

UK Law Commission Recommends Reforms to Money Laundering Suspicious Activity Reports

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The Law Commission has published an extensive report examining the UK's current Suspicious Activity Report ("SAR") regime for notifying suspected money laundering to the National Crime Agency ("NCA") and outlining 19 recommendations for reform.¹ These include both legislative and non-legislative mechanisms designed to improve the efficiency and effectiveness of the consent regime. This report follows a July 2018 consultation paper, which was discussed in a previous client update.² Interestingly, the

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Law Commission reviewed a sample of hundreds of SARs to help it analyse the potential impact of the various proposals and lend support to its final recommendations.

In short, the existing SAR regime will be largely retained, with the recommendations having limited practical effect, especially for organisations outside the regulated sector. We summarise below the key recommendations and consider their likely impact.

New Advisory Board. The Law Commission recommended that an expert Advisory Board be created, comprising representatives from the regulated sector, law enforcement agencies, government and other experts. The Advisory Board would assist in preparing statutory guidance, consult on monitoring the effectiveness of the SAR regime, and make further recommendations for reform.

Predicate criminal offences retained. Although it considered restricting the predicate offences for SARs to 'serious crimes', the Law Commission recommended maintaining the current 'all-crimes' approach to reporting suspected money laundering, so that any criminal offence can result in criminal property requiring a SAR.

Prescribed form for SARs. The Law Commission recommended introducing a standard form for SARs, the format of which is to be left to the Advisory Board to decide. The report stresses the importance of collaboration between the NCA, law enforcement

¹ Law Commission, 'Anti-Money Laundering: the SARs Regime Report', Law Com No 384 (June 2019).

² UK Law Commission Proposes Reforms to Suspicious Activity Reports for Money Laundering. <https://www.debevoise.com/insights/publications/2018/08/uk-law-commission-considers-reforms-to-suspicious>.

agencies, the regulated sector and their regulators and supervisors to ensure that the form meets the needs of all stakeholders.

Statutory guidance on the test of suspicion. The Law Commission found that almost 15% of the SARs it reviewed did not even meet the low threshold for suspicion under the *Da Silva*³ test and concluded that a significant proportion of those filing SARs were struggling to apply the test. Bolstered by strong support from respondents to the consultation paper, it recommended that the Proceeds of Crime Act 2002 (“POCA”) be amended to require the Secretary of State to issue guidance on the meaning of suspicion.

The consultation paper’s provisional proposal that the test of suspicion for required disclosure SARs by the regulated sector should be changed to ‘knows or has reasonable grounds to suspect’ has been passed to the Advisory Board for further consideration, without a recommendation that it be implemented.

Exemption for preserving criminal property. The report recommends amending POCA to provide credit and financial institutions with an exemption from the principal money laundering offences where they ring-fence suspected criminal property that has been mixed with legitimate funds. In addition, statutory guidance should be issued on the operation of this provision.

Statutory guidance on SARs providing minimal intelligence value. The Law Commission recommended that the Advisory Board produce statutory guidance on the defence of ‘reasonable excuse’ for failing to make a required disclosure. Several of the consultation paper’s provisional proposals that were aimed at reducing the number of SARs are no longer being pursued, including where there are duplicate reporting obligations, the relevant information is already in the public domain, or a transaction has no UK nexus.

Corporate criminal liability and the extra-territorial reach of POCA. Given the ongoing Ministry of Justice consultation on corporate criminal liability, there were no recommendations regarding any new corporate criminal offence of failure to report suspected money laundering. There were also no recommendations to clarify the uncertainty around POCA’s extra-territorial jurisdiction.

ANALYSIS

Although the Law Commission has made some welcome recommendations intended to ease the compliance burden on banks that file a large number of SARs, they will have

³ *R v Da Silva* [2006] EWCA Crim 1654—“a possibility, which is more than fanciful, that the relevant facts exist”.

little impact for most other organisations. It is hoped that the Advisory Board will eventually develop guidance and further recommendations that result in more meaningful reform of the SAR regime, to address the high number of inconsequential SARs that are submitted.

Last year's consultation paper contained disappointingly few wider-reaching proposals, but even many of those have been abandoned or considered too difficult to deal with for now. Despite the time and effort expended by the Law Commission during this process, unfortunately any appreciable impact to the practice of SARs will have to await the formation of the Advisory Board and any concrete guidance it will hopefully establish.



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