

# Changes to the criminal justice framework in Guernsey

Update prepared by Christopher Edwards and Iona Mitchell (Guernsey).

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This Update considers proposals concerning the criminal justice framework in Guernsey, particularly the introduction of 'failure to prevent' offences and amendments to the civil forfeiture regime.

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## 1 Introduction

On 15 October 2021, the Committee for Home Affairs (the **Committee**) issued a consultation paper on possible changes to the criminal justice framework in Guernsey.

The Committee observed that the focus of the international community in recent years had shifted from technical compliance with international standards to an examination of whether jurisdictions implement their legal frameworks effectively. The Committee considered changes that could facilitate effective implementation in Guernsey. This was informed by work done in respect of Guernsey's National Risk Assessment and by looking at other jurisdictions such as the UK and the other Crown Dependencies.

The consultation paper proposed to introduce:

- **criminal offences** concerning failure by corporate entities to prevent bribery and tax evasion
- **a shifting of the burden of proof in civil forfeiture cases** where there are reasonable grounds to suspect that the assets are the proceeds of crime
- **a summary civil forfeiture process** in cases where the assets have been the subject of 'no consent' for at least a year
- **defence disclosure obligations** (which impose a requirement on the defendant in criminal cases to provide a defence statement setting out the nature of the defence, facts in dispute and certain other matters), as in the UK and the other Crown Dependencies
- **deferred prosecution agreements** (whereby the defendant agrees to take certain steps, eg pay a financial penalty or introduce a compliance program, in exchange for the prosecutor agreeing not to proceed with a trial), in cases relevant to economic crime, largely modelled on the UK
- **changes to the effect of the Saisie regime** to prevent the process being manipulated to defeat a confiscation order

The Committee has now released a summary of the comments it received on the consultation paper and its response. This Update focuses on the first three proposals listed above.

## 2 'Failure to prevent' offences

Guernsey's National Risk Assessment identified the greatest money laundering risks to Guernsey as coming from the proceeds of foreign fraud (including tax evasion) and foreign bribery and corruption. The consultation paper stated that one difficulty in prosecuting these offences is holding corporate entities to account. This is primarily because of the **identification doctrine** applicable in Guernsey and other jurisdictions with a similar legal system, such as the UK and Jersey. It means that a corporate entity will only be liable for a criminal act if an individual that commits the offence can be identified as the **directing mind and will** of the entity.

In recognition of these difficulties, the UK introduced criminal offences for corporate entities in relation to tax evasion and bribery that are preventive in nature and, while they still require an act of bribery or tax evasion to have been committed, are not dependent on the application of the identification doctrine to that act. These offences already extend to Guernsey-based organisations that carry out business in the UK.

The common theme in these offences is the focus on whether the corporate entity had **adequate procedures** in place to prevent the criminal act from occurring, rather than looking for a culpable individual.

Having considered the responses to the consultation, the Committee proposes to have the same preventive offences as those that are now in place in the UK, and to achieve that will introduce offences of failure by corporate entities to prevent **bribery** and **facilitation of tax evasion** (akin to the provisions in the Bribery Act 2010 and the Criminal Finance Act 2017 respectively). In addition, it proposes to introduce offences of failure to prevent **money laundering** and **terrorist financing** modelled on new offences in Jersey which are being brought in by amendments to the Proceeds of Crime (Jersey) Law 1999.

The introduction of these offences will be underpinned by guidance.

### 3 Civil forfeiture

Guernsey, like a number of other jurisdictions, has legislation in place to permit the forfeiture of the proceeds of crime in civil proceedings. This enables criminal proceeds to be removed from circulation by way of a court order forfeiting seized or frozen assets.

Currently the forfeiture regime under The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007 (the **Law**) only applies to money. However, changes are being made to Guernsey's criminal justice regime that were not the subject of the consultation paper. This includes extending the type of property liable to be forfeited under the Law from only bank accounts over £1,000 to **any type of property**.

The powers may be triggered without a criminal conviction having been obtained and the process is a civil one. This means that facts need to be proved to the lower civil standard of 'on the balance of probabilities', rather than to the criminal standard of 'beyond reasonable doubt'.

#### 3.1 Shifting the burden of proof

Currently, the court may make a forfeiture order if satisfied that the money concerned or relevant part thereof is the proceeds of unlawful conduct, or intended for use in unlawful conduct (often referred to as 'tainted' money).

In the consultation paper, the Committee proposed shifting the burden of proof onto the owner of the assets to prove that they are not tainted, in line with the approach taken in Jersey. The Committee also considered the approach taken in the UK with regards to unexplained wealth orders, which effectively places the burden on the owner to prove how they obtained the property in question.

Five out of eight of the respondents were in favour of the general proposal that persons claiming ownership of property would need to demonstrate its lawful origin if there are reasonable grounds to believe that the property is criminal in origin. Responses were mixed on whether the best way to achieve this was by simply reversing the burden of proof, as in Jersey, or by introducing unexplained wealth orders, as in the UK.

The Committee has concluded that the burden of proof should be shifted in civil forfeiture cases and that the Jersey approach would be a more proportionate and appropriate model for the Bailiwick than the introduction of unexplained wealth orders.

One respondent sought clarity around the position of trustees, including their potential liability in the event that they were relying on information from a settlor or ultimate beneficial owner of assets in order to demonstrate the origin of the assets. The Law Officers have advised that, under the current regime, a trustee may swear an affidavit in objection to an application for civil forfeiture in which the source of any information relied on would have to be made clear, and reversing the burden of proof will make no difference to this process.

### 3.2 Summary procedure in 'no consent' cases

In the consultation paper, the Committee proposed introducing a summary civil forfeiture process, in cases where the assets have been the subject of 'no consent' for at least a year. These are cases where the law enforcement authorities have refused to consent to a transaction involving particular property. The effect of consent is simply that a person has a defence to money laundering or terrorist financing in relation to that transaction, and the refusal of consent does not operate as a legal bar to the transaction taking place.

However, in practice banks and other businesses will not generally proceed with a transaction where consent has been refused because of the risk of committing a money laundering or terrorist financing offence. This can lead to a situation where assets remain effectively stuck 'in limbo', sometimes for many years.

The consultation paper proposed following the approach in Jersey, whereby after at least a year, the Attorney General serves a notice on the account holder requiring them to attend court to show why the property is not tainted and should not be forfeited. If they do not attend court, the Attorney General may apply for forfeiture of the property and the court may make the order without further notice to the person concerned.

Half of the respondents were in favour of adopting the summary forfeiture procedure currently in place in Jersey. Some of the respondents preferred adopting a 'deemed consent' regime akin to that used under the Proceeds of Crime Act 2002 in the UK, whereby if the UK Financial Intelligence Unit does not respond to a request for consent within seven working days, it is deemed to have provided consent.

The Committee has concluded that it would be more proportionate and appropriate for the Bailiwick to follow the Jersey approach, rather than to introduce a deemed consent regime.

## 4 Next steps

The Committee will now propose that the States directs the preparation of legislation in relation to the amendments set out above.

## 5 Points to take away

The proposals in introducing further failure to prevent offences, though potentially wide ranging in principle should, in reality, impose little additional burden. What it will require is that regulated entities ensure that their current procedures are sufficiently broad as to capture the substance of the offences. Given that they relate to tax evasion, bribery, money laundering and terrorist financing, those procedures should already be in place. It will require, though, that there is sufficient rigour around them to demonstrate substantive compliance – a 'tick box' approach is likely to invite scrutiny.

The proposals in relation to civil forfeiture are also, on their face, understandable. What remains to be seen is how they will be implemented in practice. Forfeiture of a Guernsey bank account is a relatively straightforward matter. How that will operate in practice in relation to assets which may be owned or controlled in Guernsey, but located elsewhere, is less clear, and will likely throw up issues in due course.

The no consent proposals are the most interesting. There may be scrutiny of the interaction between the decision to refuse consent and the subsequent utilisation of that non consent to reverse the burden. Further complexities will arise where the owner of the asset (say a trustee) may not be the party best placed to answer the notification (that person usually being the beneficial owner, settlor etc). It will also ensure that there may in due course be more scrutiny of the internal SAR decision-making process (given the flagged consequences of a no-consent), and a need to ensure it is undertaken robustly and with thought.

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