**THE STATES OF DELIBERATION**
**of the**
**ISLAND OF GUERNSEY**

**COMMITTEE *FOR* HOME AFFAIRS**

LEGISLATION RELATING TO FINANCIAL CRIME AND RELATED MATTERS

The States are asked to decide:-

Whether, after consideration of the Policy Letter entitled "Legislation Relating to Financial Crime and Related Matters", dated 27th September 2021, they are of the opinion:-

1. To agree to repeal and replace the Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007 with new legislation for civil forfeiture, and to make corresponding amendments with regard to liability to other enactments, as set out in section 3 of the Policy Letter;

2. To agree to amend the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002, the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 and the Drug Trafficking (Bailiwick of Guernsey) Law, 2000 ("the AML/CFT Laws") as set out in sections 3 and 4 of the Policy Letter;

3. To agree to amend the Police Property and Forfeiture (Bailiwick of Guernsey) Law, 2006 and the Cash Controls (Bailiwick of Guernsey) Law, 2007 as set out in section 3 of this Policy Letter;

4. To agree to amend the Criminal Justice (International Cooperation) (Bailiwick of Guernsey) Law, 2001 as set out in sections 3 and 6 of this Policy Letter;

5. To agree to amend the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974 as set out in section 4 of this Policy Letter;

6. To agree to amend the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003 as set out in sections 5 and 6 of this Policy Letter;

7. To agree to amend the Computer Misuse (Bailiwick of Guernsey) Law, 1991, the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003 and the International Cooperation Law 2001 as set out in section 6 of this Policy Letter;

8. To agree to amend the Disclosure (Bailiwick of Guernsey) Law, 2007 as set out in sections 7 and 8 of this Policy Letter

9. To agree to create legislation regarding liability for international assistance as set out in section 9 of this Policy Letter;

10. To agree to amend the Rehabilitation of Offenders (Bailiwick of Guernsey) Law, 2002 (Commencement, Exclusions and Exceptions) Ordinance, 2006 as set out in section 10 of this Policy Letter;

11. To direct the preparation of such legislation as may be necessary to give effect to the above decisions.

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

**THE STATES OF DELIBERATION**
**of the**
**ISLAND OF GUERNSEY**

**COMMITTEE *FOR* HOME AFFAIRS**

LEGISLATION RELATING TO FINANCIAL CRIME AND RELATED MATTERS

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

27th September 2021

Dear Sir

## 1 Executive Summary

1.1 The purpose of this Policy Letter is to recommend some amendments to the Bailiwick's criminal justice framework for addressing financial crime.

1.2 Following discussions with the Law Officers, the Committee *for* Home Affairs (''the Committee'') has become aware of a number of technical amendments that are necessary around matters relating to money laundering, terrorist financing, cybercrime, the reporting of suspicion, the disclosure of information, the provision of international assistance and obtaining information about previous convictions.

1.3 Her Majesty's Comptroller (HMC) has provided advice in respect of how these matters might be addressed. The Committee fully supports HMC's conclusions as set out below.

## 2 Advice from Her Majesty's Comptroller

2.1 Her Majesty's Comptroller has advised in respect of the amendments in the following terms:

2.2 ***"****The amendments in respect of money laundering and terrorist financing primarily concern the Forfeiture of Money etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007 ("the Civil Forfeiture Law"). The Civil Forfeiture Law, which was broadly based on the civil forfeiture powers under Part 5 of the UK's Proceeds of Crime Act 2002 ("Part 5 of POCA"), enables the Royal Court to make forfeiture orders in civil proceedings in respect of certain types of seized or frozen property*

*if the court is satisfied that the property is or represents the proceeds of unlawful conduct. Unlawful conduct is defined as conduct that comprises a criminal offence where it occurs (and, where it occurs outside the Bailiwick, would constitute a criminal offence in the Bailiwick if it occurred there). The powers under the Civil Forfeiture Law complement non–conviction based forfeiture powers under the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002 ("the Terrorism Law"), as well as provisions in the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 and the Drug Trafficking (Bailiwick of Guernsey) Law, 2000 (collectively, with the Terrorism Law, "the AML/CFT Laws") which enable the Royal Court, when sentencing a person who has been convicted of a criminal offence, also to make an order confiscating assets of all kinds if satisfied that the assets in question represent the extent to which that person has benefited from criminal conduct. (The definition of criminal conduct is similar to the definition of unlawful conduct under the Civil Forfeiture Law, except that there is no requirement for conduct outside the Bailiwick to constitute a criminal offence where it occurs unless the conduct relates to drug trafficking). It was recognised at the time of its enactment that the Civil Forfeiture Law was only a first step in enabling the recovery of criminal proceeds without the need for a conviction, and that its scope would subsequently need to be widened. I advise that it would now be appropriate to do this, and to address some issues that have come to light in the course of the exercise of the powers under the Civil Forfeiture Law (primarily points of clarification) as well as to reflect amendments which have been made to Part 5 of POCA since the Civil Forfeiture Law was enacted. In the interests of clarity, the best way to do this is by repealing the Civil Forfeiture Law and replacing it with a new enactment that is more closely aligned to Part 5 of POCA. In addition, I recommend that some corresponding amendments are made to the AML/CFT Laws and to the Criminal Justice (International Cooperation) (Bailiwick of Guernsey) Law, 2001 ("the International Cooperation Law") to ensure consistency across the legal framework.*

2.3 *Amendments are also required regarding jurisdiction for criminal asset recovery measures, as well as in respect of sentencing powers under the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974 ("the Misuse of Drugs Law") and the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003 (the RIPL).*

2.4 *I further recommend that amendments are made to the legal framework to facilitate the preservation and investigation of electronic material in domestic and international cases, and to update the offences applicable to the misuse of electronic material.*

2.5 *An amendment is also required to the reporting obligations in the Disclosure (Bailiwick of Guernsey) Law, 20007 ("the Disclosure Law") to bring within its scope suspicion relating to the financing of the proliferation of weapons of mass destruction, in order to reflect international developments in this area. I also recommend that the Disclosure Law is amended to facilitate information–sharing*

*among domestic authorities and with their foreign counterparts, and that legislation is introduced to clarify the position with regard to exposure to liability of some Bailiwick authorities when providing assistance to other jurisdictions.*

2.6 *Finally, I recommend that amendments are made to legislation governing the rehabilitation of offenders in the interests of consistency.*

## 3 *Amendments relating to civil forfeiture*

*Property liable to civil forfeiture*

3.1 *The Civil Forfeiture Law applies to cash and funds in bank accounts to the value of £1,000 or more that are the proceeds of unlawful conduct or are intended for use in unlawful conduct. I advise that this now needs to be widened.*

3.2 *First, the type of property liable to forfeiture should be extended. Except in the context of summary civil forfeiture procedures (which are looked at below), civil forfeiture orders in the UK under Part 5 of POCA apply to any form of property where the court is satisfied that it is the proceeds of unlawful conduct or is intended for use in unlawful conduct (subject to a number of safeguards and restrictions in respect of matters such as double recovery and third party rights). This extends to associated property e.g. an interest in property and earnings from property such as profits or accrued interest. The reason for the more limited approach in the Bailiwick was that when the Civil Forfeiture Law was enacted, it was believed that extra resources would be needed before the Bailiwick authorities could deal with other types of property. However, the importance of being able to recover any property which could be shown to be the proceeds of crime was also recognised, and it was envisaged that the scope of the legislation would be widened to permit this at a later stage. Since then additional resources have been provided for civil forfeiture cases. In addition, experience to date suggests that if the scope of the legislation is widened, the type of assets most likely to be involved in civil forfeiture cases are other financial assets (e.g. assets in a collective investment fund) or non-depreciating physical property such as jewellery or bullion, which do not require active management to the same extent as other types of assets. Therefore, extending the range of property liable to forfeiture is likely be less resource – intensive than previously thought. For these reasons, I advise that it would now be appropriate to bring all types of property within the scope of civil forfeiture, in line with the position in the UK, subject to safeguards and restrictions on asset recovery along the lines of those that are in place under Part 5 of POCA. This will also mean that civil forfeiture applies to the same range of property as is now covered by criminal confiscation.*

3.3 *Second, the basis for forfeiture should be widened to include property that has been used in unlawful conduct or which is suspected of having been so used. Property of this kind is sometimes referred to as an instrumentality of crime.*

*Forfeiture of instrumentalities is already possible in criminal cases under the Police Property and Forfeiture (Bailiwick of Guernsey) Law, 2006 ("the Police Property Law") in respect of any property seized from a convicted person or under his or her control at the time of arrest. However, there may be cases where instrumentalities are not linked to a person who has been convicted of a criminal offence, for example where they belong to a person who cannot be prosecuted in the Bailiwick courts because he or she is not within the jurisdiction. It is important that the Bailiwick authorities have the power to remove such property from the reach of criminals, both as a deterrent and ensure that the Bailiwick continues to meet international standards on money laundering and terrorist financing. Forfeiture should also be possible irrespective of whether the property in question has previously been seized or frozen. In practice, it is usually necessary to seize or freeze property at an early stage in an investigation in order to prevent its dissipation. However, I advise that this should not, as now, be a prerequisite for a forfeiture application, as otherwise there could be cases where HM Procureur would have to apply for a freezing order in cases where there was no risk of dissipation and so no substantive need for such an order.*

3.4 *I therefore advise that the civil forfeiture regime ( including the investigatory powers that underpin it – see below) should be widened to include instrumentalities and to remove the need for property to have been seized or frozen before an application for forfeiture can be made. I also advise that to avoid any doubt as to the scope of the court's powers with regard to freezing orders, the court should have an express power to vary or set aside a freezing order (for example where certain funds are needed for basic living expenses) or to stay proceedings (whether on terms or otherwise) with the consent of all relevant parties, in line with the powers to do these things that exist for the UK courts under Part 5 of POCA.*

*Limitation on liability*

3.5 *I further advise that the civil forfeiture regime should include a provision specifying that the authorities are not liable for damages or costs arising from actions or proceedings. This should be subject to an exemption for acts done in bad faith or which constitute a breach of human rights, where there would be a right to compensation. This would mirror provisions in Jersey's civil forfeiture legislation and would also make it clear that the Bailiwick position with regard to civil forfeiture is the same as the long established position in criminal cases. (At the same time, the opportunity should be taken to standardise provisions to this effect in other parts of the legal framework, for example in the legislation relating to preferred debts and the désastre process).*

*Passage of time no bar to proceedings*

3.6 *The opportunity should also be taken to make it clear for the avoidance of doubt*

*that, as with criminal cases, the passage of time is not a bar to civil forfeiture proceeding. This would reflect the UK position under Part 5 of POCA, in recognition of the fact that it can take time for underlying criminality to come to light and investigations into the provenance of assets often require complex and lengthy financial investigations, particularly where the underlying criminality occurred in another jurisdiction. It would also be advisable in the interests of avoiding delay to make specific provision for the service of documents on banks and other organisations, to bring this in line with the position under the regulatory framework.*

*Powers to put in place by Ordinance measures governing how seized etc. assets are dealt with*

3.7 *It is a requirement of international standards that jurisdictions have in place asset management policies and procedures. Therefore, while as indicated it is unlikely that widening the scope of the civil forfeiture regime will lead to any significant asset management issues in practice, it would be advisable to have a legal mechanism in place to facilitate the enactment of provisions to deal with this. I therefore recommend that a power is introduced for the States to put in place by Ordinance both overarching principles governing the approach that should be taken in civil forfeiture cases to asset recovery and management and measures to govern how assets of any kind that are seized, frozen or forfeited are dealt with, including by the appointment of receivers and recognition of priority interests where necessary. There should be corresponding amendments to the AML/CFT Laws, the Police Property Law and the Cash Controls (Bailiwick of Guernsey) Law, 2007, which deals with the forfeiture of undeclared cash that is brought in or out of the jurisdiction. This is to ensure that a consistent approach can be taken to dealing with all property that is subject to asset recovery measures, whether conviction based or non- conviction based.*

*Unlawful conduct*

3.8 *The Civil Forfeiture Law applies to property that is linked to unlawful conduct. Where this conduct occurs in another jurisdiction, it will only comprise unlawful conduct if it meets the dual criminality test. In other words, it must be conduct that would constitute a criminal offence in the Bailiwick if carried out there, and is also a criminal offence in the jurisdiction where it occurs. To date the dual criminality test has not presented any difficulties in practice. However, one area where it might arise as an issue in future is in respect of proceeds linked to conduct involving human rights violations. There is a considerable variance internationally in the way in which human rights are protected and in some of the countries that are particularly vulnerable to this type of abuse, the conduct in question is not criminalised. In particular, concern has arisen in connection with the persecution of individuals trying to expose illegal activity by governments or to defend human rights and fundamental freedoms. This situation has been*

*addressed in the UK by an amendment to Part 5 of POCA, which specifies that in addition to conduct that meets the dual criminality test, unlawful conduct includes conduct outside the UK that constitutes or is connected with the commission of a gross human rights abuse or violation and would be an offence triable on indictment in the UK if it had occurred there. A gross human rights abuse or violation is defined as the torture or cruel, inhuman or degrading treatment or punishment by the state of a person who is trying to expose illegality by officials or to support human rights and fundamental freedoms. It would clearly be undesirable if assets relating to this type of persecution were located in the Bailiwick but no measures to recover those assets could be taken by the authorities. I therefore advise that corresponding provision should be made to the definition of unlawful conduct in the civil forfeiture regime.*

3.9 *Part 5 of POCA also clarifies some factors that are relevant for the purposes of determining whether property is the proceeds of a person's unlawful conduct. The first is that it is immaterial whether any money, goods or services were required to put the person in question in a position to carry out the conduct. The second is that where the property in question was obtained by one of a number of kinds of conduct, it is not necessary to prove the particular conduct in question provided that all of the kinds of conduct that might have been involved meet the test for unlawful conduct. There is no corresponding clarification in the Civil Forfeiture Law. To date this has not arisen as an issue in any domestic cases, but the possibility of this happening in the future cannot be ruled out, especially if the scope of the Civil Forfeiture Law is widened in line with my recommendations and more cases are taken forward as a result. I therefore advise that clarifying language based on that in Part 5 of POCA as outlined above is included in the civil forfeiture regime.*

*Jurisdiction – summary procedure*

3.10 *At the moment only the Royal Court can make an order under the Civil Forfeiture Law. This means that even fairly minor cases have to be sent up to the Royal Court in order to recover assets that are believed to be linked to unlawful conduct (e.g. where a person has in his or her possession at the time of arrest cash that is believed to be connected to low level drug dealing). Forfeiture in the Royal Court is subject to a complex procedure under dedicated Rules of Court that were specifically designed to deal with high value domestic or international economic crime cases but which are not proportionate when applied to low value cases that are typically more straightforward. Bailiwick Law Enforcement has identified civil forfeiture, particularly where it involves cash, as a useful disruption tactic for certain types of lower end domestic criminal activity within the Bailiwick. However, running these cases in the Royal Court requires a disproportionate amount of law enforcement and legal resource when compared to the sums actually being recovered.*

3.11 *These difficulties would be greatly alleviated by the introduction of a summary procedure for dealing with civil forfeiture, along the lines of that available in the UK. Part 5 of POCA enables civil forfeiture in relation to cash, specific listed assets (these are items such as precious metals and stones and works of art) and funds in bank accounts and building societies to be dealt with in the Magistrate's Court. This broadly mirrors the current provisions of the Civil Forfeiture Law in respect of the seizing, freezing and forfeiture of cash and funds in bank accounts (including the same minimum threshold of £1,000). In addition, the summary procedure in Part 5 of POCA permits administrative forfeiture. Under this process, a senior law enforcement official may issue a forfeiture notice if he or she is satisfied that the assets have come from or are intended for use in unlawful conduct. The person on whom the order is served has a minimum of 30 days in which to object. If no objection is made the assets are automatically forfeited. If an objection is made then the case will move forward to a full forfeiture hearing in the Magistrates Court. This process is subject to a right to appeal after forfeiture has occurred. This has been beneficial in the UK as it has helped to avoid unnecessary court hearings in situations where forfeiture is uncontested, while ensuring that mechanisms are in place to ensure that anybody who wishes to contest it has the opportunity to do so.*

3.12 *I therefore recommend that the civil forfeiture regime should enable freezing and forfeiture of property (and interest or other earnings derived from that property) to be dealt with by the Magistrates Court, with a right of appeal to the Royal Court. I also recommend that this should include a regime for administrative forfeiture that is based on the UK process and subject to the same safeguards. For the reasons outlined above, the summary procedure should also apply to instrumentalities.*

*Thresholds*

3.13 *The Civil Forfeiture Law currently only applies to assets to the value of £1,000 or more. I advise that this threshold should be removed if a summary procedure is introduced, as that procedure would be expressly aimed at low value cases and there would no longer be a need to avoid very low level value cases from going before the Royal Court. This would mirror the position in Jersey. For cases that would remain to be dealt with in the Royal Court, I advise that there should be a threshold of £25,000 in the case of financial assets. This threshold would reduce both the burden on the Royal Court and the application of complex procedures in straightforward cases as described above. However, I advise that this threshold should not be applied to physical assets or other property whose value cannot be readily determined, to avoid potentially costly and time consuming arguments as to jurisdiction. For the same reason, I advise that in determining whether the threshold for financial assets is met, provision should be made to allow assets in different accounts to be counted together if they are linked. This will help to avoid situations where assets that meet the threshold are deliberately divided up and*

*placed in different accounts in order to challenge the jurisdiction of the Royal Court.*

*Investigations and evidence*

3.14 *I recommend making it explicit that the investigatory powers in civil forfeiture cases can be invoked before assets are seized or frozen. This is currently implicit under the Civil Forfeiture Law but it would be advisable to put the matter beyond doubt.*

3.15 *I further recommend that provision is made for vehicles, aircraft and ships to be stopped and searched if there is reason to suspect that property linked to unlawful conduct may be located there. This would mirror provisions to that effect in Jersey's civil forfeiture legislation with regard to vehicles.*

3.16 *In addition, the power for the court to make preservation orders in respect of electronic material referred to below should also be introduced into the civil forfeiture regime.*

*Mutual legal assistance*

3.17 *At present, requests for assistance from other jurisdictions can only be entertained under the Civil Forfeiture Law from countries that have been designated by the Committee for Home Affairs. In practice, this requirement has not caused any difficulties to date but it is now out of step with international expectations. Since the introduction of the legislation there has been an increased global focus on civil forfeiture, particularly with regard to the recovery of the proceeds of corruption. External assessors appointed by the United Nations have recently reported on the Bailiwick's implementation of the United Nations Convention against Corruption, and while the report was favourable overall, it recommended the removal of the designation requirement. I support this recommendation, which would mirror the position in criminal cases under the AML/CFT Laws and the International Cooperation Law and would also bring the Bailiwick's ability to provide assistance in civil forfeiture cases in line with the position in such cases in the UK and in Jersey. (This would also entail some consequential amendments to the information – sharing provisions in the Disclosure Law).*

3.18 *However, as now, and as with criminal cases, HM Procureur will have a discretion as to whether or not to apply to the courts for an order to assist another jurisdiction, and it is HM Procurer's long established practice that assistance will not be provided where there is doubt about the bona fides of the request, for example where it is believed to be politically motivated.*

3.19 *Aside from the issue of designation, there is also currently a potential ambiguity*

*in the wording of the Civil Forfeiture Law as to the role of the domestic authorities in dealing with a bona fides request from another jurisdiction. I advise that it should be made clear that this role does not include making an assessment of the underlying merits of the case. This is necessary both to ensure that the legislation meets international comity principles and to remove any risk of parties seeking to use the Bailiwick courts to litigate matters that should properly be raised in the courts of the country that has made the request for assistance.*

3.20 *Finally, some further clarifying provisions are recommended in connection with requesting or providing mutual legal assistance. Explicit provision should be made for the Bailiwick authorities to request assistance from other jurisdictions in support of civil forfeiture cases. While there is nothing under the legal framework to prevent such requests being made, an express provision in the International Cooperation Law confirming the position would bring civil forfeiture cases in line with criminal cases. It should also be made clear that other aspects of the International Cooperation Law such as service of process and taking evidence also apply to civil forfeiture cases. Similarly, the civil forfeiture regime should specify that material that has been obtained from another jurisdiction in support of a criminal case may be used in a civil forfeiture case, provided that the other jurisdiction consents. Again, there is nothing to prevent this from happening in the Bailiwick's legal framework but an express provision permitting this would put the matter beyond doubt. These amendments would bring the Bailiwick position in line with the UK position under Part 5 of POCA.*

3.21 *Given the comprehensive nature of the changes recommended above, implementing them by way of amendments to the Civil Forfeiture Law would make the legislation overly complex and difficult to follow. I therefore advise that it would be preferable to enact new legislation that repeals and replaces the Civil Forfeiture Law.*

## 4 *Jurisdiction for criminal asset recovery measures*

4.1 *Under the AML/CFT Laws, restraint orders, charging orders and confiscation orders may be made in criminal proceedings to secure and recover assets that are linked to criminality. However, these orders may only be made by the Royal Court. The effect of this is that any cases that involve or are likely to involve asset recovery measures have to be dealt with in the Royal Court at the sentencing stage (and possibly also at the trial stage in some cases), irrespective of the seriousness of the offence or the value of the relevant assets. This is plainly disproportionate for matters that involve assets of low value and which, but for the need for measures to secure or recover those assets, would be suitable for trial and sentencing in the Magistrate's Court. I therefore recommend that the AML/CFT Laws be amended to permit the Magistrate's Court to make restraint orders, charging orders and confiscation orders in respect of assets with a value of up to £25,000. This should be subject to the same restrictions and safeguards*

*as the equivalent orders in the Royal Court, and there should also be a right of appeal to the Royal Court.*

4.2 *In the event that the AML/CFT Laws are amended as suggested above, I also suggest that the sentencing powers of the Magistrate's Court for drug trafficking offending are increased. At the current time, drug trafficking offences under the Misuse of Drugs Law include maximum sentences of imprisonment which are lower than the general power to impose sentences of imprisonment under the Magistrates Court (Guernsey) Law, 2008. For example the maximum sentence of imprisonment that can be imposed by the Magistrates Court under the Misuse of Drugs Law for supplying or offering to supply a controlled drug is limited to 12 months, whilst the general maximum sentence under the Magistrates Court Law is limited to 2 years. If the powers to make restraint orders, charging orders and confiscation orders in respect of assets with a value of up to £25,000 are put in place as proposed above, there is the possibility that the Magistrates Court may decline jurisdiction in some cases because of concern that the limit of 12 months imprisonment may not be enough to enable the Court to impose an appropriate sentence of imprisonment in a matter involving the use of the enhanced powers to make restraint orders etc. If these maxima for drug trafficking offences were amended to reflect the general maximum sentence available on a single charge in the Magistrate's Court then there would be the prospect of more cases being capable of being dealt with summarily rather than having to be committed to the Royal Court.*

## 5 *Sentencing powers under the RIPL*

5.1 *Under the RIPL, officials such as police officers who require access to protected information in order to discharge their functions may, subject to certain criteria, serve a notice on any persons believed to possess a key to that information requiring them to disclose that key. Failure to comply with the notice is a criminal offence that is subject to a maximum term of imprisonment of two years for conviction on indictment and six months for summary conviction.*

5.2 *In practice, notices are most commonly served on persons suspected of involvement in criminality in order to obtain the passwords to their mobile phones or other electronic devices that may contain information relevant to the crime under investigation. This particularly arises with cases of suspected drug trafficking. However, experience to date is that because the maximum terms of imprisonment for failure to comply with a notice are lower than those for the suspected criminality, many suspects choose not to comply with the notice and to serve the resulting prison sentence, rather than to reveal information that could expose them to prosecution for the suspected criminality.*

5.3 *This is an increasingly common occurrence which has the potential seriously to hamper efforts to tackle proceeds –generating crime and related money*

*laundering activity, as well as making it more difficult to trace and recover criminal proceeds. It would be considerably reduced if the maximum prison sentences for failure to comply with a notice were increased so as to bring them more in line with the sentence a person could expect to receive for the underlying criminality. I therefore advise that the maximum sentence should be increased to five years for conviction on indictment and two years for summary conviction.*

## 6 *Amendments relating to cybercrime*

6.1 *Cybercrime is a rapidly changing area, and since the introduction of the Computer Misuse (Bailiwick of Guernsey) Law, 1991 ("the Computer Misuse Law") financial crime and other offences using technology have evolved and increased. This in turn has led to global initiatives in response (for example with the enactment of the 2001 Council of Europe Convention on Cybercrime). While the measures in place to address cybercrime under the Computer Misuse Law are significant and still highly relevant, there are some areas where they could be enhanced, particularly with regard to making, supplying or using articles for the purposes of cybercrime. Furthermore, investigatory powers and related measures under the criminal justice framework more generally were put in place at a time when the use of electronic communication and records was far less prevalent than it is today. As a result they do not fully take account of issues such as the possible destruction of computer records in certain circumstances, and encryption.*

6.2 *Jersey has introduced amendments to its legal framework to address these various matters in the Cybercrime (Jersey) Law 2019. The amendments include widening the scope of cybercrime offences to cover making, supplying or using articles for the purposes of cybercrime and carrying out unauthorized acts that may impair the operation of a computer, introducing a power for the court to order the preservation of electronic material that may be relevant to a domestic or international investigation and revising Jersey's legislation on the regulation of investigatory powers to include detailed provisions governing the investigation of electronic data protected by encryption. The effect of these amendments is to bring restrictions and protections in relation to the use of electronic material in line with those already in place in relation to physical material.*

6.3 *I advise that corresponding amendments are made to the equivalent legislation in the Bailiwick, namely the Computer Misuse Law, the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003, the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003, the International Cooperation Law and the AML/CFT Laws.*

## 7 *Reporting of suspicion etc. of proliferation and proliferation financing*

7.1 *In response to global concern about the proliferation of weapons of mass destruction (proliferation) and its financing ("PF"), international standards on*

*measures to address money laundering and terrorist financing have been widened to include PF. This means that the scope and strength of the Bailiwick's efforts to address PF (and by extension, proliferation) will be included in its next evaluation by Moneyval.*

7.2 *The Bailiwick's legal framework primarily addresses proliferation and PF through the implementation of international sanctions regimes in this area, although there is also some generic weapons-related legislation that might be relevant to proliferation or PF depending on the facts of the case. However, apart from certain reporting obligations under the sanctions framework, there is currently no requirement to report knowledge or suspicion that a person is involved in activities that might be linked to proliferation or PF. This is in contrast to money laundering and terrorist financing, which are subject to comprehensive reporting obligations under the Disclosure Law and the Terrorism Law respectively.*

7.3 *To date this absence of a reporting obligation is unlikely to have caused any issues, as the risk to the jurisdiction of proliferation and PF is not considered to be high and in practice, many in the private sector would probably wish to report any suspected links to these activities on a voluntary basis in the interests of caution. However, without putting this on a more formal footing, it will be difficult for the Bailiwick to justify a low risk rating in this area or to demonstrate that it has an effective framework. I therefore advise that the reporting obligations in the Disclosure Law and underlying regulations are widened to include proliferation and PF.*

## 8 *Disclosure of information by the authorities*

8.1 *The Disclosure Law contains provisions enabling the sharing of information by various authorities in the Bailiwick for specified purposes (for example in support of criminal and civil forfeiture investigations in the Bailiwick or elsewhere, or to enable certain domestic or foreign authorities to discharge their functions). While these information-sharing powers are wide and have been used effectively for a number of years, some areas have been identified where they could be improved.*

8.2 *The first concerns some inconsistences in the information-sharing powers available under the Disclosure Law, which result from amendments that have been made over time. Some of the information-sharing provisions require the person disclosing the information to be satisfied that what is requested is proportionate to what is sought to be achieved, whereas information-sharing provisions added later, such as those relating to international sanctions, are not subject to a proportionality test. The more recent approach is in line with other information- sharing provisions across the legal framework, and has been adopted for two main reasons. First, it is recognised that in practice, the party disclosing the information is unlikely to be in a position to make a proper assessment of the needs of the requesting party, particularly in complex cases*

*where something that may initially appear to be unimportant turns out on further investigation to be significant. For this reason, a proportionality test is generally seen internationally as an unreasonable restriction on the ability of the requesting party to obtain the information that it needs to discharge its functions effectively. Second, conditions on the disclosure of information make it easier for those who are subject to enforcement action by an authority to make technical challenges to the use of information, on the grounds that it was unlawfully obtained as the conditions were not met. This is much less likely to arise where information-sharing powers are framed in fairly general terms (e.g. by specifying that information may be shared to enable a party to discharge its functions, or for the purposes of a criminal investigation). I therefore recommend that where the information–sharing powers in the Disclosure Law are subject to additional requirements, those requirements should be removed to bring the powers in line with the rest of the legal framework.*

8.3 *A further issue concerns disclosure by the Revenue Service. Under income tax legislation, the ability of the Revenue Service to share information is strictly limited, but it may share information with foreign tax authorities as required by international tax transparency standards. While this is intended to enable a foreign tax authority to discharge its functions, there are sometimes cases where the information provided by the Revenue Service to a foreign tax authority is also relevant to criminal or civil forfeiture proceedings in that jurisdiction. However, there is no power under the Bailiwick's legal framework for the Revenue Service to consent to the foreign tax authority sharing that information with the party conducting those proceedings. Consequently, that party has to ask its financial intelligence unit to obtain the information from the Financial Intelligence Service at the Guernsey Border Agency (FIS) if the information is required at an intelligence level, or must invoke the formal mutual legal assistance process under the criminal justice framework if it is required in evidential form. This would involve the FIS or HM Procureur, as the case may be, obtaining the information from the Revenue Service and then transmitting it to the requesting party. Where the information is already held by an authority in the foreign jurisdiction, it would plainly be more effective and a better use of resources in both jurisdictions if the need for a second, parallel international cooperation mechanism in respect of the same information could be avoided. This can be achieved by giving the Revenue Service the power to consent to the information being shared for the purposes of the related proceedings. That might also facilitate information sharing in the reverse situation, i.e. where a foreign tax authority has provided information to the Revenue Service and that information is relevant to a domestic criminal or civil forfeiture case (but only where the foreign tax authority has provided its explicit consent to the disclosure of the information). This is because in some countries, information can only be shared with certain authorities in a foreign jurisdiction if there are reciprocal information-sharing provisions in that jurisdiction. I therefore recommend that the Disclosure Law is amended to give the Revenue Service the power to consent to the sharing of information for*

*criminal justice purposes. In practice, information would only be shared in this way on the basis of consultation with FIS or HM Procureur as the case may be, and would be subject to the caveat that consent can only be given if the information meets statutory criteria for providing information under criminal justice mechanisms.*

8.4 *Another issue related to the Revenue Service concerns feedback to the FIS. There are information-sharing provisions that enable the FIS to disclose to the Revenue Service tax-related information contained within the reports of suspicion that the FIS receives from the private sector. Effective use of these provisions has recently been enhanced by mechanisms to facilitate improved lines of communication between the FIS and the Revenue Service. However, the information–sharing mechanisms available to the Revenue Service arguably do not extend to the provision of feedback to the FIS on any tax enforcement cases that have used information from the FIS. Feedback on cases involving financial intelligence in this way is important to improve the effective provision and use of financial intelligence. It is also needed in order to demonstrate that there are good levels of cooperation between the authorities, as required by international standards. I therefore recommend that the Disclosure Law should be amended to put beyond doubt the ability of the Revenue Service to give feedback about domestic tax cases and international tax cases (with the explicit consent of the foreign tax authority) to the FIS.*

8.5 *Finally, I advise that a further amendment should be made to the Disclosure Law to change references to the FIS to references to the Financial Intelligence Unit. This is necessary to reflect a name change that is being taken forward as part of the restructuring of the Bailiwick's framework for investigating economic crime. A corresponding amendment should be made to other aspects of the legal framework where there are references to the FIS.*

## 9 *Legislation regarding liability for international assistance*

9.1 *A key factor in maintaining the Bailiwick's position as a leading international financial centre is its ability to cooperate with other jurisdictions on cross-border issues, and its longstanding policy is to provide assistance wherever possible in support of overseas proceedings. The legal framework for providing this assistance has evolved over time in line with developments in international standards and now covers many different authorities and different areas of activity, including criminal, civil, regulatory and tax investigations and proceedings.*

9.2 *In order to ensure that the authorities remain able to provide assistance to other jurisdictions, it is important that in doing so they are not hampered by the fear of exposing themselves to liability to third parties. While this issue is addressed in some parts of the legal framework (for example under legislation implementing*

*international sanctions), the way that the framework has evolved as referred to above means that this is not done consistently.*

9.3 *Jersey has addressed this point in the International Co-operation (Protection from Liability) (Jersey) Law 2018, which specifies that there is no liability for actions carried out in good faith by public authorities to assist other jurisdictions under certain specified enactments. I advise that similar legislation be introduced in the Bailiwick.*

**10 *Information about previous convictions***

10.1 *Under the Rehabilitation of Offenders ( Bailiwick of Guernsey) Law, 2002 ( "the 2002 Law"), it is a general rule that obligations to disclose details of previous convictions under any agreement or arrangement, and the ability to ask questions about those convictions, do not apply to convictions that are to be treated as spent by virtue of the passage of time. This is subject to an exemption under the Rehabilitation of Offenders (Bailiwick of Guernsey) Law, 2002 (Commencement, Exclusions and Exceptions) Ordinance, 2006 ("the 2006 Ordinance"). The effect of exemption under the 2006 Ordinance is that questions may be asked about any convictions a person has, irrespective of how long ago the convictions may have occurred.*

10.2 *There is an exemption for offices and employment listed at Part II of Schedule 1 to the 2006 Ordinance. The list includes some authorities with access to sensitive information linked to financial crime, such as the Law Officers Chambers, the Guernsey Police, the Customs and Immigration Service and the Guernsey Financial Services Commission ("GFSC"). Therefore, when assessing whether a person is suitable to work in those authorities, questions may be asked about any convictions the person has, irrespective of how long ago the convictions may have occurred. However, some other authorities within the Bailiwick whose functions also involve handling sensitive information linked to financial crime, such as the Revenue Service and the Registrar of Beneficial Ownership, are not on the list. It is clearly important that the legal framework on this important point is consistent in its application to all relevant authorities. I therefore recommend that the 2006 Ordinance be amended to add to the list all authorities whose functions involve handling sensitive information linked to financial crime.*

10.3 *In addition, there is an exemption in the 2006 Ordinance that enables the GFSC and employers in the financial services sector to ask questions about any convictions for the purposes of licensing and employment respectively. This reflects the importance of maintaining high standards in the financial services sector, given its importance to the economy and the need to continue to protect it from abuse. The same considerations apply to Alderney's eGambling sector, but there is currently no equivalent exemption applicable to the Alderney Gambling Control Commission licensing and certification process, or to employers in the*

*sector. I therefore recommend a further amendment to the 2006 Ordinance to introduce an exemption for these activities that corresponds to the exemption for the GFSC and employers in the financial services sector."*

**11 Compliance with Rule 4**

11.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.

11.2 In accordance with Rule 4(1)(a), the Propositions contribute to Priority 2 of the Government Work Plan by ensuring compliance with international agreements and standards.

11.3 In accordance with Rule 4(1)(b), the Committee has consulted Her Majesty's Procureur, the Policy & Resources Committee, the Head of Law Enforcement, the States of Alderney, Sark Chief Pleas, and the Alderney Gambling Control Commission.

11.4 In accordance with Rule 4(1)(c), the Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications.

11.5 In accordance with Rule 4(2)(a), the Propositions relate to the duties of the Committee to advise the States and to develop and implement policies on matters relating to its purpose including law enforcement, including policing and customs.

11.6 In accordance with Rule 4(2)(b) the propositions were supported unanimously by the Committee.

Yours faithfully

R G Prow
President

S P J Vermeulen
Vice-President

S Aldwell
M P Leadbeater
A W Taylor

P A Harwood
Non-States Member