

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

COMMITTEE *FOR* HOME AFFAIRS

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

The States are asked to decide: -

Whether, after consideration of the Policy Letter dated 11th December, 2017, of the Committee *for* Home Affairs, they are of the opinion to endorse the policy approaches set out in the Policy Letter :-

1. to agree to amend the regulation making powers of the Committee under the Disclosure (Bailiwick of Guernsey) Law, 2007 and the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002 to include the power to identify the type of reports which trigger the information – gathering powers of the Financial Intelligence Service, and the power to put in place protection against claims of breach of confidence for any reports made to the Financial Intelligence Service that would not be covered by the existing breach of confidence provisions in those Laws;
2. to agree to amend the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002 to
 - a. include specific terrorist financing offences in respect of terrorist fighters and ransom payments;
 - b. replace the current definition of proscribed organisations with a definition which expressly incorporates the list of proscribed organisations under the Terrorism Act 2000 by way of ambulatory reference;
 - c. replace the current definition of cash with a definition which expressly incorporates the definition of cash in the Cash Controls (Bailiwick of Guernsey) Law, 200 by way of ambulatory reference;
3. to agree to amend the Terrorist Asset-Freezing (Bailiwick of Guernsey) Law, 2011 to extend ambulatory references to all relevant EU lists;
4. to agree to amend the definition of cash in the Cash Controls (Bailiwick of Guernsey) Law, 2007 to make provision for recent innovations in the storing and transfer of asset; and

5. to direct the preparation of such legislation as may be necessary to give effect the foregoing, including any necessary consequential and incidental provision.

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

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ISLAND OF GUERNSEY

COMMITTEE *FOR* HOME AFFAIRS

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

The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port

11th December 2017

Dear Sir

1. Executive Summary

- 1.1. The purpose of this Policy Letter is to recommend amendments to criminal justice legislation in respect of money laundering and terrorist financing.

2. Strategic Context

- 2.1. The purpose of the Committee *for* Home Affairs is “to support a high standard of living and quality of life by maintaining and promoting a safe, stable and equitable society which values public protection and justice and respects that rights, responsibilities and potential of every person.” The proposed amendments to criminal justice legislation in respect of money laundering and terrorist financing are an important part of ensuring both the Bailiwick’s international standing and responsiveness to cross-border crime, whilst maintaining the safety of the Bailiwick and its residents. The need to amend the legislation has been identified by Her Majesty’s Comptroller.

3. Advice from Her Majesty’s Comptroller

- 3.1. Her Majesty’s Comptroller has advised in the following terms:

“Introduction

The purpose of this letter is to recommend some amendments to the Bailiwick's criminal justice framework for addressing money laundering and terrorist financing.

The legislation concerned is the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002 ("Terrorism Law"), the Disclosure (Bailiwick of Guernsey) Law, 2007 ("Disclosure Law"), the Cash Controls (Bailiwick of Guernsey) Law, 2007 ("Cash Controls Law"), the Forfeiture of Money, etc. in Civil Proceedings (Bailiwick of Guernsey) Law, 2007 (Civil Forfeiture Law), and the Terrorist Asset-Freezing (Bailiwick of Guernsey) Law, 2011 ("Terrorist Asset Freezing Law").

The amendments relate to the information gathering powers in support of investigations available to the Financial Intelligence Service, a division of the Guernsey Border Agency, some technical changes to definitions in respect of terrorism and terrorist asset freezing, and the definition of cash for the purposes of cross-border declarations and the powers of seizure and confiscation. Except for the amendment to the Civil Forfeiture Law, all of these amendments may be made by Ordinance.

Information in support of investigations

Under the Disclosure Law and the Terrorism Law respectively, a person must report to the Financial Intelligence Service suspicions of money laundering or terrorist financing which that person has acquired in the course of a business. The Disclosure Law and the Terrorism Law also contain a power for the Committee for Home Affairs to make regulations enabling the Financial Intelligence Service to obtain additional information following the making of such a report. Under regulations that have been made in the exercise of this power, the Financial Intelligence Service may request additional information in relation to a report of suspicion from the person who has made it or from any third party whom it reasonably believes has relevant information.

This power to obtain additional information is not limited to domestic cases so may be, and regularly is, used to provide assistance to other jurisdictions as well as in support of domestic investigations. However, as it is triggered by a disclosure of suspicion made in the course of a business, the Financial Intelligence Service cannot invoke the power in order to obtain information in circumstances where it is made aware of the existence of relevant information within the jurisdiction by intelligence from a foreign counterpart or from another domestic competent authority such as the Guernsey Financial Services Commission or the Director of Income Tax. This applies whether the additional

information is required in support of a domestic investigation arising from that intelligence or to support an overseas investigation connected with it. To date, this has not caused any significant difficulties in practice, because if the Financial Intelligence Service gives an informal indication to a party that it needs certain information which that party holds, this has generally been sufficient to give rise to suspicion, with the result that the party in question has then made a disclosure and the information gathering powers have been engaged. The 2016 MONEYVAL report accepted that in practice no problems had been experienced but nevertheless recommended that this issue should be addressed at a technical level to avoid problems in future.

The Jersey legal framework has been amended to address the same issue in respect of the information gathering powers of the Joint Financial Crimes Unit within the Jersey police, which is Jersey's equivalent of the Financial Intelligence Service. In addition to reports of suspicion from industry triggering the relevant information gathering powers, those powers are now also triggered by other reports from Jersey financial services businesses (or businesses with a link to Jersey operating elsewhere) as well as by reports from the following parties;

- the Jersey Financial Services Commission*
- a financial intelligence unit outside Jersey,*
- the Jersey Comptroller of Taxes*
- a Jersey police officer*
- an administrative or law enforcement agency (other than the States of Jersey Police Force) concerned with combating money laundering and the financing of terrorism.*

I therefore advise that the information gathering powers of the Financial Intelligence Service should apply at least as widely as noted above. I also advise that the powers should extend to reports from other competent authorities whose functions concern financial crime such as the Alderney Gambling Control Commission and the Guernsey Registry, as well as to reports from any private organisations or individuals who do not come within any of the categories referred to above. This should apply to any kind of report received by the Financial Intelligence Service, whether or not it comes within the ambit of the reporting obligations in the Disclosure Law and the Terrorism Law. These powers should be made subject to the same tests of relevance and reasonableness as those that apply to the existing power to obtain additional information. Extending the information gathering powers in this way will help to ensure that the Bailiwick meets relevant international standards which

require Financial Intelligence Units to have access to all information necessary for the effective discharge of their functions.

The easiest way to achieve this is would be by regulations made by the Committee for Home Affairs under the Disclosure Law and the Terrorism Law, either by amending the existing regulations or by enacting new standalone regulations. However, the current regulation making power in the Disclosure Law and the Terrorism Law is not wide enough to permit this, as it only applies to circumstances where a report of suspicion has been made by a person in the course of a business. Therefore I advise that the Disclosure Law and the Terrorism Law be amended to give the Committee for Home Affairs the necessary regulation making powers, including the power to identify the type of reports which will trigger the information –gathering powers and to put in place protection against claims of breach of confidence for any reports made to the Financial Intelligence Service that would not be covered by the existing breach of confidence provisions in the Disclosure Law and the Terrorism Law.

Terrorism and terrorist financing

Following recent changes to international standards on terrorist financing to reflect the growing threat posed by terrorist organisations, the Law Officers of the Crown have begun a review of the Bailiwick’s legal framework to ensure that it continues to comply with these standards and remains robust. While the review is at an early stage, and I expect it to lead to detailed recommendations for change in due course, an issue has been identified in respect of the scope of the terrorist financing offences which I advise should be addressed now. The same is also true of an issue which has been identified in relation to the definition of designated persons for the purposes of certain financial restrictions under the Terrorist Asset Freezing Law, and an issue which has been identified in respect of the definition of proscribed organisations under the Terrorism Law which has been brought to my attention by the Policy and Resources Committee following liaison with the Committee for Home Affairs.

The first issue relates to the removal of some possible gaps in the terrorist financing offences under the Terrorism Law. International concern in respect of so-called terrorist fighters has led to a specific requirement by the Financial Action Task Force to criminalise the provision of funds to them. Where funds are provided to assist them in perpetrating a terrorist act or some other form of criminality, there is no doubt that this would be covered by ancillary offences such as aiding and abetting under the Bailiwick’s existing legal framework.

However, the position is arguably less clear cut in relation to funding for their travel costs and related expenses that cannot by themselves necessarily be linked to criminal activity. Therefore I advise that to put this beyond doubt, the Terrorism Law should be amended specifically to criminalise the provision of funds to terrorist fighters. A similar point arises in relation to insurance payments that are made to cover ransom demands issued by terrorists, which is also an issue of great concern to the international community. Where the transmission of funding to a terrorist group is clear, there is no doubt that existing offences would apply, but it is arguable that this may not be the case in some other situations, particularly where intermediaries are involved. Therefore, I advise that here too the Terrorism Law should be amended, to criminalise any insurance payments that are made in relation to a ransom demand by terrorists. These amendments also mean that the Bailiwick legal framework will remain in line with those in comparable jurisdictions such as the UK and Jersey, where similar changes have recently been made.

The second and third issues referred to above concern the use of so-called “ambulatory references” to keep lists relating to terrorism up to date. This is a provision in an enactment which specifies that any reference to another enactment should be taken as including amendments to that second enactment. The practical effect of this in the context of terrorist listing is that where, for example, a Guernsey Law gives effect to a list made under a UK Act of Parliament, any updates to that list made by the UK are automatically included within the scope of the Law without the need for any further domestic legislation or other action. This mechanism is frequently used in Bailiwick legislation to give effect to listings by external parties such as the EU or HM Treasury, particularly in areas such as financial sanctions where time is of the essence in order to prevent asset flight.

The Terrorist Asset Freezing Law applies financial restrictions to the assets of designated persons, which includes persons designated by the EU on a list provided for by article 2(3) of Council Regulation (EC) No 2580/2001 (‘the first Regulation’). The first Regulation is subject to an ambulatory reference in the Terrorist Asset Freezing Law so that any changes to the list that forms part of it have effect automatically. However, in 2016 some listings of persons subject to restrictions under article 2(3) were made in a separate EU Regulation (‘the second Regulation’) on a temporary basis. It is unusual for terrorist listings relevant to one Regulation to be made by a separate Regulation, and it arose in this case because the listing procedures under the first Regulation are different from those for other EU measures that impose financial restrictions. Because

the second Regulation was not in contemplation when the Terrorist Asset Freezing Law was drafted, the listings in it were not covered by the ambulatory reference in that Law. Therefore, if any changes had been made to the list under the second Regulation they would not have taken effect domestically. No changes were in fact made, but this situation could occur again in future and clearly it is important to remove the risk of this technicality giving rise to a potential loophole in the Bailiwick's asset freezing framework. I therefore recommend that the Terrorist Asset Freezing Law should be amended to ensure that its ambulatory reference applies to any future regulations which set out lists for the purposes of the first Regulation, not just to lists set out in the first Regulation itself.

Under the Terrorism Law, terrorist financing offences and other key measures apply to proscribed organisations, that is, organisations that are listed in Schedule 1 to the Terrorism Law (or which operate under the same name as an organisation listed in Schedule 1). The list in Schedule 1 may be amended by regulations made by the Policy and Resources Committee, subject to the proviso that such regulations may only make an addition or deletion to the list if a corresponding change has been made to the equivalent list under the UK's Terrorism Act 2000. This mechanism for updating listings is out of step with that contained in more recent Bailiwick legislation such as the Terrorist Asset Freezing Law and various sanctions Ordinances. As outlined above, the approach under this other legislation is to incorporate external listings automatically and make them subject to ambulatory references, in order to give immediate effect to international developments without the need for any intermediate action to be taken domestically. This approach has developed as standard practice in the years since the Terrorism Law was introduced, in consequence of the fact that in this period the international situation in respect of terrorism and other activity giving rise to financial restrictions has been subject to increasingly rapid changes. It is important that the Bailiwick keeps pace with these changes, both to comply with its international obligations and to prevent the abuse of its financial systems.

The Policy & Resources Committee has informed me that it wishes to align the provisions in the Terrorism Law with current practice and it is therefore content to relinquish its regulation making power, which will be redundant if provision is made for ambulatory references. I concur with that view and advise that the Terrorism Law should be amended to delete Schedule 1 and to replace the domestic regulation-making power with a provision that defines proscribed

organisations for the purposes of the Terrorism Law by way of an ambulatory reference to organisations proscribed under the Terrorism Act 2000.

Definition of cash

The untraceable nature of cash presents obvious challenges in the fight against money laundering, terrorist financing and other forms of financial crime. For this reason, there are well established measures in place under the Bailiwick's criminal justice framework to mitigate the risk of cash being used to facilitate criminal activity. These measures comprise the obligation to declare cross-border movements of cash above a certain threshold under the Cash Controls Law (and under other legislation governing the transportation of cash by mail or freight), and the power to seize and confiscate cash under the Civil Forfeiture Law and the Terrorism Law. The definition of cash for these purposes is not confined to coins and banknotes but includes instruments such as cheques and money orders.

The Bailiwick authorities have a longstanding policy of reviewing the financial crime framework to take account of changes in the risk situation, and this includes measures relating to the use of cash. For example, amendments have previously been made to extend the definition of cash for certain purposes to other forms of portable assets considered to constitute an emerging threat, namely postage stamps and bullion. In line with this policy, the risks related to cash have been subject to further consideration in the last few months. This has been done as part of specific work targeted at the risks relating to cash carried out by the Guernsey Border Agency, and it has also featured in the work being carried out to draw up an overall assessment of the money laundering and terrorist financing risks faced by the Bailiwick.

These considerations of risk have identified the use of recent innovations in methods of storing or moving assets (for example, stored value cards, cash passports, tokens or other devices that electronically store or provide access to funds and may be used to make funds available to others) as a growing money laundering and terrorist financing threat. These innovations are not currently included in the definitions of cash in any of the enactments referred to above. It is obviously important that the Bailiwick's legal framework captures these emerging threats if it is to remain effective. I therefore advise that the definition of cash for the purposes of the different enactments referred to above should be amended to capture recent innovations in the storing and transfer of assets and to ensure that the definition of cash is consistent across the Bailiwick's legal

framework. The most effective way to do this is to update the definition in the Cash Controls Law and to replace the definition of cash in the Terrorism Law with an ambulatory reference which cross refers to the updated definition in the Cash Controls Law. This would mirror the existing approach taken in the legislation governing the transporting of cash by mail or freight. There is no power to do this by Ordinance under the Civil Forfeiture Law, but I advise that this should be included as part of a future work stream involving a number of other changes that will require the Civil Forfeiture Law to be amended by primary legislation. In the interim, I also advise that the point is addressed by enacting regulations which will add the innovations referred to above to the existing definition of cash, these regulations may be made by the Committee for Home Affairs after consultation with the authorities in Alderney and Sark under section 3 of the Civil Forfeiture Law.

The above recommendations have been discussed and agreed with Her Majesty's Procureur."

4. Engagement and Consultation

- 4.1. The Guernsey Border Agency and the States of Guernsey's Director of Financial Crime Policy have been consulted and are supportive of the recommendations set out above.
- 4.2. The States of Alderney and Chief Pleas of Sark have been consulted and are content with the recommendations set out above.

5. Propositions

- 5.1. The States are asked to decide whether they are of the opinion to endorse the policy approaches set out in this Policy Letter and: -
 - 1. to agree to amend the regulation making powers of the Committee under the Disclosure (Bailiwick of Guernsey) Law, 2007 and the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002 to include the power to identify the type of reports which trigger the information – gathering powers of the Financial Intelligence Service, and the power to put in place protection against claims of breach of confidence for any reports made to the Financial Intelligence Service that would not be covered by the existing breach of confidence provisions in those Laws;
 - 2. to agree to amend the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002 to

- a. include specific terrorist financing offences in respect of terrorist fighters and ransom payments;
 - b. replace the current definition of proscribed organisations with a definition which expressly incorporates the list of proscribed organisations under the Terrorism Act 2000 by way of ambulatory reference;
 - c. replace the current definition of cash with a definition which expressly incorporates the definition of cash in the Cash Controls (Bailiwick of Guernsey) Law, 200 by way of ambulatory reference;
3. to agree to amend the Terrorist Asset-Freezing (Bailiwick of Guernsey) Law, 2011 to extend ambulatory references to all relevant EU lists ;
4. to agree to amend the definition of cash in the Cash Controls (Bailiwick of Guernsey) Law, 2007 to make provision for recent innovations in the storing and transfer of asset; and
5. to direct the preparation of such legislation as may be necessary to give effect the foregoing, including any necessary consequential and incidental provision.

6. Committee Support for Propositions

- 6.1. In accordance with Rule 4(4) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the propositions above have the unanimous support of the Committee.

Yours faithfully

M M Lowe
President

R H Graham
Vice-President

M P Leadbeater
V S Oliver
R G Prow