SERIOUS ORGANISED CRIME ACT

Background to the Bill

The Serious Organised Crime Bill was introduced in the Queen's Speech 2014, and received Royal Assent to become an Act of Parliament on the 9 March 2015.

The principal objective of the Bill was to ensure that law enforcement agencies had effective legal powers to deal with the threat from serious and organised crime. Section 41 of the Bill was touted as tackling 'professional enablers' of organised crime and introduced a new participation offence which would make it illegal to assist serious criminals. Whilst ICAEW remains supportive of measures to tackle organised crime and bring any Chartered Accountants who break the law to justice, the legislation had significant flaws which we lobbied on over the life of the Bill.

ICAEW concerns

Section 41 had been justified as being necessary to enable the conviction and deterrence of 'crooked lawyers and accountants'. This participation could be (for example) providing a transaction, giving professional advice to rent or buy a property which would be used for illegal activity, or prepare accounts for a criminal to legitimise a fronting operation. However:

- **The measures as they existed might have reduced access to valuable intelligence** available to law enforcement authorities, by discouraging professionals from reporting suspicions while money laundering is still in operation.
- **Would have criminalised unknowing, naïve or unwitting** accountants who were duped into assisting highly sophisticated criminals.

Engagement with Ministers, officials & stakeholders

ICAEW led representations for the professional services sector. We consulted with:

- Bill Officials on six separate occasions across the passage of the Bill.
- Home Office Minister Lord Taylor of Holbeach (who introduced the Bill)
- Chief Whip in the Lords Baroness Anelay
- Opposition Minister Baroness Smith of Basildon, and her staff on a number of occasions
- Karen Bradley, Home office Minister in the Commons
- Representatives from the Law Society
- Representatives from the National Crime Agency

We submitted briefings to interested members of the House of Lords at Second Reading, and further detailed briefings at Committee Stages. We repeated this process as the Bill went into the Commons under the guidance of Karen Bradley MP.

These briefings were received well, with Earl Atlee (who took over the Home Office brief from Lord Taylor) remarking in the Chamber:

"[…] many noble Lords have received the commendably short and evidently effective briefing from the ICAEW concerning Clause 41, which relates to participation in organised crime."

What we secured

We were particularly concerned with the lack of a sufficient definition of *mens rea* within the legislation. As originally drafted, the legislation would have criminalised Chartered Accountants who had no knowledge of the activities of their clients, and who were acting in their minds in good faith.

Whilst the legislation was designed broadly as to catch highly trained and knowledgeable professionals, Bill officials were cautious not to amend the Bill to such a level that they would be able to 'play the system'.

Our successive representations secured a change in the legislation to include both a subjective and an objective test to establish whether a member *knew, or reasonably suspected* that a client was engaging in criminal activity. This put the burden of proof in any case on the prosecution to prove that a Chartered Accountant was aware of the conduct of the client, and aware of his actions.

Interaction with the Proceeds of Crime Act - remaining concerns

A key facet of our representations was around existing provisions within the Proceeds of Crime Act 2002 (POCA) which deals specifically with money laundering and the ability of professionals to report suspicion to the National Crime Agency.

These two pieces of legislation created an overlap, and a legislative inconsistency which we have gone some ways to reconcile. The legislation makes it possible for the following case:

1. A member suspects a client of money laundering.
2. The member files a suspicion report with the NCA.
3. The report is analysed by experts from the NCA.
4. The member receives consent to proceed with the transaction from the NCA to gather information in order to prevent and detect crime.

However, the introduction of the general participation offence via the Serious Crime Bill added a new layer of complexity:

5. **This constitutes a participation offence under the SCB** – and a Chartered Accountant technically breaking the law as there is no POCA equivalent consent defence under the new legislation. By continuing to offer other services to the client – a member may be participating in the crime, even if it is for the purposes of prevention or detection.

CPS guidance

The Home Office concern was that if another general defence were added into the Serious Crime Bill, this could be used as a 'get out of jail free card' when a complicit accountant suspected they were about to be caught.

The Home Office has assured us that in a case where a suspicion report is logged, it would likely be an abuse of process, and not in the public interest to prosecute a member.

However we remain in a situation where if our members receive consent to proceed with a transaction, they are not breaking the law under POCA, but are still technically breaking the law under the Serious Crime Bill.

Whilst this part of the legislation remains unsatisfactory we will continue to work with the Home Office, CPS and future Governments as the legislation beds down and its effects become clear.

Next steps and possible implications for our members

We will continue to work with Government and communicate with our membership.

The College of Policing guidance will include the following paragraph:

> *"Overlap with the money laundering provisions in the Proceeds of Crime Act 2002 (POCA)*
> *Particular issues arise for an individual who has reported suspicious activity to the National Crime Agency and received consent to proceed and who does not therefore commit a money laundering offence. In such circumstances it is most unlikely that a prosecution instead for participation would be in the public interest. However, where there is evidence of wider criminality, wholly different from the activity for which consent was obtained, or deliberate manipulation of the Suspicious Activity Reporting (SARs) regime, a prosecution for participation might be appropriate. The advice of the CPS should be sought at an early stage in these cases."*

Additionally a Home Office circular dated 26 March 2015 includes the following guidance:

> *It is a defence for a person charged with the participation offence to prove that participation was necessary for a purpose related to the prevention or detection of crime. The defence is required to protect, for example, undercover police officers who are participating in the activities of an organised crime group for the purpose of frustrating those activities or collecting sufficient information to bring the perpetrators to justice. It is also available to anyone whose actions were genuinely intended to assist law enforcement agencies.*

For more information, please contact:

Felicity Banks
Head of Business Law
(0)20 7920 8413
felicity.banks@icaew.com

James Calder
Public Affairs Manager
(0)20 7920 8827
james.calder@icaew.com

David Stevens
Integrity and Law Manager
(0)1908 248 322
david.stevens@icaew.com