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Criminal Finances Bill: Committee Stage Report

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Summary

The *Criminal Finances Bill* was introduced by the Government on 13 October 2016. It contains measures aimed at improving the Government's ability to recover the proceeds of crime; prevent the financing of terrorism; and tackle money laundering and tax evasion.

Library Briefing Paper CBP 7739 *Commons Library Analysis of the Criminal Finances Bill* provides an analysis of the Bill as originally introduced.

This paper provides an overview of Committee stage amendments and debate. Clause numbers refer to the Bill as introduced (HC Bill 75).

The Bill had its Second Reading on 25 October 2016. There were six sittings of the Public Bill Committee, including two evidence sessions. A date for Report stage has not yet been set.

The amendments made in Committee were mostly of a technical nature and were uncontroversial. They included:

- Expanding the definition of "cash" in the *Proceeds of Crime Act 2002* and the *Anti-Terrorism, Crime and Security Act 2001* to including gaming vouchers and casino tokens for the purposes of civil recovery;
- The extension of new freezing, seizure and forfeiture powers to immigration officers; and
- The creation of an accreditation regime for civilian counter-terrorism financial investigators.

Factsheets, Impact Assessments and overarching documents to accompany the Bill are available on Gov.uk

1. Second Reading Stage

The Second Reading of the Bill took place on 25 October 2016. There was broad agreement over what the Bill contained; the only criticism was that it did not go far enough in certain respects:

- no specific references to Crown dependencies and overseas territories, or to Scottish limited partnerships;
- the 'corporate failure to prevent' should not be limited to tax evasion; and
- there was concern for the resources available to organisations such as the National Crime Agency and the replacement of its computer systems.

The Bill was introduced by the Minister for Security, Ben Wallace, in the absence of the Home Secretary. He outlined the severity of, and the spread and reach of, financial crime in all its forms be it fraud, scams, corruption or money laundering. The immediate challenge to his comments was that the Bill did not extend fully to overseas territories and Crown dependencies – an issue raised by Christian Aid. Responding, the Minister said:

> Yes, I absolutely agree that transparency is one of the steps along the path of tackling both corruption and money laundering. That is why, at the anti-corruption summit in May, the Prime Minister basically reaffirmed that commitment. Even before that, we had worked with the overseas territories and Crown dependencies to ensure that, hopefully by the end of this year or into next year, there will be transparency, registers, of which a considerable number will be public, and automatic information exchange between our tax authorities and those of our dependencies. In that way, we will be able to have access to information about people hiding tax from us, and our law enforcement agencies will then be able to set about tackling the matter.
>
> This Bill is part of that process. A key element of that approach will be ensuring that we work with the private sector to make the UK a more hostile place for those seeking to move, hide or use the proceeds of crime.[1]

Questioned as to why the provisions in this Bill regarding seizure and forfeiture of assets will be any more successful than existing provisions, the Minister replied:

> in the past, it has been a challenge. Crafty hoods have been very good at taking their money out of cash and putting it into a range of moveable valuables, such as fast cars, paintings, jewels, or even betting slips, which I know the Scottish Government are quite keen for us to consider. We need to broaden it out and ensure that when they are crafty, we are crafty as well.
>
> This Government have already done more than any other to tackle money laundering and terrorist financing. More assets have been recovered from criminals than ever before, with a record £255 million recovered in 2015-16, and hundreds of millions of pounds more frozen and put beyond the reach of criminals. We set up the Panama papers taskforce to ensure an effective, joined-up

[1] HC Deb 25 October 2016, c195

> approach to those revelations. The London anti-corruption summit in May built capacity with overseas partners.
>
> It is important to note that we are already doing this. In November 2015, the UK returned £28 million to Macau, which were the proceeds of corruption laundered in the UK. That is a concrete example of our giving back money to those countries that have been robbed by crooks who have used Britain to launder the money or to make the money in its jurisdiction. I want to see more of that and to see it go further.[2]

On the question of tax evasion the Minister said that:

> At present, if an individual evades tax and that is criminally facilitated by those working for a company, the individual taxpayer will have committed a crime and those individuals facilitating it could also be prosecuted, but it is very difficult and often impossible to hold the corporate entity to account. That needs to change. That is why we are creating two new offences of corporate failure to prevent the criminal facilitation of tax evasion—one in relation to UK taxes; another in relation to taxes owed to other countries.
>
> Tax evasion is wrong. It is a crime. It cannot be right that a business operating in the UK can escape criminal liability simply because a tax loss is suffered by another country rather than the UK. The new offence in relation to foreign taxes will be of particular benefit in tackling corporate facilitation of corruption in developing countries. HMRC has conducted two public consultations on these offences, including engagement with the private sector—banks, accountants and legal practices—and everyone is clear of the need to take responsibility for ensuring the highest possible standards of compliance in this area.[3]

He concluded:

> The Bill is only one part of a wider package of measures, as I have said, aimed at strengthening the Government's response to money laundering and increasing the amount of criminal assets confiscated by the state. Our wider programme includes improving the effectiveness of the supervisory regime for the regulated sector; reforming the SARs regime, including investment in systems and processes; and further increasing our international reach, working with other Governments, overseas territories, Crown dependencies and international organisations to crack down on money laundering, tax evasion and corruption. We must ensure that the Bill and those other projects have the greatest possible impact on money laundering and terrorist finance in this country and abroad.[4]

Responding for the Opposition Ms Diane Abbott focused her initial comments on money laundering "in plain sight" through the purchase of expensive London properties. She shared the Public Accounts Committee's astonishment "that of over 1 million property transactions last year only 335 were deemed suspicious. I agree with the Select Committee's conclusion that supervision of the property market has been 'totally inadequate' and has 'laid out a welcome mat for

2 HC Deb 25 October 2016, c197
3 HC Deb 25 October 2016, c199
4 HC Deb 25 October 2016, c201

launderers'".[5] Ms Abbot said that the Opposition "support the new law in principle":

> but stress that for it to be effective agencies must be given the financial and political support to take powerful and wealthy individuals to court. Furthermore, there is some concern, which we will explore in Committee, that the measures may be too widely drawn. Throughout, the sole safeguard for seizure orders is the reasonable suspicion of a police officer on their own authority. This may be too low a bar as a safeguard against the incompetent use or abuse of state powers.[6]

Although she welcomed "measures to bear down on tax evasion" she suggested that "failure to mention" the Crown dependencies represented a "major omission" in the Bill.

Sir Edward Garnier called for court applications for unexplained wealth orders to be made privately in the case of politically exposed persons where even the fact of an application for an order could destroy a person's reputation. He asked whether there would be an appeals process as part of the unexplained wealth orders process; and he called for a significant expansion of the 'failure to prevent' provisions:

> I want the Government not to limit the "failure to prevent" provisions to section 7 of the Bribery Act and those clauses in this Bill that deal with tax evasion, but to expand the regime to all offences that can sensibly be brought under it, as set out in part 2 of schedule 17 to the Crime and Courts Act 2013. The schedule covers 40 or 50 economic or financial crimes that corporations should be required to prevent. That would put a blanket across a range of criminal financial offences that are not dealt with at the moment, such as fraud, theft, false accounting, the suppression of documents, dishonestly retaining a wrongful credit, the exportation of prohibited or restricted goods and so on.[7]

The SNP spokesman, Richard Arkless, said "there is not much within the four corners of the Bill that we would dispute. Our problem is not with what is in the Bill but with what is not in the Bill". What was omitted, Mr Arkless argued, was the criminalisation of banks' "resident rogue bankers" meaning activity such as that related to benchmarks. He also wanted to extend corporate economic crime beyond tax evasion and echoed the view that it was "a missed opportunity" not to have mentioned the Crown dependencies.[8] Finally Mr Arkless raised concerns that the Bill did not include any provision to deal with concerns of the misuse of Scottish limited partnerships for illegal activity, an issue discussed at more length by Roger Mullin MP. On this occasion the Minister said, "I will meet my ministerial colleagues to discuss [this problem] … and see what we can do about it."[9] Subsequently the Department for Business, Energy and Industrial Strategy has announced a review of the law in this area.[10]

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5 HC Deb 25 October 2016, c203
6 HC Deb 25 October 2016, c204
7 HC Deb 25 October 2016, c209
8 HC Deb 25 October 2016, c213, c214
9 HC Deb 25 October 2016 c231
10 Department for Business, Energy & Industrial Strategy, *Review of limited partnership law: call for evidence*, 16 January 2016. See also, HC Deb 5 December 2016 c23.

2. Proceeds of crime

2.1 Investigations

Unexplained wealth orders

Clauses 1 to3 provide for the introduction of 'unexplained wealth orders' (UWOs) in England and Wales and Northern Ireland via amendments to the *Proceeds of Crime Act 2002* (POCA). Clauses 4 to 6 make equivalent provision for Scotland.

The Minister for Security, Ben Wallace, explained that an UWO is:

> [A] civil investigatory tool. It is a court order that requires a person to provide information that shows they obtained identified property legitimately. If the person provides information and responds to an unexplained wealth order, the enforcement authority can then decide whether to investigate further, take recovery action under the Proceeds of Crime Act 2002 or take no further action. If the person does not comply with an unexplained wealth order, either by not responding or not responding fully to the terms of the order, the property identified in the order is presumed to be recoverable under any subsequent civil recovery proceedings. [11]

Dr Rupa Huq explained that the Opposition are supportive of UWOs in principle, but believe that they could go further. An Opposition amendment was tabled seeking to ensure that UWOs could be issued for property located outside the UK. Dr Huq explained the amendment:

> The amendment would facilitate information sharing across different jurisdictions and would provide the United Kingdom with vital information regarding illicit financial activity that has taken place elsewhere across the globe.
>
> …
>
> We can glean information on behaviour abroad and share it with other states, which would act as a disincentive to come to the UK to corrupt politically exposed persons who may contaminate our economy with their illicit wealth. If criminals know that on entering the UK, there is a process and our enforcement agencies can compel them to talk about their suspect wealth or property regardless of where they have placed it, they will think twice about coming here. [12]

In response, Mr Wallace suggested that the amendment was unnecessary, because an UWO would already have this effect:

> New section 262A(2)(b) in clause 1 of the Bill provides that the person on whom the order will be served must be named, and it expressly provides that
>
> > "the person specified may include a person outside the United Kingdom".
>
> The unexplained wealth order therefore has global effect. The definition of "property" in the POCA already encompasses all property, whether it is situated at home or abroad. An

[11] PBC, 17 November 2016, c79
[12] PBC, 17 November 2016, c79

> unexplained wealth order can therefore list any property, wherever it is in the world.[13]

The amendment was consequently withdrawn.

Another Opposition amendment would have required enforcement authorities to co-operate when making applications for unexplained wealth orders. Dr Huq stated that this was prompted by evidence from agencies such as HMRC and the NCA, that

> the buck seems to be passed between many of them, and there is confusion about who the lead investigator is. The amendment would introduce a duty on all those agencies to co-operate, even before it got as far as the Crown Prosecution Service and Her Majesty's Courts and Tribunals Service.[14]

Mr Wallace agreed with the spirit of the amendment, but indicated that such co-operation already occurs between law enforcement agencies, and that UWOs would be subject to an updated POCA code of practice, which would also address co-operation. The amendment was withdrawn.

Tristram Hunt tabled a new clause[15] that would have placed a duty on agencies to prevent corruption when considering the use of UWOs.

The Minister invited him to withdraw the amendment on the basis that the existence of UWOs should in itself deter the laundering of corrupt wealth in the UK. He also suggested that singling out corruption could have the effect of impliedly deprioritising other forms of criminality at which UWOs might be aimed. Mr Hunt withdrew the amendment, but suggested that it might be revisited at Report stage.

Further amendments tabled by Tristram Hunt would have extended the use of UWOs to politically exposed persons (PEPs) in the UK and EEA. [16]

In response, the Minister explained that the application of UWOs to PEPs outside of the EEA reflects operational challenges of gathering evidence against people in countries in which the government itself may be corrupt or there may be no properly functioning government. These concerns do not exist to the same extent in EEA countries, where it is possible to co-operate with law enforcement agencies in order to obtain evidence by conventional means. The amendments were withdrawn.

A division was called on a further amendment tabled by Tristram Hunt that would have required the Secretary of State to make an annual report to Parliament about the number of UWOs made each year.[17] The Minister suggested that the amendment was not necessary, because these figures would be included in annual statistics on asset recovery, to which the Government had already committed. The amendment was defeated by nine votes to seven.[18]

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13 PBC, 17 November 2016, c79
14 Amendment 2
15 New clause 12
16 Amendments 59 and 60
17 New clause 11, PBC, 17 November 2016,c86
18 PBC, 22 November 2016, c 181

The SNP tabled an amendment to Clause 4, providing for UWOs in Scotland, which would have lowered the threshold for the imposition of a UWO from £100,000 to £50,000. Richard Arkless explained that there were three reasons for this proposal:

> We state in the explanatory notes that that would bring the threshold in line with international standards. The level in Ireland is €5,000 while the level in Australia is 100,000 Australian dollars, which equates to around £60,000.
>
> I also refer the Minister to the drastic difference in asset valuations north and south of the border, particularly in property prices. Property prices in London average at £487,000. The unexplained wealth order threshold in England and Wales is set at £100,000, which is just less than a quarter of the average property price. Property prices in Scotland are significantly lower. In my constituency the average is £120,000, while in North Ayrshire they are less than £100,000. Applying the same rationale of a percentage of the overall property price, our threshold should be substantially lower. We suggest that a reasonable level would be £50,000.
>
> I also draw the Minister's attention to the point that reducing the threshold in Scotland, where there are lower asset valuations, is a no-lose situation for the Government. The threshold in itself is not the main benchmark to trigger these unexplained wealth orders; it is the test. The test for Scotland, which we agree with, is set out in proposed new subsection 396B(3) of the Proceeds of Crime Act 2002. That test must be met in every single circumstance, whether the threshold is £5, £10 or £100,000. Even if the limit was set at £500,000, that test must be met. Given the lower asset valuations in Scotland, it is a no-lose situation to bring the threshold down.[19]

The Minister responded to the effect that UWOs would be made against a person and their respective assets, rather than an individual asset. The amendment was withdrawn on the basis of assurance that further discussion would take place on the issue.

A new clause was tabled by the Opposition relating to recovery orders, which are provided for currently by POCA and enable the recovery of property in certain civil and criminal proceedings. New Clause 20 would insert a new provision into POCA requiring property that was subject to a recovery order to be repatriated to its country of origin where the money was obtained through unlawful conduct in that country. Dr Huq explained the new clause:

> The new clause would place a duty on the Secretary of State—and the enforcement agencies vested with the power to do so—to receive recovered property under the Proceeds of Crime Act 2002, and to repatriate recovered property where a court is satisfied that the property or the value of the property was begotten by illicit means. I hinted at the issue this morning. The clause builds on former Prime Minister David Cameron's global forum for asset recovery, which came about after the anti-corruption summit of May 2016. We Opposition Members commend him for that. How he is missed. We have seen the forum begin to bear fruit, with the Government having signed a memorandum of understanding with Nigeria last September.

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19 PBC, 17 November 2016, c91-92

> There has clearly been limited progress on repatriation, but the Crown Prosecution Service's most recent asset recovery strategy laments the low take-up of mutual legal assistance requests:
>
> > "Since London is a global centre for finance, there are a large number of criminal proceeds deposited in its financial institutions. Despite this, historically the CPS has not received a high volume of incoming MLA requests for the restraint and recovery of assets."
>
> Many of the people from the charitable sector who gave evidence worry that, at the end of the process, little will go back to those communities and third-world economies.
>
> Through this new clause, we seek to help [the Minister] with that process. He has made a clear commitment to seeing repatriation go further, and to ensuring that there is more of it. The CPS has also stated that mutual legal assistance is seriously underused, and that massive sums of illicit wealth are simply not subject to such requests and are therefore not being repatriated.[20]

Responding, the Minister suggested that it was unnecessary to put such a provision into domestic law, because, as a matter of international law, the UK is already required to repay embezzled funds to the victim state by virtue of the UN convention against corruption.[21] He pointed to evidence of the UK's participation in other international initiatives aimed at repatriating assets, and invited the Opposition to agree that there was no need for further primary legislation.

The Committee divided and the new clause was defeated.

Disclosure orders

Clauses 7 and 8 extend the use of disclosure orders in money laundering investigations. Disclosure orders already exist under POCA, and require any person having relevant information to answer questions, provide information or produce documents. The Minister explained that the changes would extend the power to seek a disclosure order in money laundering investigations which were previously excluded. The new clauses maintain protection against self-incrimination, ensuring that individuals who are subject to a money laundering investigation cannot be compelled to provide information that might incriminate them.

The clauses were agreed to without debate.

2.2 Money laundering

Clauses 9 to 11 make changes to the money laundering regime.

Clause 9 extends the period in which the National Crime Agency (NCA), or other investigators, can gather evidence to determine whether further action, such as restraint of the funds, should take place following disclosures of suspicious activity. This period is called a moratorium period. This clause gives the NCA potentially more time to investigate suspicious transactions reported to them. Clause 9 would

[20] PBC, 22 November 2016, c190-191
[21] PBC, 22 November 2016, c193

allow for time extensions totalling no more than 186 days from the end of the current 31 day moratorium period.

There was broad agreement on the clause during the Committee debate. A Government amendment was approved, which the Minister said would:

> remove references to Scottish Ministers from the list of persons who may make applications to the sheriff for extending the moratorium period and for making a further information order under the Proceeds of Crime Act 2002 or the Terrorism Act 2000. In our ongoing dialogue with the Scottish Government and with law enforcement partners, we have clarified that Scottish Ministers do not require those powers. In Scotland, they would be used by the Crown Office and Procurator Fiscal Service, the National Crime Agency, the police and HMRC in respect of the moratorium period and by the procurator fiscal, the police and the NCA in respect of further information orders.[22]

Clause 9 was agreed to.

Clause 10 gives civil and criminal immunity to private, regulated companies who share information between themselves where they suspect possible money laundering activity is taking place. The clause was debated briefly on a stand part basis and agreed to.

Clause 11 broadens the investigative reach of the regulatory authorities (the UK Financial Intelligence Unit) to include all regulated firms, not just those that initiate a Suspicious Activity Report or SAR. It was agreed to, with an amendment similar to that made to Clause 9 and for similar (Scottish) reason.

2.3 Civil recovery

The Bill addressed the issue of what criminal assets could be seized if they were proven to come from illicit activity or were intended to be used for such. Clause 12 sets out 'listed assets' which are eligible to be seized. They include precious metals and stones; watches; artistic work; vouchers and postage stamps.

In Committee both the Government, by virtue of a new clause, and the SNP, by way of an amendment, sought to widen the scope of listed assets to include gaming vouchers and 'fixed-value casino tokens'. The SNP amendment was more explicit in that it referred to 'betting slips' instead of the 'tokens' of the new clause. The Minister (Ben Wallace) outlined the purpose behind the new clause, which extended the definition of 'cash', and why it differed from the SNP alternative:

> clauses 12 and 13 seek to allow those agencies to freeze, seize and seek forfeiture of illicit funds held in bank accounts and other forms of criminal property used to transfer value. It has always been the Government's intention to include gambling vouchers and casino chips in those provisions, as I made clear on Second Reading. When the Bill was introduced, we were still looking at the best way of achieving that in legislation, but I tabled new clause 10 on Monday—I apologise for doing so at the beginning of the Committee stage and not giving hon. Members more time

[22] PBC, 17 November 2016, c98

> to look at it—which will add gambling vouchers and casino chips to the definition of cash in the Proceeds of Crime Act and allow law enforcement agencies to seize those items on the same basis as they can seize cash, where their individual or aggregate value is more than £1,000.
>
> […]
>
> I turn to the hon. Gentleman's point and why we have used the term "gaming vouchers" rather than "betting slips". In discussions with law enforcement agencies, we have identified that there is a major concern about the laundering of proceeds of crime through machines that provide a guaranteed return if they are played in a certain way. Those machines produce pay-out vouchers with a value that can then be cashed in. Betting slips, such as those used for horse racing, are used for betting with no guaranteed return and, therefore, are much more risky for use in money laundering.
>
> However, once the points had been raised by the hon. Gentleman, I asked officials to examine whether there is potential to extend the Bill to ensure that we cover betting slips as well. As someone who likes the horses and knows his way round a losing—rather than a winning —bet, I understand that the ability to exploit that type of bet could potentially lead to such money laundering.[23]

The SNP withdrew their amendment and the new clause was agreed to.

Clause 12 was agreed to without debate.

Clause 13 inserts further new sections into Part 5 of POCA allowing for the freezing and forfeiture of bank and building society accounts that contain the proceeds of unlawful conduct. The clause was agreed to without debate.

2.4 Enforcement powers

Clauses 14 to 16 (together with Schedule 1) extend the enforcement powers of the Serious Fraud Office (SFO), HMRC and the Financial Conduct Authority (FCA).

In clauses 15 and 16, HMRC and the FCA are given powers of civil recovery of assets. Either organisation can initiate civil proceedings against people they suspect of illegal activity. Civil cases require a lower standard of proof than criminal cases so both bodies will have a greater chance of recovering property they believe to have been acquired illegally.

The clauses, and Schedule, were agreed to with little or no debate.

Clauses 17 to 19 deal with offences against investigating officers – either assault or obstruction offences. The Minister said that there was a 'gap in the law':

> It is a gap in the law that under POCA, investigators of certain agencies are put in situations where they could be assaulted or obstructed, and yet there are no connected offences. Section 453A of POCA has already created assault and obstruction offences for civilian accredited financial investigators operating

[23] PBC, 17 November 2016, c106

> under the Act. The clause provides that those who can execute search and seizure warrants in civil recovery investigations have a similar protection.[24]

Clauses 17 and 18 were agreed to without debate.

Clause 19 is similar in effect to the two previous clauses, but in relation to immigration officers. The Minister said that "As immigration officers now regularly use their powers under POCA—in particular since the extension of those powers in the Crime and Courts Act 2013—it is consistent for them to have a related obstruction offence."[25] It was agreed to with no debate; a minor amendment was made consequent on the passage of New Clause 9.

Clause 20 was agreed to without debate.

Clause 21 deals with the treatment of 'seized money'. Three Government amendments were agreed to. The Minister explained:

> Section 67 of POCA provides the magistrates court with a power in relation to money seized by the police or HMRC under the Police and Criminal Evidence Act 1984 that has to be paid into a bank or building society account. The court can order that money be paid to the court in satisfaction of a confiscation order. The money still belongs to the criminal. Therefore, section 67 avoids the ridiculous scenario of money being paid back into the criminal bank account when there is an outstanding confiscation order to pay. The amendments do not break new ground, but extend the established logic of section 67. When the police have possession of a criminal's money, they should be able to transfer that across in the payment of a confiscation order, rather than return it to the criminal.
>
> The amendments do three things. First, section 67 currently applies only to police and HMRC officers. The amendments effectively extend the powers to law enforcement officers who have the power to seize money, including immigration officers and SFO investigators. Secondly, the provision will now apply to money that has been seized under any power relating to a criminal investigation or proceeding, or under the investigatory powers in POCA. Instead of being limited to money seized under the Police and Criminal Evidence Act, this removes an unnecessary restriction. Many other powers of seizure should come from this provision's scope, such as those in the Immigration Act 2016.
>
> Thirdly, section 67 currently applies only to money that has been paid into a bank or building society account. That is another false limitation. For example, if money has evidential value it will not be paid into an account. It may be required at a trial as evidence that it is contaminated with a trace of drugs or explosives. It would be odd that a convicted drug trafficker with an outstanding confiscation order has his money returned by the police purely because that money was used as evidence in his trial, and not paid into his bank account.[26]

Further technical amendments were made and the clause was agreed to.

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24 PBC, 17 November 2016 c113
25 PBC, 17 November 2016 c114
26 PBC, 17 November 2016 c115

Clauses 22 to 28 were described as "minor and technical amendments that will …strengthen POCA".[27] However Charlie Elphicke asked a number of questions about them. First on how the provisions could be applied more efficiently to Scotland; why there are barriers to dealing with 'hereditable' (i.e. real) property; and how the relationship between civilian 'accredited financial investigators' and the police will work and be managed.

On the first two points the Minister said:

> My hon. Friend's first question was about why the miscellaneous provisions relate to Scotland, how they are processed and why they are different. Sections 67 and 215 of the 2002 Act provide that a magistrates court can require a bank or building society to pay a sum of up to £5,000 if it fails to comply with an order. However, there is no precedent for such a provision in Scottish law. Also, the equivalent orders in Scotland will apply to law enforcement authorities, as well as to banks and building societies. It was therefore considered more appropriate for any, hopefully rare, wilful non-compliance with an order in Scotland to be dealt with as contempt of court.
>
> Clause 24 addresses recovery orders relating to heritable property. Although it is Scottish Ministers, as the enforcement authority, who apply for a recovery order, once granted it is for the trustee for civil recovery to recover possession of any heritable property to which the recovery order applies. That is because the effect of a recovery order is to vest the property in the trustee for civil recovery. Under existing law, however, a trustee for civil recovery is unable to seek recovery of possessions directly in the Court of Session so must raise a separate action in a lower court, namely the appropriate sheriff court. That can lead to defenders rehashing arguments that were unsuccessful before the Court of Session and incurring costs for those days, which ultimately compromises the amount recovered. Such delays also permit those involved in criminality to continue occupying a property despite the Court of Session having determined that the property was obtained through unlawful conduct and should therefore be recovered.[28]

And on the last:

> On the final concern raised by my hon. Friend the Member for Dover about the governance of accredited financial investigators, the use of the power in the clause is covered by a code of practice that will be amended. That mirrors the application processes elsewhere in POCA whereby civilians authorise applications.[29]

Clause 22 was agreed to. Clauses 23 to 27 were agreed to without debate. Clause 28 was agreed to with a minor amendment.

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27 PBC, 17 November 2016 c117
28 PBC, 17 November 2016 c120
29 PBC, 17 November 2016 c122

3. Terrorist property

Clauses 29 to 35 make provision for dealing with terrorist property. The Minister explained that the clauses largely reflect the provisions relating to financial crime, but have been adapted where necessary to respond to the differing nature of the threat.

The Government tabled a number of amendments to these clauses and to Schedule 2 relating to counter-terrorism financial investigators. The Minister explained that

> Clause 34 of the Bill, which we will reach consideration of in due course, will allow civilian members of police staff, who will be referred to as counter-terrorism financial investigators, likewise to exercise certain investigatory powers in connection with terrorist investigations. The powers include applying to a court for a production order in relation to terrorist property, a financial information order or an account monitoring order. Clause 34 will also amend schedule 1 to the Anti-terrorism, Crime and Security Act 2001 to allow financial investigators to seize terrorist cash. Clause 32 will enable them to seize certain personal movable items.[30]

This role would be equivalent to that fulfilled by civilian financial investigators accredited to the National Crime Agency under the Proceeds of Crime Act 2002, in investigations into money laundering and other serious crime. The amendments would establish a separate accreditation process for counter-terrorism financial investigators, as Mr Wallace explained:

> The amendments will put in place bespoke arrangements for training, accrediting and monitoring counter-terrorism financial investigators. The Metropolitan Police Service will be responsible for training and will be required to provide a system of accreditation for civilians who wish to become counter-terrorism financial investigators. That will include monitoring performance and withdrawing accreditation from any person who contravenes or fails to comply with any condition of their accreditation.[31]

The amendments were agreed without debate.

Another Government amendment increased the maximum sentence for making false or misleading statements in response to a disclosure order from 6 to 12 months following a summary conviction in Scotland. This resulted from advice from the Scottish Government on the sentencing powers of the summary courts in Scotland and was thus supported by the SNP.

Further Government amendments were tabled to Clauses 32 and 33 and Schedules 3 and 4.[32]

These provisions are equivalent to Clauses 12 and 13 on proceeds of crime, covering the seizure and forfeiture of moveable personal items

30 PBC 17 November 2016, c123-124
31 PBC 17 November 2016, c123-124
32 PBC 22 November 2016, c127-130

used for funding terrorism; and the freezing and forfeiture of money held in bank accounts.

The Government amendments would mean that law enforcement agencies could seek the forfeiture of terrorist cash without seeking a court order, where it is uncontested. An equivalent power already exists in POCA.

Further amendments were described as making technical and consequential changes to complement these provisions.

The amendments were agreed to without debate.

4. Corporate offence of failure to prevent facilitation of tax evasion

4.1 Summary

Part 3 of the Bill – Clauses 36 to 44 – provides for the new corporate offence of failure to prevent facilitation of tax evasion. This part of the Bill was debated, and agreed, with cross-party support. Two minor Government amendments, correcting drafting errors, were also agreed.[33] The Committee went on to debate several new clauses relevant to Part 3 of the Bill that had been tabled by the Labour Party, and by the SNP, but none of these were put to the vote.

During Second Reading many Members raised concerns about the scale of tax evasion facilitated by financial institutions based in the Crown dependencies (CDs) and overseas territories (OTs), and argued that these jurisdictions should follow the UK's example, and each have a publicly-available register of 'beneficial ownership' – that is, a register of all persons who can influence or control companies, trusts or foundations based in that territory.

In Committee there was an extended debate as to whether the UK was doing enough in this area, and whether the Bill should include a statutory timetable for the Government to achieve this, possibly by taking unilateral action against individual territories. The Government's position has been that it has been working closely with the CDs and OTs to improve standards of corporate transparency, and by June 2017 the UK's law enforcement and tax authorities will have full and direct access to this information.[34] Given this progress, Ministers have argued that unilateral action on the UK's part would be inappropriate.

In Committee, the Minister for Security, Ben Wallace, said the following:

> I understand where the Opposition are coming from and appreciate the desire for these jurisdictions to have publicly accessible registers of beneficial ownership information—David Cameron made this an ambition in 2015 … The best thing, in my view, would be to say, "Yes, we know what David Cameron's intention was in 2015 when he made that statement; yes, the United Kingdom pretty much leads the world in making our register public for the whole of the United Kingdom", but also to say, "Let us revisit this once we get the Bill through, once we see whether our law enforcement agencies can use that access to prosecute, deter, change culture and show the way forward."
>
> If that is not happening, of course we can have these debates again, but we should recognise that a lot of those countries have moved without our imposing our will on them, and we are hopefully giving access to our National Crime Agency and

33 PBC 22 November 2016 cc135-152
34 See, for example, PQ43422, 2 August 2016

> HMRC—all the things that we struggled to get for very many years.[35]

4.2 Second Reading debate

Opening the debate, the Minister, Ben Wallace, set out the case for the new corporate offence as follows:

> Part 3 will deliver on the Conservative manifesto commitment to make "it a crime if companies fail to put in place measures to stop economic crime, such as tax evasion".
>
> At present, if an individual evades tax and that is criminally facilitated by those working for a company, the individual taxpayer will have committed a crime and those individuals facilitating it could also be prosecuted, but it is very difficult and often impossible to hold the corporate entity to account. That needs to change. That is why we are creating two new offences of corporate failure to prevent the criminal facilitation of tax evasion—one in relation to UK taxes; another in relation to taxes owed to other countries ...
>
> The new offence in relation to foreign taxes will be of particular benefit in tackling corporate facilitation of corruption in developing countries. HMRC has conducted two public consultations on these offences, including engagement with the private sector—banks, accountants and legal practices—and everyone is clear of the need to take responsibility for ensuring the highest possible standards of compliance in this area ...
>
> The Government are committed to reducing the regulatory burden on business, which can make it harder for companies to focus on real risks. The measures in the Bill were developed in close partnership with law enforcement agencies and the regulated sector, including major financial institutions, as well as other key representatives.[36]

The Minister was asked by Dame Margaret Hodge why the Bill was not being used "to ensure that the overseas territories and Crown dependencies … publish publicly available registers of beneficial ownership." Mr Wallace replied:

> I absolutely agree that transparency is one of the steps along the path of tackling both corruption and money laundering. That is why, at the anti-corruption summit in May, the Prime Minister basically reaffirmed that commitment. Even before that, we had worked with the overseas territories and Crown dependencies to ensure that, hopefully by the end of this year or into next year, there will be transparency, registers, of which a considerable number will be public, and automatic information exchange between our tax authorities and those of our dependencies. In that way, we will be able to have access to information about people hiding tax from us, and our law enforcement agencies will then be able to set about tackling the matter.[37]

In her own speech later in the debate Dame Margaret asked if the Minister would set a timeline "at the end of which, if matters cannot be resolved in a collective and collaborative way with the overseas territories and the Crown dependencies, the Government will use their

35 PBC 22 November 2016 c198, c199
36 HC Deb 25 October 2016 cc199-200
37 HC Deb 25 October 2016 cc195

power. That would go a long way to settling some of our concerns today."[38]

In her speech Shadow Home Secretary Diane Abbott said that the Opposition welcomed the proposed new corporate offence, but went on to argue that it was a "startling oversight" to have no provision relating to the CDs and OTs:

> The Opposition insist that if this Government are serious about dealing with tax evasion, they must ensure that the overseas territories and Crown dependencies not only set up beneficial ownership registers, but make them publicly available.[39]

Closing the debate Dr Rupa Huq reiterated the Opposition's support for the new corporate offence, and its view that the Bill should have included provision to improve corporate transparency in the CDs and OTs:

> Many Members on both sides of the House have flagged up the fact that action must be taken on our overseas territories and Crown dependencies, and we argue that they need public registers of beneficial ownership. The British Virgin Islands and the Cayman Islands are among the worst offenders, and we administer them. We assert that this is the most gaping hole of all. A trick has been missed. Applying transparency to those opaque corporate structures is a key part of the solution, but the Bill does not go there.[40]

In his speech Richard Arkless said that the SNP supported this part of the Bill, though he also suggested the Bill was a "huge missed opportunity" because it did not apply more widely to financial crime. Mr Arkless also asked if the Minister would consider "whether there is any way in which we could compel the overseas territories and Crown dependencies to publish registers of beneficial ownership, which would provide much needed transparency in what is turning out to be a bottleneck in the fight against tax evasion."[41]

Concluding the debate the Minister for Policing and the Fire Service, Brandon Lewis, responded to these concerns by saying the following:

> In response to comments about the overseas territories and Crown dependencies, I am pleased to announce that the British Virgin Islands and the Turks and Caicos Islands have just—conveniently, as I am here at the Dispatch Box this afternoon—committed themselves to the initiative on beneficial ownership, which many hon. Members have spoken about today. All the overseas territories have now agreed to have central registries, which will be accessible to law enforcement authorities. We will continue to push for all countries to introduce public registers.[42]

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38 HC Deb 25 October 2016 c222
39 HC Deb 25 October 2016 c205
40 HC Deb 25 October 2016 c238
41 HC Deb 25 October 2016 c213, c215
42 HC Deb 25 October 2016 c242

4.3 Committee stage

Examination of witnesses

The Committee took evidence from a variety of witnesses in its first two sittings, and the new corporate offence was discussed a number of times. Simon York, director of HMRC's fraud investigation service, gave evidence with Nick Price from the Crown Prosecution Service and Mark Thompson from the Serious Fraud Office. Dr Rupa Huq asked Mr York about the scale of tax evasion and his view of the new offence:

> **Simon York:** We estimate the tax gap in relation to tax evasion as a whole as around £5 billion a year. That includes a range of different types of evasion, such as what is colloquially known as offshore evasion ... Corporates can be significant facilitators of tax evasion, as we have seen on a number of occasions. There is a real public and, I think, political appetite to tackle it.
>
> We find a difficulty in attributing criminal liability to these sorts of corporate entities. We think this is an important proposal in improving corporate behaviour in this area—deterring bad behaviour and improving good behaviour. This is by no means the only provision or capability that we need to tackle tax evasion, which is a very broad issue, but it is an important one in tackling a very specific area.[43]

Dr Huq went on to ask if Mr York expected a significant number of prosecutions for the new offence, once it was put on the statute book:

> **Dr Huq :** [The new offence] is modelled on section 7 of the Bribery Act 2010. Am I right in thinking that so far under that Act there have … a very low level of prosecutions … Do you foresee there being a low or high level of prosecutions when the Bill is enacted?
>
> **Simon York:** A good result would be that corporates change their behaviour and that there is less facilitation of tax evasion, and consequently, less tax evasion. We certainly have the tools, through a combination of this proposed legislation and our existing capability—HMRC is a very competent and successful law enforcement agency and criminally investigates many people and convicts them successfully every year, so I think we have that capability. Do I think we will have a lot of prosecutions in this area? I hope not, but I think we will be looking for a number to act as part of this deterrent to show that the legislation has teeth and to show that we mean business.[44]

Both Mr Price (CPS) and Mr Thompson (SFO) addressed this question:

> **Nick Price:** I would just make a quick general observation: all prosecutions are difficult and we operate an adversarial system, which of course we are well used to. This is a really useful piece of potential legislation, with some really useful elements to it. Are we going to see a phalanx of extra prosecutions coming over the horizon? Perhaps not, but there are some really useful aspects of the Bill that we will no doubt deal with shortly.
>
> **Mark Thompson:** In my experience, it is not inherently a numbers game, in terms of numbers of prosecutions. We have found that the section 7 offence of the Bribery Act is a useful tool

43 PBC 15 November 2016 c19
44 PBC 15 November 2016 c20

> for us as prosecutors. It focuses the corporate mind and there has been a large response from the private sector in complying with that. I would be surprised if the tax evasion offence did not have the same implications.[45]

Peter Dowd asked Mr York whether there was a case for extending the new offence "to dissuade companies from facilitating quite aggressive tax avoidance":

> **Simon York:** At the moment this is a criminal offence, and tax avoidance is not a crime, which is why that would be difficult. We are currently consulting on additional legislation that would penalise the enablers of tax avoidance, so we are seeking legislation in that area too.[46]

Mr Dowd also asked about the suggestion made by some that prosecutions in this area were likely to be for 'relatively small cases":

> **Peter Dowd :** The Chartered Institute of Taxation has expressed some concern that the new corporate offence of failure to prevent the criminal facilitation of tax evasion may lead to a string of prosecutions in relatively small cases where current civil penalties already provide enough punishment. What is your view about that?
>
> **Simon York:** That is probably unfounded. Our approach here, like it is with all our criminal investigation work, would be to focus on where the behaviour is at its worst and most fraudulent, and therefore on where it is having the most impact, particularly where a corporate is having a very wide impact on a wide group of taxpayers and where the amounts involved are large. That is typically our approach. We would be equally selective with this power.[47]

The potential impact of the new offence on corporate behaviour was discussed with Professor Richard Murphy (director of Tax Research UK) and Alex Cobham (from the Tax Justice Network). Mr Cobham argued that one critical factor would be how HMRC reported its performance:

> There is one thing that I think is really important for the Bill. On the technical side we can have concerns about how it is framed, and on the enforcement side we might have concerns whether the resources are actually there to make it happen, but what is perhaps missing from that discussion is whether or not we have consistent reporting about the performance under this measure.
>
> If, year on year, we hear HMRC saying, "This is our estimate of the tax gap in this area. This is the amount of evasion we have stopped and the number of prosecutions, the revenue at risk in that area," then, "This is the number of those cases where we have also gone after the facilitator, and so this is the proportion where we are consistently tracking this all the way through," what you do, apart from giving HMRC a useful metric to demonstrate progress … it also shows the public this is not just one more piece of tax law that may be more form than substance.[48]

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45 PBC 15 November 2016 c20
46 PBC 15 November 2016 c2
47 PBC 15 November 2016 c24
48 PBC 15 November 2016 c29

Dame Margaret Hodge, who gave evidence during the Committee's second sitting, made a similar argument: "if we could at least have a report to Parliament showing how the failure to prevent tax evasion power is actually being used by the enforcement authorities, I think that would really improve the Bill."[49] For his part Professor Murphy argued that the new offence was unlikely to have a big impact:

> The number of prosecutions is likely to be very low indeed. This is a strict liability offence—tax evasion triggers the potential liability. The defence provided that is provided is that there are systems in place. That means that the company—the corporate entity that permits the action—has a defence available to it. That defence will largely be available only to the biggest companies. They will have systems that can be easily documented.[50]

Antoinette Sandbach asked Professor Murphy if the potential risk to a company's reputation would not be a significant incentive for large companies:

> **Professor Murphy:** I have spent quite a lot of time in the last year or two talking to large firms of accountants … and large companies about their response to the sea change in public attitude towards tax, and I am reasonably convinced that they have noticed that there is reputational risk to them, and that they are changing their behaviour as a result. To that extent, I feel that this legislation is a little too late, in the sense that they are trying to steer clear of some of these activities as fast as they can. Again, that is a reason why I think the impact will be on smaller businesses.[51]

The Committee also took evidence from Anthony Browne, chief executive of the British Bankers Association, and Amy Bell, chair of the money laundering taskforce at the Law Society. Dr Huq asked both of them if they thought the new offence was necessary:

> **Anthony Browne:** We think that it would be better to use regulation to enforce this, rather than creating a criminal offence for banks as such, although there are also already criminal offences for individuals.
>
> **Amy Bell:** Our view is that there is already a predicate offence in relation to this, but our tax law committee has been involved, and they are generally happy with the drafting.[52]

Consideration of clauses

Clauses 36 to 44 were debated, and agreed, with cross-party support over the Committee's fifth sitting.

Clause 36 defines a number of essential terms to establish the scope of the new corporate offence. Introducing the clause the Minister, Ben Wallace, noted that the offence applied to "bodies incorporated and partnerships":

> The new offences can therefore be committed by companies, whether established to make a profit or for charitable purposes;

49 PBC 15 November 2016 c63
50 PBC 15 November 2016 c29
51 PBC 15 November 2016 c32
52 PBC 15 November 2015 c38

> partnerships; and similar entities established under foreign law. Indeed, the not-for-profit sector publically welcomed the offence applying to its sector, recognising that charities can be misused to facilitate tax evasion. Individuals involved in facilitating tax evasion will of course continue to face prosecution under existing tax evasion offences.[53]

The Minister also underlined that the clause "defines broadly the persons who could attract liability for a relevant body":

> Those include an employee, an agent and any other person who provides services for, or on behalf of, the relevant body. That mirrors the similar offence of corporate failure to prevent bribery in the Bribery Act 2010. That is important because we have seen in the past that corporations structure their affairs to try to insulate themselves from liability by deliberately contracting out the most risky services, typically to persons based in the most secretive jurisdictions. The definition of associated persons in the clause addresses that and closes that potential loophole.[54]

In response Dr Rupa Huq said that the Opposition supported the clause, but went on to ask the Minister if he thought there would be a larger number of successful prosecutions for this offence compared with the number arising from the *Bribery Act 2010*:

> **Mr Wallace :** In response to what has been said by the Opposition spokeswoman, it is important to note that the Bribery Act has two effects: prosecution, but also change of behaviour. If one goes out to many parts of the world where British companies are engaged in export or trying to win orders, it is clear that the message has gone out loud and clear not to bribe them and not to be involved in bribery.[55]

Clauses 37 and 38 would establish the corporate offence to prevent facilitation of UK tax evasion offences and foreign tax evasion offences, respectively. The wording of both clauses was amended to correct an omission – each initially referred to the liability of a company to pay a fine on summary conviction, whether in England, Scotland or Northern Ireland, but had omitted mention of Wales. Introducing **Clause 37** the Minister set out the scope of the new UK offence:

> The existing criminal law already makes it an offence to evade tax. When an individual taxpayer evades their tax, they can be prosecuted. When a professional such as a banker or an accountant is complicit in the fraud, that individual can also be prosecuted. However, for the relevant criminal acts to be attributed to the corporation itself, the existing law on corporate criminal liability requires the most senior members of a corporation to be involved in and aware of those acts. At present, they can simply say, "I did not commit the crime" and blame the individual employee for the offence. That current approach to corporate criminal liability simply does not reflect the decentralised way in which decisions are made in large multinational organisations, and it can leave them beyond the reach of the criminal law.
>
> The new offence will change that. By moving beyond seeking to attribute specific criminal acts to the relevant body, and by

53 PBC 22 November 2016 c136
54 PBC 22 November 2016 c136
55 PBC 22 November 2016 c136

> focusing instead on its failure to prevent those who act in its name from breaking the criminal law, we can better ensure that relevant bodies take reasonable steps to ensure that crimes are not committed when services are being provided on their behalf.[56]

In the context of wider concerns about tax evasion in CDs and OTs, Mr Wallace underlined that the offence would apply to any case where someone had facilitated the evasion of UK tax, including people based in these territories:

> If someone in a Crown dependency or overseas territory—I know that hon. Members are interested in those—is advising UK citizens to evade UK tax, it does not matter that they have no nexus here; they are criminally at risk. As regards trying to change the behaviour of overseas territories or tax havens, this offence will allow us to prosecute people anywhere in the world who are encouraging people to evade UK tax. That is a major and significant step.[57]

Dr Huq and Richard Arkless expressed the support of the Labour Party and the SNP respectively, and the clause was agreed to without division.

The position of CDs and OTs was debated at some length when the Committee considered Clause 38. On this occasion the Minister set out the scope of the new offence …

> Clause 38 creates a new offence that will be committed by relevant bodies that fail to prevent persons associated with them from criminally facilitating evasion of taxes owed to a country other than the United Kingdom … The measure will ensure that the UK is not a safe harbour for professional facilitators or the businesses for which they work. The new overseas tax evasion offence can be committed by relevant bodies that are formed or incorporated in the UK, or which are carrying out a business activity in the UK, or where the criminal act of facilitation occurs within the UK.
>
> There is a necessarily broad scope for the new offence. It holds corporations that carry out a business in the UK, or the representatives of which are acting in the UK, to operate to the same high standards as UK businesses ...
>
> The offence requires a dual criminality. Essentially, that means that, for a relevant body to be liable, the criminal law of the country suffering the tax loss must recognise tax evasion and the facilitating of tax evasion as criminal offences in their jurisdiction, and the laws must be broadly equivalent to those in the UK.
>
> The offence does not require relevant bodies to have a thorough understanding of the tax laws in each jurisdiction, but rather to ask itself the question, "If we were providing these services to a UK taxpayer client, would this be legal?" If the answer is yes, there is no question of criminal liability under the new overseas fraud offence.[58]

… and when, precisely, the Government anticipated a prosecution being undertaken:

> The offence is not about the UK policing the world's tax affairs. We envisage that a prosecution for the overseas tax evasion

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56 PBC 22 November 2016 cc137-138
57 PBC 22 November 2016 c139
58 PBC 22 November 2016 c173

> offence will take place only where there would otherwise be a failure of justice—for example, where the country suffering the tax loss was unwilling or unable to take action because of an inability to handle a complex international fraud trial, or was unable to investigate and prosecute because of corruption concerns.[59]

As Dr Huq explained, the Opposition had tabled a number of 'probing amendments' to extend the scope of this offence to these territories: "this legislation rightly seeks to hold directors of companies in the UK accountable for their business's actions, but why does it not also apply to the UK's overseas territories?"[60] In response the Minister argued that this would "criminalise under the UK law a situation where there is no link to the UK", and that it would be inappropriate to force these territories to change their law in this fashion:

> The amendment seeks to force Crown dependencies and overseas territories to change their law …That is a major step to take. As I said earlier, we have come a long way—90% of the way—with the establishment next year of automatic sharing of data via beneficial registers of ownership .
>
> We should also remember that because of the City of London, there will not be many financial organisations that do not have a nexus in this country. I am not going to finger a particular country, but take the bank of a fictitious country with tax haven status; it would not be much of a bank if it did not have an operation in the UK. If that bank was encouraging people to evade tax, even if they were not British citizens or were not evading UK tax, we could deal with it, because it would have a branch here. If those concerned were convicted, they would most likely lose their banking licence. A bank that cannot trade in one of the major financial institutions of the United Kingdom is effectively a dud. In a sense, we could take quite considerable action. The fundamental difference is that we think there has to be a link. The alternative is to impose our will directly on these Crown dependencies and overseas territories.[61]

In the event Dr Huq withdrew these amendments.

The Committee also debated two new clauses tabled by the Opposition: the first, to introduce a system of corporate probation orders, so that a court could require relevant bodies found guilty of the new corporate offence to make changes to their prevention procedures; the second, to require in these circumstances that directors of the relevant company would be investigated with a view to their disqualification. Mr Wallace argued that neither of these measures were necessary, and in the event neither clause was put to a vote.

In the first case the Minister argued that there were adequate powers to achieve the desired result:

> Hon. Members should be aware that clause 43(2) adds those offences to the list of offences for which a serious crime prevention order can be imposed under the Serious Crime Act 2007. Serious crime prevention orders allow for a court passing sentence on a person or corporate body to impose prohibitions,

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59 PBC 22 November 2016 c146
60 PBC 22 November 2016 c140
61 PBC 22 November 2016 c142

> restrictions or requirements to prevent, restrict or disrupt involvement in serious crime. Those orders are already available and can successfully disrupt tax fraud. Where such an order is made against a relevant body, its terms may require the body to allow a law enforcement agency to monitor how it provides services in the future.
>
> Additionally, where the corporation in question is in the regulated sector, the regulator may, quite independently of a serious crime prevention order, undertake monitoring of the relevant body, relevant to failings in its systems and controls. For example, the Financial Conduct Authority could take steps to disqualify directors or put extra conditions on to the companies. It is the Government's view that the hon. Gentleman's objective can be achieved by applying the existing power to impose serious crime prevention orders on conviction of the new offences, or within the terms of the deferred prosecution agreement. Those orders can do anything that corporation probation would do.[62]

Similarly the Minister argued that the existing legislative framework for disqualifying directors was quite sufficient:

> The existing law already allows the Secretary of State to apply to a court to have a director disqualified where he or she believes that that is in the public interest. A court can grant such an order when it is satisfied that the director's conduct makes him unfit to be concerned in the management of the company. There is no evidence of which we are aware that the power is not being used in the appropriate cases. When not used, it is not used for appropriate reasons. When company directors are charged with offences, the sentencing court can consider disqualification.
>
> Where the new offence is charged and the relevant body is not tried alongside a director, prosecutors will still be able to refer cases to the Secretary of State so that an application for disqualification can be considered. Indeed, there may be cases when sentencing judges recommend that this is done in their sentencing remarks. In short, rather than creating new law, we again consider it proper for the new offences to sit alongside, and work within, the existing legislative framework for disqualifying directors. If regulators have evidence that a director is unfit to be concerned in the management of the company, they can refer the case to the Secretary of State to make an application to have that director disqualified.[63]

Following consideration of Clause 38, the remaining clauses of Part 3 of the Bill were briefly considered and agreed to without a vote.

Debate on new clauses

In its last sitting the Committee debated several new clauses relating to the new corporate offence, and the wider question of improving the corporate transparency standards of CDs and OTs.

Tristram Hunt introduced a new clause to bar any company convicted of the new corporate offence from any public procurement contracts. In response the Minister argued that contracting authorities had the discretion to exclude any organisation guilty of grave professional misconduct, in compliance with EU law in this area:

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62 PBC 22 November 2016 cc148-9
63 PBC 22 November 2016 c149

> I fully agree that, where an organisation has been convicted under the new offences and grave professional misconduct has taken place, it should be possible to exclude that organisation from public contracts.
>
> I am pleased to say that existing law already allows for that by virtue of the Public Contracts Regulations 2015, which allow for the exclusion of a body from a public contract "where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable" …
>
> I am advised that it is not possible lawfully to include a new mandatory exclusion under regulation 57, as proposed by the amendment. Regulation 57 contains a list of offences based on the six categories set out in the EU public contracts directive. The categories outlined in the directive are exhaustive. Case law indicates that member states are not free to add new additional grounds for exclusion to those set out in the directive.[64]

Mr Hunt also introduced a new clause to require the Secretary of State to report annually on the number of prosecutions and convictions made for the new offence. Mr Wallace argued that this was unnecessary:

> Under the domestic tax evasion offence, HMRC will be the investigating authority and the decision on whether to prosecute will rest with the Crown Prosecution Service. In relation to the overseas offence, the Serious Fraud Office and the National Crime Agency will be the investigating authorities and the decision to prosecute will rest with the SFO or the CPS.
>
> It is important to emphasise that, as with the corresponding offence under the Bribery Act 2010, the number of prosecutions alone will not be a true metric of the level of success of the measure. The new corporate offences are not only about responding to wrongdoing but about changing corporate culture and behaviour. True success will lie in changing corporate culture and preventing wrongdoing from occurring in the first place.
>
> In any case, all of the prosecuting authorities already undertake extensive public reporting on investigations and prosecutions. For example, HMRC publishes quarterly performance updates and the CPS publishes an annual report. Neither of those documents are obscure—they are weighty but not obscure. I can confirm that information relating to the new offences will be included in those existing formats.[65]

Mr Hunt withdrew both clauses.

Roger Mullin introduced two new clauses to require the Government to formally review, first, the arrangements to facilitate whistleblowing in banking and financial services, and second, the role of banking culture in the incidence of the new corporate offence in this specific sector. The Minister opposed both – first, on the grounds that the statutory provisions to protect whistleblowing had been recently reviewed …

> Both HMRC and the FCA have published information for whistleblowers on how to disclose wrongdoing in their workplace. They both accept, and act on, anonymous disclosures. The Public Interest Disclosure Act 1998, under which disclosures are made

64 PBC 22 November 2016 c184
65 PBC 22 November 2016 c185

> and protected, was comprehensively reviewed as recently as 2014. There is a code of practice and guidance for its use. The Government are taking significant steps to ensure that effective arrangements are in place to facilitate whistleblowing in relation to tax evasion or other matters. I am not sure that, as yet, I see a case for further review at this stage.[66]

… and second, that it would be inappropriate to review the new corporate offence immediately on its introduction:

> We have engaged extensively with business over the last 18 months on the offences, both in the UK and overseas. We have seen examples of good practice in a number of sectors and organisations, which have responded swiftly to the new measures and are proactively seeking to drive culture change and operate to the highest standards. Some organisations have been slow to react, but HMRC officials have been working with them and their representative bodies to support business in putting in place compliance procedures.
>
> Given that ongoing engagement, I do not believe it would be prudent to conduct a statutory review immediately following Royal Assent, although I share the same objectives as hon. Members. It is the Government's view that we should focus our efforts on effectively implementing the new offences, and on using them to help trigger further cultural change, prior to diverting resources to a further review of the arrangements.[67]

Mr Mullin withdrew the new clauses.

Finally the Committee debated a new clause tabled by the Opposition to set a statutory timetable for the establishment of public registers of beneficial ownership in the CDs and OTs. Introducing the new clause Dr Huq said, "the new clause would make it incumbent on the Secretary of State to do all that she can to ensure that there are public registers of beneficial ownership in the UK's overseas territories and Crown dependencies for companies operating and registered in their jurisdictions."[68]

In his speech Richard Arkless explained that the SNP supported the move to public registers, but that, "we are obviously reluctant to compel this place in primary legislation to legislate for jurisdictions where it perhaps does not have locus."[69]

In his response the Minister reiterated that a number of steps to improve transparency had already been taken, and went on to note that it was extremely rare for the UK Government to take unilateral action:

> While the overseas territories and Crown dependencies are separate jurisdictions with their own democratically elected Governments, and are responsible for their own economic diversification and fiscal matters, we have been working with them on their role on company transparency. If public registers emerge as a new global standard, the UK Government would expect all relevant jurisdictions to meet that standard. However, it would be wrong to say that, in the absence of public registers, no

66 PBC 22 November 2016 c188
67 PBC 22 November 2016 c188
68 PBC 22 November 2016 c195
69 PBC 22 November 2016 c197

> efforts have been made to increase corporate transparency and tackle tax evasion and corruption. The Crown dependencies and those overseas territories with financial centres are already taking a number of important steps on beneficial ownership and tax transparency, which will put them well ahead of most jurisdictions. This includes some of our G20 partners and other major corporate and financial centres, including some states in the United States. These measures will prevent criminals from hiding behind anonymous shell companies and mark a significant increase in the ability of UK law enforcement authorities to investigate bribery and corruption, money laundering and tax evasion.
>
> I asked officials whether there has ever been an example of our imposing legislation on the Crown dependencies. As far as we can find out, in recent history there has never been an example of our imposing legislation on Crown dependencies without their consent. That is important—we have not gone around imposing our will on Crown dependencies as we see fit. Where we have done so on overseas territories, it has been on very strong moral issues such as capital punishment. Both in Crown dependencies and overseas territories, people have moved quite significantly and, I have to say to the hon. Lady, far more significantly that in 13 years of a Labour Government. [70]

In turn Dr Huq agreed to withdraw the clause: "I have listened carefully to what the Minister said. We will not push the new clause to a vote, but I am sure that he is aware that a lot of people are concerned about the issue."[71]

[70] PBC 22 November 2016 cc198-9
[71] PBC 22 November 2016 c201

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