



The Law Society

Implementing the Third Money Laundering Directive: Draft Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007

The Law Society's response to the Home Office consultation

Legal policy

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Introduction

This response has been prepared by the Law Society, the representative body for over 100,000 solicitors in England and Wales. The Law Society negotiates on behalf of the profession and lobbies regulators, government and others.

The Law Society welcomes the opportunity to comment on the Draft Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007. The Law Society is committed to ensuring that anti-money laundering measures are workable and effective. In order to achieve this we believe that legislation must be clear, precise and proportionate. We feel strongly that government must resist imposing stricter provisions or 'goldplating' when implementing EU directives. We believe legal practitioners and other businesses should operate on a level playing field with their counterparts in other EU jurisdictions and we must ensure that our regulatory environment does not place UK businesses at a competitive disadvantage. We also believe that the government should exercise extreme caution when implementing any provisions which would erode even further the protection of legal professional privilege which belongs to the client and is fundamental to the lawyer-client relationship.

The Law Society has set out its consistent view on the prohibition on tipping off and its application to the legal profession in various submissions to the European Commission and HM Treasury from November 2004 and most recently in our response to the consultation on the Implementing the Third Money Laundering Directive in October 2006 (3MLD).

- (a) Law Society Submission to the European Commission – November 2004
- (b) Letter to Lucy French HM Treasury copied to Brian Penn DCA and Stephen Webb (Home Office) – 28th February 2005
- (c) Law Society Response to Consultation – October 2006

This response is in two parts. Part One will contain comments on our specific concerns and Part Two will answer the questions posed in the consultation.

Part one

1 Proposed amendments to the Proceeds of Crime Act 2002

1.1. Rationale for amending domestic legislation

The Law Society is concerned about some aspects of the proposals to amend the tipping off offence under the Proceeds of Crime Act 2002 (POCA) in order to comply with the 3MLD.

The reason given for the proposed amendments is compliance with the FATF Recommendations and the 3MLD. The Law Society notes that the FATF completed a rigorous evaluation of the UK money laundering regime in 2007 and with respect to the tipping off provisions, the UK is regarded as being compliant.¹ The FATF noted in the main part of their evaluation of the UK anti-money laundering regime that: 'The obligations to report SARs related to money laundering and terrorist financing are generally comprehensive for all DNFBPs. They are subject to the same regime and sanction as financial institutions. The measures to provide a safe harbour and to prohibit tipping off are also comprehensive.'²

With respect to the obligation to implement the 3MLD, we believe that there might be some latitude available for the government during transposition into domestic legislation. We would like to draw attention to a letter from EU Commissioner Charlie McCreevy to the former President of the Law Society, Fiona Woolf, in which he discusses the transposition of provisions relating to beneficial ownership. Commissioner McCreevy observed 'I must concede in this regard that, legally speaking, there is no requirement to make a literal copy of a Community Directive when transposing it into national law. The content of the directive can be adapted to the national legal framework, provided that the obligations it sets are respected. This is indeed the very essence of a directive.' (enc). There is a strong argument for the proposition that some of the proposals relating to the tipping off offence will have a greater impact on solicitors in the UK than their counterparts in other EU jurisdictions who have narrower reporting obligations. A literalist approach to transposition of these provisions would erode important constitutional protections that exist in our legislation. We urge the Home Office to consider carefully whether compliance with the Directive can only be achieved by removing the exemption for privileged circumstances. Our strong belief is that the UK legislation could be compliant with the privileged circumstances exemption.

The concerns about the impact of the 3MLD on our money laundering legislation were outlined by the Chairman of the Select Committee on the European Union, Lord Grenfell. In a letter to HM Treasury on 7 April 2005 'Care must be taken that the Third Directive does not challenge the protection of legal privilege and the lawyer-client relationship. These issues have caused great concern both to the legal profession and to the courts in the UK. We believe that the protection afforded to the lawyer-client relationship by the courts not only demonstrates the need for a careful and restrictive interpretation of the duties imposed on lawyers by the second money laundering directive, but also seems to argue against attempts to make further

¹ Report on FATF Mutual Evaluation of the UK: Table 1: ratings of Compliance with FATF Recommendations, Point 14, page 285

² Report on FATF Mutual Evaluation of the UK: Paragraph 1034, page 215

inroads to the lawyer-client relationship by extending the tipping off duty to lawyers.'(enc).

1.2. Law Society's historical position on the tipping off provisions

The government proposes to amend POCA in the draft Regulations and to make related amendments as regards Articles 28.3 – 28.4 of the 3rd Money Laundering Directive (3MLD). The consultation states that the government considers that there may also be a need to amend the tipping off provision in section 333 of POCA, to give full effect to Article 28.1 of the 3MLD.

The Law Society has been firmly opposed to amendment of the tipping off provisions from our first response to the European Commission's proposal for 3MLD in 2004. In several submissions and letters to the European Parliament, Commission and HM Treasury (enclosed) we reiterated the importance of ensuring that legal professional privilege remains an exception to the prohibition on disclosure. The Law Society agreed with the view expressed in the consultation document issued by HM Treasury in July 2006, which observed that 'Given the interdependency between Article 28 and Articles 22 – 23, the government's provisional view is that no further amendments to the Proceeds of Crime Act 2002 and the Terrorism Act 2000 are needed to give effect to Article 28.'³

1.3. Disclosure and consent

The consultation proposes to import the consent regime which operates under POCA into the Terrorism Act 2000 (TACT). The consultation recognises that the consent regime in POCA remains a source of concern to some parts of the regulated sector and is subject to imminent review. Our view is that the government might find it beneficial and less confusing to the regulated sector if this particular amendment could await the outcome of the general review of the consent regime under POCA.

We note that the requirements of the 3MLD have equal application in respect of money laundering and terrorist financing. However, we feel where the government believes it must amend legislation to comply with the 3MLD, it should try as far as possible where it is in the interests of certainty and ease of enforcement, to achieve consistency between the money laundering and terrorism legislation.

For example, we would query the omission of an equivalent to section 338 (2A) of POCA, which provides for disclosure while doing a prohibited act where an alleged offender does not suspect at the time he begins to do the act but comes to suspect thereafter. We would propose that this situation could be covered by new Section 21ZB (2) which provides for a reasonable excuse for failure to make a disclosure before becoming involved in a transaction.

The lack of harmony between similar provisions which have different applications in two related pieces of legislation has the potential to cause confusion for those covered by the legislation. In practice the basis for reporting to SOCA is usually knowledge, suspicion or reasonable grounds of criminal conduct. In order to comply with the different applications of the similar provisions in the two pieces of legislation (TACT and POCA), solicitors would be forced decide whether money laundering or

³ Implementing the Third Money Laundering Directive: a consultation document July 2006, pg58

terrorism offences formed the basis for their report. This distinction is not always apparent at the time of reporting.

1.4. Tipping off

Under section 333(1) of POCA a person commits an offence if he knows or suspects that a disclosure falling within sections 337 (protected disclosures) or 338 (authorised disclosures) has been made, and he makes a disclosure to another person which is likely to prejudice any investigation which might be conducted following the disclosure referred to. Such a disclosure is not, however, an offence if the person making it did not know or suspect that it was likely to be prejudicial to any such investigation. Sections 333(2) (c), (3) and (4) provide for a privileged circumstances exception.

1.5. Implications of an absolute tipping off offence

The proposed new offence in s333A imposes an absolute prohibition on disclosing information, subject to exceptions in B, C and D. Under the current POCA legislation, the tipping off offence is committed if a person knows a report under sections 337 or 338 has been made and he goes on to make a disclosure to another person which is likely to prejudice any investigation. In other words, you cannot commit the offence if you did not know that your disclosure was likely to be prejudicial to an investigation. This qualification will be swept aside by the proposals for a new s333A. Under this new strict liability offence, a person in the regulated sector will be liable if he simply discloses the fact that a report has been made (whether by himself or another person), regardless of whether it is prejudicial to any investigation. There is a separate offence under section 333A (2)(b) which applies to persons in the regulated sector who disclose an investigation has been committed, is being contemplated or is being carried.

In the Law Society's view, these proposals have shifted the goal posts by moving away from results crimes to offences with no mental element. We view this as a worrying development for this complex area of law.

1.6. Absence of privileged circumstances exception

Solicitors have a duty of full disclosure to their clients. Although ss333 and 342 of POCA prohibit disclosure of information where it would prejudice an investigation, the importance of maintaining legal advisers' professional duty of full disclosure within the limits of privileged circumstances is recognised by the creation of exceptions in the legislation. The Law Society would like to point out that all legislative predecessors to the tipping off provisions in UK law [section 53 of the Drug Trafficking Act 1994 (as amended) and section 93D of the Criminal Justice Act 1988 (as amended)], were subject to a privileged circumstances exception which has been substantially reproduced in POCA.

It is useful to consider one of the early decisions that looked at the position of lawyers under the Proceeds of Crime Act. In the case of *P v P*, the President of the Family Division rejected arguments put forward at the time by the National Criminal and Intelligence Service that it would frustrate the purpose of legislation if legal advisers were not entitled to inform their clients and others of the fact that a disclosure had

been made⁴. She held that the natural meaning of sections 333 (3) and 342 (4) was 'to enable solicitors to carry out their duties to the court and their ancillary relief proceedings without fear of committing the tipping off offences. This would involve, where necessary and appropriate, a duty to make disclosures to the client and the court. The privilege protection would only be lost where the solicitor disclosing the information himself makes a disclosure with the intention of furthering a criminal purpose.'

Under current legislation, in the course of litigation, a solicitor must be able to disclose to his/her client and to the opposing lawyers that a report has been made to the financial intelligence unit. The decision in *Bowman v Fels* has shed light on how the exception to the tipping off offence for legal advisers, might apply to transactional work. The Law Society's Practice Note⁵ gives the following advice to solicitors:

'It is considered that the judgment in [Bowman v Fels](#) further supports the statutory exemption, namely that professional legal advisers have a discretion to give advice to their clients about disclosures to SOCA, although there remains no absolute duty to do so. For example, if a client is aware that his bank has been in contact with the police, he is entitled to seek advice on his legal position. You are entitled to advise him that he may be the subject of a money laundering investigation without the risk of being prosecuted for either offence, even if such advice might prejudice the investigation. In providing such advice you should not aid, abet, counsel or procure your client to commit one of the principal money laundering offences, for instance, by also advising the client to remove his money from the bank or to take any steps to obstruct/frustrate the investigation. When you act in such a situation, you should make a full attendance note at the time, setting out in detail the advice sought and received; the reasons for it and the circumstances in which this took place. This note should be brought to the attention of your nominated officer at once.'

This ability to deploy discretion in discussing matters which are relevant to a client's case is removed by the proposal to create a new tipping off offence (Section 333D (2)(b)) which provides an exception for disclosures made 'for the purpose of dissuading the client from engaging in conduct amounting to an offence under this Part'.

One of the difficulties with this wording is that a solicitor can only disclose the fact that he knows that a SAR has been made if it is about his client and he is trying to dissuade his client from committing one of the money laundering offences. It does not cover for example, the common situation where a solicitor might need to let his client know that a SAR has been submitted because of suspicion about the opposing party's conduct. This information is usually material to a client's case and on a practical level can help a solicitor to explain delay in a transaction.

Our overall view is that this new offence constrains solicitors in giving legal advice and is therefore a limitation on access to justice for the large majority of ordinary, legitimate individuals who in the main are not seeking legal advice with a view to engaging in criminality but may need to have possession of all facts relevant to their case.

⁴ Paragraphs 59 -62, *P v P* [2003] EWCA Fam 2260

⁵ Law Society's Practice Note on Anti-Money Laundering and Counter Terrorist Financing is available on www.moneylaundering.lawsociety.org.uk

1.7. The creation of two classes of professional legal advisers

The Home Office proposes to create a new tipping off offence (Section 333A) which only applies to the regulated sector, while retaining the existing Section 333 of POCA which will apply to those not in the regulated sector. This separation, in effect creates two classes of professional legal adviser. Solicitors engaged in unregulated activities will be subject to the privileged circumstances exemption in section 333 (3) and those carrying on regulated activities will be subject to a different exception where they are permitted to dissuade a client from engaging in conduct that amounts to an offence under this Part (new Section 333D (2)).

The Law Society is concerned about the ramifications of creating two classes of legal practitioner. In practice the separation between regulated and unregulated work is not as fixed as it is for some other parts of the regulated sector who will always be undertaking regulated activities in the course of their business. Lawyers move between regulated and non-regulated sectors during the course of their work. An illustration of this is the situation where a private client lawyer may learn information during the course of a transaction (regulated activity) that causes him to make a report about a third person. He (or another lawyer in his firm) then conducts litigation (not a regulated activity) on the client's behalf in relation to the transaction, and it becomes necessary to explain to the client why SOCA have obtained a restraint order against the third party and have, for example, intervened in the litigation. The lawyer is confident that disclosure to his client will not prejudice any investigation and is necessary in order to advise him properly.

1.8. Illegal activity vs conducting amounting to an offence under this Part

The proposal to modify the wording used in the 3MLD which refers to 'dissuading a client from engaging in illegal activity' to dissuading a client from engaging in 'conduct amounting to an offence under this Part' poses some difficulties for legal practitioners. The Directive's wording is a wider defence than the draft amendment. On a strict interpretation of the draft amendment, it could mean that a solicitor would need to be sure that a client would be in danger of committing a particular offence before he could seek to dissuade him. This would impose unreasonable and onerous demands on solicitors who will not have sufficient information to know if a client is in danger of committing an offence. In any event, there are areas of uncertainty in the law and varying interpretations of offences.

1.9. The necessity of a tipping off offence for the non-regulated sector

The Law Society notes that the 3MLD does not require a tipping off offence to be applied to those who are not in the regulated sector. Therefore, the proposal to create this offence cannot be said to be in line with the requirements of 3MLD or the Financial Action Task Force Recommendations.

1.10. Exceptions to tipping off only apply to new offences

We have already stated that we believe s333D(2), will create difficulties for legal advisers and have concerns about the impact of the proposal for a separate tipping off offence for those who are regulated and those who are not.

However, in the event that these proposals were adopted, in the interests of clarity, the Law Society would suggest that some of the exceptions to the new tipping off offence (in particular s333B – D(1)) apply to the 'old' s333 offence. Due to the scope of coverage of solicitors work as laid down in the Directive, it is common for solicitors

to carry out both regulated and unregulated work, sometimes during the course of a single retainer. It would therefore be simpler to apply the exceptions in the Directive to solicitors who are carrying on unregulated work.

2 Amendments to the Terrorism Act 2000

2.1. 21C limits role of MLRO

Article 21 C of TACT requires that where there is a disclosure other than to a member of staff of the Serious Organised Crime Agency, the person to whom the disclosure is made must disclose it in full to a person so authorised as soon as practicable after it has been made. The meaning of disclosure in this context is unclear. The current wording appears to remove the discretion of nominated officers to decide whether a report should be submitted to SOCA. If this was indeed the intention of this amendment, the Law Society would strongly object to the removal of nominated officers' ability to decide which internal reports fall to be disclosed to the authorities. The essence of an MLRO is their greater knowledge, experience and ability to judge whether there is a risk of an offence being committed and to determine whether a report should be made. If this amendment were made, there would be a significant increase in reports for no or little benefit.

Part two

General questions

Do you believe they adequately reflect the government's policy intention and obligations under the directive?

All provisional indications given to us by government in our discussions about the tipping off offence in POCA were that the existing offence broadly met the aims of 3rd Directive, therefore it was unlikely that it would be changed fundamentally. We are also aware of the government's broad policy of trying to avoid 'gold-plating' during implementation of the 3rd Directive. The fact is that adding new provisions to legislation that has already been 'gold-plated' could have just this effect. For example, not only creating a new tipping off offence to apply to the regulated sector but creating one that applies to those who are not in the regulated sector. The directive does not require the latter.

Scope of the directive

Do you agree with the scope of the changes to be made by the draft regulations?

No. The Law Society is extremely concerned that some aspects of the proposed changes to the tipping off offence in POCA and TACT might pose difficulties for solicitors and others in the regulated sector. Our view is that any amendments must take into account the fact that the Proceeds of Crime Act 2002, went beyond the

requirements of the EU legislation (2nd Directive). The Law Society considers it imperative to apply a restrictive interpretation of the 3rd Money Laundering Directive at this stage, given the already onerous nature of our legislation. Disclosure and Consent

Do you agree that the government is taking appropriate action to implement Article 24 of the directive?

The Law Society suggests that changes to the consent regime in TACT should await the outcome of the review of the consent regime under POCA.

Tipping off

Do you agree, for both TACT and POCA, that we have taken appropriate action to implement Article 28 of the Directive?

No. Our view accords with the provisional view expressed by HM Treasury during the consultation on the implementation of the 3MLD in 2006. We believe that it is not necessary to make extensive changes to the existing tipping off offence. In particular, we are concerned about the omission of the statutory privilege exception because of the effect this may have on access to justice

However, we recognise that some of the exceptions (in particular s333B – D(1)) may be of benefit to the profession.

Are the requirements created by the amendments clear? Is there any further clarification needed?

We are concerned that the ability to ‘dissuade your client from engaging in conduct amounting to an offence under this Part’ is less clear than the exemption for privileged circumstances. We are also concerned about the language of this provision which does not reflect the primary professional duty of a lawyer, which is to give legal advice. This advice might have the effect of dissuading a client from engaging in certain conduct, but the role of seeking to dissuade a client from engaging in any conduct is not the main role of a professional legal adviser.

Recital 29 and Article 21

Do you agree, for both TACT and POCA, that we have taken appropriate action to implement Article 21 and recital 29 of the Directive?

No. 21C TACT and s339ZA POCA which deal with disclosures to SOCA are a cause for concern because they appear to remove the discretionary aspect of the role of the nominated officer which enables them to decide whether to forward an internal report to SOCA.

Are the requirements created by the amendments clear? Is any further clarification needed?

The Law Society would like to clarify whether the government intended s 21c and s339ZA to apply to internal reports made within institutions covered by the Directive.

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