GUERNSEY
FINANCIAL
SERVICES
COMMISSION

# CONSULTATION ON AMENDMENTS TO THE CRIMINAL JUSTICE LEGISLATION IN RESPECT OF MONEY LAUNDERING AND TERRORIST FINANCING

## AMENDMENTS TO THE CRIMINAL JUSTICE LEGISLATION IN RESPECT OF MONEY LAUNDERING AND TERRORIST FINANCING

In May of next year the Bailiwick's legal regime in respect of anti-money laundering ("AML") and countering terrorist financing ("CFT") will be evaluated by the International Monetary Fund ("IMF"). This evaluation will assess the Bailiwick's compliance with the recommendations of the Financial Action Task Force ("FATF"). The IMF carried out an evaluation of the other Crown Dependencies in 2008, and its reports on these jurisdictions have now been published. In many respects the AML and CFT legislative frameworks in the other Crown Dependencies mirror that of the Bailiwick, and in some of the areas where the IMF found that AML and CFT legislation in the other Crown Dependencies needed to be enhanced, the wording of the equivalent provisions in the Bailiwick's legislation is identical. Therefore, there is a strong risk that the Bailiwick's legal regime in respect of AML/CFT will be considered by the IMF to need enhancing in the same way. In addition, the Bailiwick's law enforcement agencies have identified some of these points as areas of weakness from an enforcement perspective.

A review undertaken by the Law Officers' Chambers has identified a number of amendments which should be made to the Bailiwick's legal regime to improve both compliance with international standards and the effectiveness of the Bailiwick's AML/CFT regime. They apply to the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 ("Proceeds of Crime Law"), the Drug Trafficking (Bailiwick of Guernsey) Law, 2000 ("Drug Trafficking Law"), the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002 ("Terrorism Law") and the Disclosure (Bailiwick of Guernsey) Law, 2007 ("Disclosure Law").

In addition to the amendments arising from the review, it is considered opportune to amend the provisions of the AML/CFT legislation which deal with aspects of the process for reporting suspicion. This is necessary in light of changes to the structure of the law enforcement agencies. It is also considered prudent to make an amendment to the Cash Controls (Bailiwick of Guernsey) Law, 2007 so as to bring postage stamps within its ambit, in response to concern at the risk of high value stamps being transported across the Bailiwick's borders for money laundering purposes.

The Commission is currently reviewing the legislation which provides protection against breach of confidence claims with a view to better facilitate the sharing of information between regulated businesses. Additionally, a review of the Commission's on-site powers is being undertaken to ensure consistency of approach throughout the Bailiwick's AML/CFT legislation.

Full descriptions of the substantive proposed amendments are as follows:

### Amendments to the Proceeds of Crime Law and the Drug Trafficking Law

*Section 38 of the Proceeds of Crime Law and section 57 of the Drug Trafficking Law*

These sections create offences in respect of concealing, disguising, converting or transferring the proceeds of criminal property. However, the offences will only be made out if the prosecution can prove that the acts in question were carried out for the purpose of avoiding prosecution or the making or enforcement of a confiscation order. The IMF identified this requirement as inconsistent with FATF standards, and it has also been identified by the Bailiwick's law enforcement agencies as an unnecessary impediment to successful prosecutions. Therefore, it is proposed that the offences under sections 38 and 57 be widened by removing this requirement.

As a result of the amendments identified above, it is necessary to add safeguards which currently do not apply to section 38 and 57 offences. Firstly, it is important to provide for the mental element which the prosecution must prove in all cases to be knowledge or suspicion that the property being transferred is criminal property. The Bailiwick legislation currently only requires the prosecution to prove that a third party had knowledge or reasonable grounds for suspicion of the criminal origin of the relevant funds. Secondly, it is necessary to extend the defence which is currently only available to charges under sections 39 and 40 of the Proceeds of Crime Law and sections 58 and 59 of the Drug Trafficking Law (offences of assisting another to retain the proceeds of crime or drug trafficking, and the acquisition possession or use of the proceeds of crime or drug trafficking, respectively) to section 38 and 57 offences when these are widened.

*Section 40 of the Proceeds of Crime Law and section 59 of the Drug Trafficking Law*

Under these sections it is an offence for a person to acquire, possess or use property which he knows to be the proceeds of another's criminal conduct. It is a defence to prove that the property was acquired used or possessed for adequate consideration. The IMF has identified this defence as being inconsistent with international standards and has expressed concern that it is open to abuse. It is therefore proposed that this defence should be repealed.

The IMF has also criticised the fact that the equivalent offences in Jersey and the Isle of Man do not extend to a person's acquisition, possession or use of property which is derived from his own criminal conduct, on the basis that this also falls short of international standards. Therefore, it is proposed to widen the offences under section 40 and section 59 to cover "self – launderers".

*Disclosure of Suspicion, Tipping off and Confidentiality*

The provisions of the Disclosure Law dealing with these areas will require amendment – see immediately below. In the interests of consistency it is important that similar provisions in the Proceeds of Crime Law and the Drug Trafficking Law are amended along the same lines.

## Amendments to the Disclosure Law

*Confidentiality*

The Disclosure Law expressly states that a disclosure made under its provisions does not contravene any obligation of confidentiality or similar duty. The IMF view is that this protection should be confined to disclosures made in good faith, as otherwise the legislation could be abused by persons making disclosures of suspicion that they did not actually hold in order to damage an individual or business. It is therefore proposed to remove this anomaly and restrict this protection to cases of bona fide disclosures, that is cases where disclosure is made on the basis of an honestly held suspicion or belief.

*Tipping off*

The Bailiwick's tipping off offences in the Disclosure Law are limited to disclosures which are likely to prejudice an investigation. It is a defence for a person to prove that he or she did not know or suspect that an investigation would be prejudiced. The IMF view of this type of limitation is that it makes the scope of the offences more restricted than required under the relevant FATF recommendation. That recommendation simply requires that financial businesses should be prohibited from disclosing the fact that a suspicious transaction report has been filed. The IMF pointed out in relation to the equivalent Jersey wording that a defendant could honestly but mistakenly conclude that the disclosure would not prejudice an investigation and on that basis the preventative effect of the disclosure offences could be significantly undermined. The Bailiwick provisions, like the equivalents in Jersey and the Isle of Man, are drafted to cover more than just the FATF requirement in this area so include the defence as a necessary safeguard in some contexts. It is proposed that the Disclosure Law be amended to ensure that the FATF recommendation is fully met in a way which will not lead to injustice.

*Formalities of Disclosure*

As the Law is currently worded, the disclosure obligations are met by reporting to a police officer in a prescribed form. The prescribed form currently states that a disclosure must be made to a specialist financial investigatory unit at a specified address. However, concern has been expressed by the law enforcement agencies and by the Guernsey Financial Services Commission that, on the face of the Law, a disclosure to any Police Officer would suffice and this could cause confusion for members of the public who might believe that they had discharged their obligations by making a disclosure to a Police Officer with no connection to, or experience of, financial investigation. This point has even more force in the light of ongoing changes to law enforcement structures and the establishment of a remodelled Financial Investigation Unit. Therefore, it is proposed that the Disclosure Law be amended to define the Financial Investigation Unit and identify that unit as the appropriate recipient of disclosures under the Law. Consequential amendments to the secondary legislation should also be put in place.

Some further minor amendments are necessary. Firstly, section 3 of the Law should be amended to include a reference to regulations, which occurs in sections 1 and 2 but which was omitted by oversight from section 3 when the Law was drafted. Secondly, section 15 should be amended to give the Guernsey Financial Services Commission the power to issue instructions alongside its existing powers to make rules and issue guidance. This is a tidying up exercise to ensure consistency of references throughout the Bailiwick's AML/CFT legislation.

**Terrorism Law**

*Definition of Terrorism*

The IMF identified the definition of terrorism in the relevant legislation of Jersey and the Isle of Man as falling short of international standards. This was on the basis that the definition did not include certain non-violent acts referred to in various international treaties, such as the possession of nuclear material, which are included in the definition of terrorism at Article 2 of the United Nations Convention for the Suppression of Terrorist Financing. The FATF standard requires terrorist financing to be criminalised in line with the definitions in the UN Convention. The definition of terrorism at section 1 of the Terrorism Law is similar to that of Jersey and Isle of Man. Therefore, it is proposed that this should be amended to cover certain non-violent acts in order to comply with the international standards in this area.

*Disclosure of Suspicion, Tipping off and Confidentiality*

In the interests of consistency, the amendments to the Disclosure Law dealing with these areas as outlined above should be replicated in the equivalent provisions in the Terrorism Law.

**Cash Controls Law**

The law enforcement agencies have become aware of high value stamps and associated investment opportunities being assertively marketed within the Bailiwick and elsewhere. Stamps are internationally traded in all currencies and the price obtained is largely constant wherever they are sold. With over 48 million collectors worldwide, the stamp market represents a global business of $10 billion per annum. They are obviously highly portable.

At present the Bailiwick has no measures in place in respect of the cross border movement of stamps, in contrast to the restrictions in place in respect of cash and bullion. This gap in the Bailiwick's legislation has been identified as an area of concern, given the ease with which cash or bullion could be transferred into a small number of high value stamps which could then be easily carried by a person entering or leaving the Bailiwick. It is proposed therefore that the definition of cash in the Cash Controls Law, which has previously been amended to include bullion, should be further amended to include postage stamps.

Interested parties area asked to provide comments in writing to the Policy and International Affairs Division of the Commission by the close of business on 8 January 2010. This deadline enables the Bailiwick's criminal justice legislation to be amended before the IMF assessment of the Bailiwick. Copies of all responses will be provided to the Law Officers' Chambers.