheffield University)

12.67 The Proceeds of Crime Lawyers Association

12.68 Professor Peter Alldridge (Queen Mary, University of London)

12.69 Anand Doobay (Boutique Law)

12.70 Tristram Hicks (former Detective Superintendent on the national Criminal Finance Board), in consultation with Ian Davidson (former Detective Superintendent with national financial investigation responsibility) and Professor Mike Levi, Cardiff University

12.71 Northumbria University's Financial Crime Compliance Research Group (Mr Christopher Mitford, Ms Susan Turner, Mr Jonathan Bainbridge, Dr Peter Sproat, and Professor Jackie Harvey)

12.72 Bobby Hussain

12.73 Anna Sulkowska

12.74 David Lonsdale (33 Bedford Row)

NON-GOVERNMENTAL ORGANISATIONS

12.75 Corruption Watch

12.76 Transparency International

12.77 City of London Law Society Committee of Corporate Crime and Corruption

Appendix 3: Statutory material

3.1 Proceeds of Crime Act 2002

327 Concealing etc

(1) A person commits an offence if he—

(a) conceals criminal property;

(b) disguises criminal property;

(c) converts criminal property;

(d) transfers criminal property;

(e) removes criminal property from England and Wales or from Scotland or from Northern Ireland.

(2) But a person does not commit such an offence if—

(a) he makes an authorised disclosure under section 338 and (if the disclosure is made

before he does the act mentioned in subsection (1)) he has the appropriate consent;

(b) he intended to make such a disclosure but had a reasonable excuse for not doing so;

(c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.

(2A) Nor does a person commit an offence under subsection (1) if—

(a) he knows, or believes on reasonable grounds, that the relevant criminal conduct occurred in a particular country or territory outside the United Kingdom, and

(b) the relevant criminal conduct—

(i) was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory, and

(ii) is not of a description prescribed by an order made by the Secretary of State.

(2B) In subsection (2A) “the relevant criminal conduct” is the criminal conduct by reference to which the property concerned is criminal property.

(2C) A deposit-taking body that does an act mentioned in paragraph (c) or (d) of subsection (1) does not commit an offence under that subsection if—

(a) it does the act in operating an account maintained with it, and

(b) the value of the criminal property concerned is less than the threshold amount determined under section 339A for the act.

(3) Concealing or disguising criminal property includes concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it.

328 Arrangements

(1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

(2) But a person does not commit such an offence if—

(a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;

(b) he intended to make such a disclosure but had a reasonable excuse for not doing so;

(c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.

(3) Nor does a person commit an offence under subsection (1) if—

(a) he knows, or believes on reasonable grounds, that the relevant criminal conduct occurred in a particular country or territory outside the United Kingdom, and

(b) the relevant criminal conduct—

(i) was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory, and

(ii) is not of a description prescribed by an order made by the Secretary of State.

(4) In subsection (3)“the relevant criminal conduct” is the criminal conduct by reference to which the property concerned is criminal property.

(5) A deposit-taking body that does an act mentioned in subsection (1) does not commit an offence under that subsection if—

(a) it does the act in operating an account maintained with it, and

(b) the arrangement facilitates the acquisition, retention, use or control of criminal property of a value that is less than the threshold amount determined under section 339A for the act.

329 Acquisition, use and possession

(1) A person commits an offence if he—

(a) acquires criminal property;

(b) uses criminal property;

(c) has possession of criminal property.

(2) But a person does not commit such an offence if—

(a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;

(b) he intended to make such a disclosure but had a reasonable excuse for not doing so;

(c) he acquired or used or had possession of the property for adequate consideration;

(d) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.

(2A) Nor does a person commit an offence under subsection (1) if—

(a) he knows, or believes on reasonable grounds, that the relevant criminal conduct occurred in a particular country or territory outside the United Kingdom, and

(b) the relevant criminal conduct—

(i) was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory, and

(ii) is not of a description prescribed by an order made by the Secretary of State.

(2B) In subsection (2A) “the relevant criminal conduct” is the criminal conduct by reference to which the property concerned is criminal property.

(2C) A deposit-taking body that does an act mentioned in subsection (1) does not commit an offence under that subsection if—

(a) it does the act in operating an account maintained with it, and

(b) the value of the criminal property concerned is less than the threshold amount determined under section 339A for the act.

(3) For the purposes of this section—

(a) a person acquires property for inadequate consideration if the value of the consideration is significantly less than the value of the property;

(b) a person uses or has possession of property for inadequate consideration if the value of the consideration is significantly less than the value of the use or possession;

(c) the provision by a person of goods or services which he knows or suspects may help another to carry out criminal conduct is not consideration.

335 Appropriate consent

(1) The appropriate consent is—

(a) the consent of a nominated officer to do a prohibited act if an authorised disclosure is made to the nominated officer;

(b) the consent of a constable to do a prohibited act if an authorised disclosure is made to a constable;

(c) the consent of a customs officer to do a prohibited act if an authorised disclosure is made to a customs officer.

(2) A person must be treated as having the appropriate consent if—

(a) he makes an authorised disclosure to a constable or a customs officer, and

(b) the condition in subsection (3) or the condition in subsection (4) is satisfied.

(3) The condition is that before the end of the notice period he does not receive notice from a constable or customs officer that consent to the doing of the act is refused.

(4) The condition is that—

(a) before the end of the notice period he receives notice from a constable or customs officer that consent to the doing of the act is refused, and

(b) the moratorium period has expired.

(5) The notice period is the period of seven working days starting with the first working day after the person makes the disclosure.

(6) The moratorium period is the period of 31 days starting with the day on which the person receives notice that consent to the doing of the act is refused.

(6A) Subsection (6) is subject to—

(a) section 336A, which enables the moratorium period to be extended by court order in accordance with that section, and

(b) section 336C, which provides for an automatic extension of the moratorium period in certain cases (period extended if it would otherwise end before determination of application or appeal proceedings etc).

(7) A working day is a day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (c. 80) in the part of the United Kingdom in which the person is when he makes the disclosure.

(8) References to a prohibited act are to an act mentioned in section 327(1), 328(1) or 329(1) (as the case may be).

(9) A nominated officer is a person nominated to receive disclosures under section 338.

(10) Subsections (1) to (4) apply for the purposes of this Part.

336 Nominated officer: consent

(1) A nominated officer must not give the appropriate consent to the doing of a prohibited act unless the condition in subsection (2), the condition in subsection (3) or the condition in subsection (4) is satisfied.

(2) The condition is that—

(a) he makes a disclosure that property is criminal property to a person authorised for the purposes of this Part by the Director General of the National Crime, and

(b) such a person gives consent to the doing of the act.

(3) The condition is that—

(a) he makes a disclosure that property is criminal property to a person authorised for the purposes of this Part by the Director General of the National Crime Agency, and

(b) before the end of the notice period he does not receive notice from such a person that consent to the doing of the act is refused.

(4) The condition is that—

(a) he makes a disclosure that property is criminal property to a person authorised for the purposes of this Part by the Director General of the National Crime Agency,

(b) before the end of the notice period he receives notice from such a person that consent to the doing of the act is refused, and

(c) the moratorium period has expired.

(5) A person who is a nominated officer commits an offence if—

(a) he gives consent to a prohibited act in circumstances where none of the conditions in subsections (2), (3) and (4) is satisfied, and

(b) he knows or suspects that the act is a prohibited act.

(6) A person guilty of such an offence is liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both, or

(b) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine or to both.

(7) The notice period is the period of seven working days starting with the first working day after the nominated officer makes the disclosure.

(8) The moratorium period is the period of 31 days starting with the day on which the nominated officer is given notice that consent to the doing of the act is refused.

(8A) Subsection (8) is subject to—

(a) section 336A, which enables the moratorium period to be extended by court order in accordance with that section, and

(b) section 336C, which provides for an automatic extension of the moratorium period in certain cases (period extended if it would otherwise end before determination of application or appeal proceedings etc).

(9) A working day is a day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (c. 80) in the part of the United Kingdom in which the nominated officer is when he gives the appropriate consent.

(10) References to a prohibited act are to an act mentioned in section 327(1), 328(1) or 329(1) (as the case may be).

(11) A nominated officer is a person nominated to receive disclosures under section 338.

338 Authorised disclosures

(1) For the purposes of this Part a disclosure is authorised if—

(a) it is a disclosure to a constable, a customs officer or a nominated officer by the alleged offender that property is criminal property, and

(b) […]

(c) the first , second or third condition set out below is satisfied.

(2) The first condition is that the disclosure is made before the alleged offender does the prohibited act.

(2A) The second condition is that—

(a) the disclosure is made while the alleged offender is doing the prohibited act,

(b) he began to do the act at a time when, because he did not then know or suspect that the property constituted or represented a person's benefit from criminal conduct, the act was not a prohibited act, and

(c) the disclosure is made on his own initiative and as soon as is practicable after he first knows or suspects that the property constitutes or represents a person's benefit from criminal conduct.

(3) The third condition is that—

(a) the disclosure is made after the alleged offender does the prohibited act,

(b) he has a reasonable excuse for his failure to make the disclosure before he did the act, and

(c) the disclosure is made on his own initiative and as soon as it is practicable for him to make it.

(4) An authorised disclosure is not to be taken to breach any restriction on the disclosure of information (however imposed).

(4A) Where an authorised disclosure is made in good faith, no civil liability arises in respect of the disclosure on the part of the person by or on whose behalf it is made.

(5) A disclosure to a nominated officer is a disclosure which—

(a) is made to a person nominated by the alleged offender's employer to receive authorised disclosures, and

(b) is made in the course of the alleged offender's employment.

(6) References to the prohibited act are to an act mentioned in section 327(1), 328(1) or 329(1) (as the case may be).

Terrorism Act 2000

21 Cooperation with police

(1) A person does not commit an offence under any of sections 15 to 18 if he is acting with the express consent of a constable.

(2) Subject to subsections (3) and (4), a person does not commit an offence under any of sections 15 to 18 by involvement in a transaction or arrangement relating to money or other property if he discloses to a constable–

(a) his suspicion or belief that the money or other property is terrorist property, and

(b) the information on which his suspicion or belief is based.

(3) Subsection (2) applies only where a person makes a disclosure–

(a) after he becomes concerned in the transaction concerned,

(b) on his own initiative, and

(c) as soon as is reasonably practicable.

(4) Subsection (2) does not apply to a person if–

(a) a constable forbids him to continue his involvement in the transaction or arrangement to which the disclosure relates, and

(b) he continues his involvement.

(5) It is a defence for a person charged with an offence under any of sections 15(2) and (3) and 16 to 18 to prove that–

(a) he intended to make a disclosure of the kind mentioned in subsections (2) and (3), and

(b) there is reasonable excuse for his failure to do so.

(6) Where–

(a) a person is in employment, and

(b) his employer has established a procedure for the making of disclosures of the same kind as may be made to a constable under subsection (2),

this section shall have effect in relation to that person as if any reference to disclosure to a constable included a reference to disclosure in accordance with the procedure.

(7) A reference in this section to a transaction or arrangement relating to money or other property includes a reference to use or possession.

21ZC Reasonable excuse for failure to disclose

(1) It is a defence for a person charged with an offence under any sections 15 to 18 to prove that-

(a) the person intended to make a disclosure of the kind mentioned in section 21ZA or 21ZB, and

(b) there is a reasonable excuse for the person's failure to do so.

CCS0419963024

978-1-5286-1191-6