

## A CHANGE IS COMING – THE CRIMINAL FINANCE BILL AND THE CHANGES IT WILL BRING TO THE ASSET RECOVERY LANDSCAPE.

### Introduction

Radical change to the Proceeds of Crime Act is coming. Below I summarise four of the areas of key changes to POCA 2002.

The Criminal Finance Bill (CFB) is currently going through the parliamentary process and is likely to be on the statute books by the summer. Though we have had a steady stream of amendments to the POCA, including the Serious Crime Act 2015, the CFB should be a sea change. It addresses a number of key weaknesses in the current regime, but the changes will bring controversy and could take a long period of time to settle in.

In this article, rather than examining the whole CFB, I am going to give an overview of key changes in four areas. The four developments I will cover are:

- I. Two new offence of corporate failure to prevent tax evasions;
- II. Changes to seizure powers;
- III. Unexplained wealth orders (UWO);
- IV. Changes to Proceeds of Crime Act.

In my view though UWO's have been the main focus in the media, the new offences two new offence of corporate failure to prevent tax evasions could be the measures which have the most impact on the legal landscape,

depending on how they are implemented.

Notably I have not covered the changes to Disclosure Orders, Terrorism Finance Provisions, or the SAR's regime. These can be covered in a further article if there is demand. Rather it is a focus on some of the key changes which will affect the asset recovery landscape over the next year.

### Corporate failure to prevent tax evasions

The act introduces two new offences of corporations failing to prevent the facilitation of tax evasions in relation to both UK and foreign taxes. One offence deals with domestic tax evasion, the other deals with overseas evasion. Like the Bribery Act before it, the international scope of the offence is striking. The creation of these offences was announced after the anti-corruption summit in April 2016 and represent a clear response to the Panama Papers scandal.

The offence will be committed by a corporate entity where a person acting in the capacity of an associated person facilitates another person's offence of tax evasion. The definition of an associated person is wide and not confined to employees.

It is questionable how this offence will stay in its current form



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throughout parliament. One area which might evolve is where the offence applies to an associated person facilitating another person's evasion of foreign tax. This will mean that the country is legislating to protecting other countries tax revenue. It might be intended to use the provisions against tax evasion and corruption, but it might be a step too far, or at least will have to be monitored on how the law is applied.

For corporations however, if the offence remains they will need to carry out a risk assessment which considers where the issues might arise. This would need to be very far reaching as there is a need to consider UK and other countries tax rules. As well as this a clear compliance program for all those defined as associated persons will be needed.

### **Seizure Powers**

There are two proposed changes to the cash seizure powers which are simple but will enhance the use of these powers. First, the powers will now be extended to mobile property such as watches, precious materials and art work. This means that if a suspect is stopped with an expensive watch it can be seized, as if it was cash. This legislation already exists in other POCA legislation, such as the Bermudian law.

It is likely that this simple change will expand the powers considerably. It is likely that we will see a large increase in cases, as police use this as a simple way to take property derived from criminal conduct.

The other change allows the prosecution to freeze and disgorge money held under the forfeiture powers. This is a small change

which will make the powers more efficient but in my view will not increase the amount of cases dealt with.

### **Unexplained Wealth Orders (UWO)**

UWO's have been the most trumpeted changes to POCA. They give the NCA and other enforcement authorities the power to apply to the High Court for an order which requires an individual to set out the nature and extent of their interest in an identified property. The High Court will have to be satisfied that the respondent is either a politically exposed person (PEP's) or a person who is, or has been, involved in serious crime or connected to a person who has been involved in serious crime. The property in question must exceed £100,000.

The order is of an inquisitive nature, and makes the subject



explain themselves. It will be used by enforcement agencies in conjunction with Civil Recovery Orders (CRO). It is likely that UWO's will be used to gain information which will be used as the foundation for a CRO.

Failure to comply with a UWO will trigger contempt of court proceedings and there is a new criminal offence of making a false or misleading statement in response to a UWO. The twin threats of a CRO and a prosecution for making a misleading statement in response to a UWO is likely to make a potent weapon for enforcement agencies.

The subjects of UWO's will have to be very careful in how they respond. Not taking these requests seriously will result in serious ramification for the subjects. There is also likely to be political ramifications, as PEP's will be a high priority in the target list. Though we are unlikely to see a large amount of UWO's being made, the government has estimated 20 cases a year; they are likely to be all high profile in nature.

### **Changes to POCA**

Two other significant changes to POCA are the change to allow HMRC and the FCA to carry out civil recovery work and the powers for courts to revisit a criminal benefit on a confiscation order.

The changes allowing HMRC and the FCA to use Civil Recovery Orders (CRO) are eye catching, but the question will be how much they use them. The lead on CRO's has been the NCA for some time. Though the CPS and the SFO have these powers, they have not used them widely. It will be interesting to see if HMRC and FCA use the powers regularly by establishing dedicated units.

The powers to revisit criminal benefit have long been discussed, but it is how they will work in practice which will be key. They will be used by the CPS Regional Asset Recovery Teams, who already revisit cases in which the available amount might have increased. The issue will be how you fairly show that the criminal benefit was wrongly calculated initially. There is also a risk that negotiated settlements might be reconsidered. This would certainly bring issues of fairness to the fore.

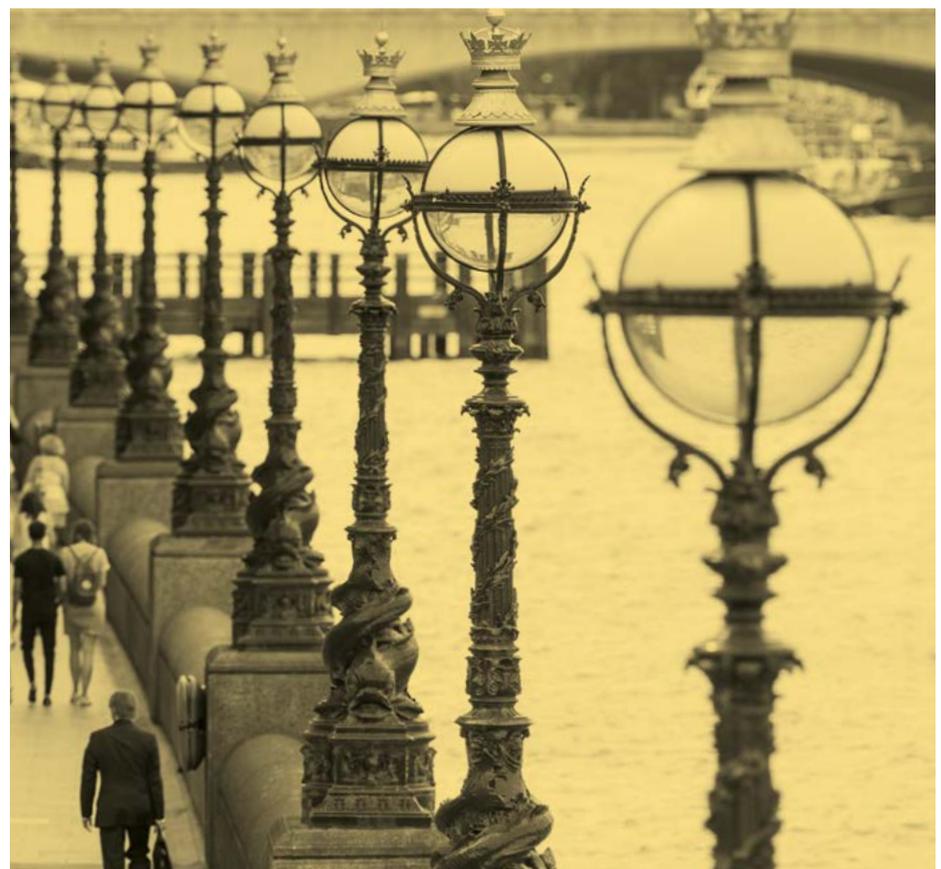
### **Conclusion**

The effect of these changes will be felt internationally as well as nationally. The unexplained wealth orders, particularly could mean government agencies going on to the front foot and investigating

more intentional corruption cases, while the corporate failure to prevent tax evasion will also have widespread international ramifications for corporate bodies.

The views set out above are based on the current contents of the bill. As it progresses through parliament, the Bill is likely to evolve. We have already seen a number of amendments offered and defeated. It will be interesting to see the finished product, which I am sure will be the inspiration for further articles and the source of on-going litigation for a number of years to come.

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Barnaby has a range of experience in fraud, international asset recovery, financial crime and professional discipline law, particularly in healthcare and sports law matters. He is regularly instructed in tax tribunal matters (in a POCA context) and civil recovery. Barnaby's international asset recovery and financial crime practice includes experience of dealing with corruption, money laundering, fraud offences (that have an international angle) and recovering the proceeds of these offences.

He has experience of all areas of the Proceeds of Crime Act both domestically and internationally. In addition to his busy practise, Barnaby writes the chapters on International Asset Recovery and Terrorism Finance for Millington and Sutherland Williams on POCA and recently completed a series of seminars and articles on changes to POCA under the Criminal Finance Act 2017. Barnaby is ranked in the Legal500 as a 'leading individual' in POCA and Asset Recovery law.