



The Law Society

Serious Organised Crime And Police Act (2005) Amendments to Part 7 of the Proceeds of Crime Act (2002)

Professional Ethics

Last updated: June 2006

1. Sections 97 to 109 inclusive of the Serious Organised Crime and Police Act (2005) ("SOCPA") amends various parts of the Proceeds of Crime Act (2002) ("POCA"). In particular, amendments to Part 7 of POCA are contained in sections 102-107 inclusive. The amendments to Part 7 of POCA came into force on 1 July 2005, 21 February 2006, and 15 May 2006. All of these amendments can be viewed on the amended copy of Part 7 available from www.lawsociety.org.uk/documents/downloads/ML_POCAamends.pdf. The Statutory Instruments which introduced these changes are also available from www.lawsociety.org.uk/documents/downloads/ML_OrdersSOCPJune05.pdf

Section 327(2C), Section 328(5), Section 329(2C)

This section should be read in conjunction with paragraphs 2.13-2.18 of the Law Society's Money Laundering Guidance, pilot-January 2004 ("the Guidance").

2. A deposit taking body no longer commits an offence under section 327(1)(c) or section 327(1)(d), or section 328(1), or section 329(1), if:
 - (1) it does the act in operating an account maintained with it; and
 - (2) the value of the criminal property is less than the threshold amount.
3. The new section 339A sets the threshold amount at £250.00, although there is a provision under which this amount can be varied in specific cases.

NOTE:

As solicitors are not "deposit taking bodies" operating an account they maintain, this change will not affect solicitors.

4. Section 102 of SOCPA, as qualified by the Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006, introduce a limited defence relating to lawful conduct carried out overseas which would otherwise be criminal conduct under the definition in section 340(2). This defence will affect the money laundering offences in sections 327, 328 and 329 of POCA.
5. If it is known, or believed on reasonable grounds, that the relevant conduct occurred in a particular country or territory outside the United Kingdom, **and** if such conduct was not unlawful under the criminal law then applying in that country or territory (it is not sufficient that the conduct is believed to be not unlawful under the criminal law in the relevant country or territory, it must actually not be unlawful), then an offence will not be committed – subject to

an important qualification. The qualification is that such activity will remain criminal conduct for the purposes of POCA if it would attract a maximum sentence in excess of 12 months' imprisonment were it to have been carried out in the UK. However, this additional qualification does not apply if the conduct constitutes an offence under the following legislation:

- a. the Gaming Act 1968;
 - a. the Lotteries and Amusements Act 1976;
 - c. s.23 or s.25 of the Financial Services and Markets Act 2000.
6. Therefore, if the maximum penalty for the offence in the United Kingdom would be less than 12 months (if it occurred here), and if (a) it is known or believed that the conduct took place in a particular country overseas and (b) the conduct was not unlawful there, then an offence under sections 327-329 will not be committed by dealing with the property generated by the conduct. Therefore for less serious offences (i.e. where the penalty is under 12 months) there is effectively a dual criminality test – for a money laundering offence to be committed the conduct generating the criminal property must be unlawful both under the law of the overseas country and in the United Kingdom.

Section 330, 331, and 332

This section should be read in conjunction with paragraphs 2.40-2.47 of the Guidance.

7. To be guilty of an offence under section 330, 331, and 332, the following new conditions must be fulfilled:
- (1) the accused must have been able to state the identity of the money launderer; or the whereabouts of the laundered property; **or**
 - (2) he must have believed, or it must have been reasonable to expect him to believe, that the information or other matter on which his knowledge or suspicion (or reasonable grounds for knowledge or suspicion) is based, and which is in the disclosure, will or may assist in identifying the money launderer, or the whereabouts of any of the laundered property.
8. In order for a disclosure to be made, either to a Nominated Officer or to a party authorised by the Director General of the Serious Organised Crime Agency (SOCA), the discloser must be able to provide information which fulfils at least one of the categories outlined above.
9. Professional legal advisers continue to be exempt from the reporting obligations under this section if the information or other matter came to them in legally privileged circumstances, see paragraph 2.45-2.53 and chapter 4, of the Guidance. The defence of lack of training under section 330(7) (b) also remains, as does a defence of "reasonable excuse".
10. Section 102 of SOCPA, introduces a new defence to sections 330, 331, and 332. This defence applies where an individual "...*knows, or believes on reasonable grounds, that the money laundering is occurring in a particular country or territory outside the United Kingdom, and...the money laundering...is not unlawful under the criminal law applying in that country or territory*". It is not sufficient that the conduct is believed to be not unlawful under the criminal law in the relevant country or territory, it must actually not

be unlawful. In such instances, no report will be required. In these sections there is a power reserved to the Secretary of State to limit the defence further by prescribing exceptions. The Secretary of State has not as yet made any order which restricts the scope of this defence.

Section 330

This section should be read in conjunction with paragraphs 2.40-2.43 of the Guidance.

11. The addition of section 330(9A) confirms paragraph 2.55 of the Guidance that legal professional privilege is not lost when professional legal advisers, including solicitors, seek advice from Nominated Officers in their firms. Legal professional privilege remains intact whether or not the Nominated Officer is himself a professional legal adviser. The new provision allows professional legal advisers to take advice from their Nominated Officers, without a formal disclosure being made to the Nominated Officer. This amendment gives extra comfort that clients' legal professional privilege rights are protected.
12. The exception to the reporting requirement in section 330(6) has been extended to apply to other "relevant professional advisers". Relevant professional advisers are defined in section 330(14).
13. It is helpful to solicitors that new s330(7B) also confirms that those employed by, or in partnership with, a professional legal adviser can similarly rely upon the section 330(6) exemption from the reporting requirement. The exemption also applies if a professional legal adviser works with a "relevant professional adviser" on a matter.
14. The practical effect of these amendments is that the effect of extending the exemption contained in s330(6) applies to:-
 - (a) Relevant professional advisers (that is, accountants, auditors or tax advisers).
 - (b) Clerical and support staff employed by professional legal advisers or other relevant professional advisers.
15. The Law Society believes that the changes to the legislation mean that solicitors instructing accountants, auditors or tax advisers can be sure that provided any information given to these professionals is given in privileged circumstances, that is in the context of the giving or receiving of legal advice by the accountant, auditor or tax adviser or in actual or contemplated litigation, then the information will remain privileged from disclosure, for example, providing information/documents to a tax adviser which suggest a tax fraud may have taken place would be provided in privileged circumstances if the tax adviser had to advise on the legal/tax implications.

Section 337 and 338

This section should be read in conjunction with paragraph 2.49 of the Guidance. See also paragraph 5 above about the requirements for authorised and protected disclosures.

16. The definition of authorised disclosures has been extended so that an authorised disclosure can be made whilst a “prohibited act” (under section 327-329) is ongoing. The person making the disclosure in the course of doing a prohibited act will not commit a criminal offence under one or more of the money laundering sections provided that, at the time when he began to do the act he did not then know or suspect,
 - (1) that the property constituted or represented a person’s benefit from criminal conduct; and
 - (2) the authorised disclosure is made on his own initiative and as soon as is practicable after he knows or suspects that the property constitutes or represents a person’s benefit from criminal conduct.
17. Section 338(5)(b) has also been amended so that an authorised disclosure can be made to a Nominated Officer in any way, not necessarily in accordance with the procedure established by the employer for the purpose.

Section 339

18. Please note that although there have been amendments to section 339 of POCA, no order has yet been made by the Secretary of State under section 339(1) to prescribe the form and manner of disclosures.
19. If a prescribed form is introduced, further guidance will be issued.