

# STATES OF JERSEY



Jersey

## **DRAFT PROCEEDS OF CRIME (AMENDMENT No. 7) (JERSEY) LAW 202-**

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**Lodged au Greffe on 9th March 2022  
by the Minister for External Relations and Financial Services  
Earliest date for debate: 25th April 2022**

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**STATES GREFFE**





Jersey

## **DRAFT PROCEEDS OF CRIME (AMENDMENT No. 7) (JERSEY) LAW 202-**

### **European Convention on Human Rights**

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Minister for External Relations and Financial Services has made the following statement –

In the view of the Minister for External Relations and Financial Services, the provisions of the Draft Proceeds of Crime (Amendment No. 7) (Jersey) Law 202- are compatible with the Convention Rights.

Signed: **Senator I.J. Gorst**

*Minister for External Relations and Financial Services*

Dated: 9th March 2022



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## REPORT

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Jersey is a leading and well-regulated International Finance Centre, and the Government of Jersey is committed to combat financial crime and illicit finance whilst protecting the integrity of the international financial system from misuse. At the core of these efforts are the anti-money laundering (AML) and countering the financing of terrorism (CFT) regulations.

The Financial Action Task Force (FATF) is the global money laundering (ML) and terrorist financing (TF) watchdog. The inter-governmental body sets international standards that aim to prevent these illegal activities and the harm they cause to society. Under Immediate Outcome 7 (IO7) of the FATF Methodology, jurisdictions are required to demonstrate that money laundering offences and activities are investigated, and offenders are prosecuted and subject to effective, proportionate, and dissuasive sanctions.

IO7 outlines a number of Core Issues which need to be considered when determining whether the Outcome is achieved, and of particular relevance are Core Issues 7.2, 7.4 and 7.5:

- To what extent are the types of ML activity being investigated and prosecuted consistent with the country's threats and risk profile and national AML/CFT policies?
- To what extent are the sanctions applied against natural or legal persons convicted of ML offences effective, proportionate, and dissuasive?
- To what extent do countries apply other criminal justice measures in cases where a ML investigation has been pursued but where it is not possible, for justifiable reasons, to secure a ML conviction?

The points to particularly highlight are, firstly, the requirement to demonstrate prosecutions which are consistent with Jersey's money laundering risk profile and, secondly, to apply effective and dissuasive sanctions against natural persons as well as legal persons.

This creates a requirement to introduce new statutory measures to enhance the jurisdiction's effectiveness of AML/CFT enforcement in order to better meet the Core Issues of IO7 in addition to other relevant requirements under the FATF Methodology. This view is supported by the results of the 2015 Mutual Evaluation Report by MONEYVAL, the Government's own National Risk Assessment of ML in 2020 and the mock MONEYVAL assessment by independent experts in 2021.

Government's broader policy proposal to enhance the AML/CFT enforcement effectiveness, from a statutory perspective, is based on following three building-blocks:

- extend the civil financial penalties regime available to the JFSC; and
- introduce a bespoke Deferred Prosecution Agreement (DPA) regime; and
- introduce a Failure-To-Prevent Money Laundering/Terrorist Financing offence (FTP ML/TF).

The combination of these three building-blocks will significantly enhance the jurisdiction's overall AML/CFT enforcement effectiveness. These statutory building-blocks are further supplemented by operational measures. For example, additional resources have been secured in the [Government Plan 2022-2025](#) to significantly increase resources in the Jersey Financial Intelligence Unit and the Economic Crimes and Confiscation Unit in order to increase the Island's operational defences against financial crime.

With regards to the first building block, the extension of the civil financial penalties regime, the [Draft Financial Services Commission \(Amendment No. 8\) \(Jersey\) Law 202-](#) has been adopted unanimously by the States Assembly on 19th January 2022 already.

With regards to the second building block, Deferred Prosecution Agreements, the work is ongoing with the intention to bring a draft law before the States Assembly later in the year.

The third building block of the aforementioned policy proposal is contained in the Draft Proceeds of Crime (Amendment No. 7) (Jersey) Law 202- (the "Amendment") which, if adopted, would create a failure-to-prevent ML and TF corporate criminal offence within the [Proceeds of Crime \(Jersey\) Law 1999](#) (POCL).

Failure-To-Prevent (FTP) offences have been specifically created by other legislators because they provide for a more appropriate attribution of criminal liability in specific contexts where it would be otherwise extremely difficult to attribute any criminal liability to a legal person. The UK for example, introduced a failure-to-prevent bribery offence in 2010 and a failure-to-prevent tax evasion offence in 2017. Furthermore, the UK Law Commission is currently reviewing the potential introduction of a failure-to-prevent economic crime offence.

However, FTP offences are considered an effective and hence attractive tool in the fight against economic crime beyond the UK. Switzerland introduced in 2003 with Article 102 (2) of its criminal code a failure-to-prevent offence for certain financial crimes including money laundering. On a European level, the European Union adopted its sixth Anti-Money Laundering Directive (6AMLD) in 2018. The Directive introduces, inter alia, a failure-to-prevent offence for corporate bodies in Article 7(2). The Directive requires member states to comply with the Directive by 3 December 2020 while regulated entities operating in member states were given a timeline till 3 June 2021 to be compliant with the new requirements.

Should the Amendment be adopted, the creation of the new offence within POCL would enable a more appropriate attribution of corporate criminal liability and thus support a better alignment with the requirements of Core Issue 7.4 of IO7 with regards to legal persons.

The offence would apply to financial services businesses (FSBs). The substantive offences covered under the Amendment are Articles 30 and 31 of POCL and Articles 15 and 16 of the [Terrorism \(Jersey\) Law 2002](#) as well as conduct outside Jersey which, if occurring in Jersey, would be an offence under said articles. This means that only money laundering and terrorist financing as defined under the aforementioned articles would trigger the new offence, whereas, for example, a contravention of the [Money Laundering \(Jersey\) Order 2008](#) would not. Because the substantive offences would be committed by an associated person of the FSB, the Amendment provides a definition of associated persons which lists the most relevant categories from a financial services and money laundering perspective. Importantly, the Amendment also provides the corporate body with a "reasonable steps" defence considering the activities of the associated person.

Compared to the existing FTP offences of bribery and tax evasion in the UK, the introduction of an FTP ML/TF offence can be considered superior for several reasons. Firstly, the proposed offence would only apply to the sectors which are already regulated for AML purposes. Hence, no additional requirements for other sectors would be introduced. Moreover, for the AML-regulated sectors, the requirements to prevent money laundering and terrorist financing already exist and would not be expanded by the Amendment. This means that, unlike the introduction of the bribery and tax evasion FTP offences, no new or additional compliance requirements, and thus costs, would be imposed on the regulated sectors through the introduction of the FTP ML/TF offence. This is also preferable with regards to competitiveness aspects for the jurisdiction. Finally, considering the different stages of the money laundering process and given that Jersey is generally more exposed to the layering stage, the introduction of the offence is considered beneficial regarding the attribution of criminal liability to legal persons, consistent with the country's threats and risk profile, as outlined under Core Issue 7.2 of IO7.

Furthermore, because FTP offences provide for a defence where adequate prevention measures are in place, they create an incentive for corporate bodies to ensure they comply with best practices and that they identify and support the removal of any areas of uncertainty in statutory and regulatory guidance, whereas at present, there is no positive incentive to do so. This represents another attractive feature from a policy perspective which looks to minimise AML vulnerabilities on a jurisdictional level.

The Amendment has been drafted in coordination with the Law Officers' Department and was subject to a pre-consultation with representatives from the main trade bodies and the Law Society of Jersey, followed by a full public consultation during which no concerns were raised. Through direct engagement with the finance industry though, it can be noted that the introduction of the new offence would generally be welcomed due to its potential to deter criminal actors from tarnishing the Island's well-earned reputation.

The Amendment represents a key building-block to enhance the enforcement effectiveness and thus the overall financial crime regime with respect to AML offences. Its introduction would enhance the overall dissuasiveness of the sanctions available to the Royal Court and act as an effective deterrent against contravening the existing AML provisions. This overall increase in effectiveness can be achieved without creating additional requirements for the AML-regulated sectors. Finally, the new offence is considered beneficial to enable prosecutions which are consistent with Jersey's threats and risk profile, in line with the FATF Methodology. Therefore, we propose the Amendment for adoption by the States Assembly.

### **Financial and manpower implications**

There are no financial and manpower implications for the States arising from the adoption of the Amendment.

### **Human Rights**

The notes on the human rights aspects of the draft Law in the **Appendix** have been prepared by the Law Officers' Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

**APPENDIX TO REPORT****Human Rights Notes on the Draft Proceeds of Crime (Amendment No. 7)  
(Jersey) Law 202-**

These Notes have been prepared in respect of the draft Proceeds of Crime (Amendment No. 7) (Jersey) Law 202- (the “**draft Law**”) by the Law Officers’ Department. They summarise the principal human rights issues arising from the contents of the draft Law and explain why, in the Law Officers’ opinion, the draft Law is compatible with the European Convention on Human Rights (the “**Convention**”).

**These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.**

It is envisaged that, under the New Offence, an FSB will have available to it a “reasonable steps” defence that it had “adequately maintained and applied prevention procedures” in place. Such a defence will be subject to a reverse burden of proof on the defendant, such that the defendant will be required to establish, on the balance of probabilities, any facts that need to be proved in advancing the defence. It is recognised that there is a potential for the imposition of reverse burdens of proof to engage and interfere with the right in Article 6 of the Convention (the right to a fair trial). However, the Law Officers’ Department is of the view that imposing a reverse burden of proof can be justified and is proportionate in this case (and therefore not incompatible with Article 6 of the Convention) on a number of grounds.

In reaching this view, the Law Officers’ Department has had regard to the leading UK case of *Sheldrake v DPP* (which includes two judgments, the Sheldrake judgment and a judgment on a separate AG reference relating to certain terrorism offences). From the judgements in that case was that a reverse legal burden of proof is likely to be acceptable from an Article 6(2) ECHR/presumption of innocence perspective, as long as it is justified and proportionate. The judgment in relation to the AG reference states that the “*imposition of a legal burden is necessary and proportionate because there is a manifest public interest in suppressing terrorism...*”. The object of the reverse legal burden in the present case is in part to provide additional tools to tackle money laundering and terrorist financing.

When considering the proportionality of a measure, a balance needs to be struck between the general interest of the community and the protection of the fundamental rights of a defendant when considering offences under primary legislation against ECHR rights. ECHR case law “*recognises that where the balancing of rights is concerned the state is accorded a wide margin of appreciation in striking the balance*”.

In considering the factors that might weigh on the proportionality of the reverse burden in this case the Law Officers’ Department has had regard to paragraph 33 of the Convention memorandum prepared by the UK Home Office and HMRC on the Criminal Finances Bill (the “**ECHR Memo**”<sup>1</sup>) which sets out a number of grounds justifying the imposition of reverse legal burdens of proof (as opposed to merely evidential burdens) in the context of that Bill. These grounds include the following:

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<sup>1</sup> [ECHR memo \(parliament.uk\)](#) – this Bill later became the [Criminal Finances Act 2017](#), and contains an offence of failing to prevent tax evasion in sections 45 and 46.



- a. the difficulties in prosecuting corporations are well documented;
- b. the relevant body will be uniquely well placed to know what procedures it has in place. Indeed, this information is likely to be in the defendant relevant body's sole knowledge; and
- c. investigators and prosecutors would find it very difficult to obtain evidence of these procedures from anyone apart from the defendant relevant body.

The above grounds are also likely to apply in the context of the "reasonable steps" defence referred to above.

Further, paragraph 34 of the ECHR Memo refers to support for the above justification being drawn from the Sheldrake judgment and its line of authorities starting with the European Court of Human Right's decision in *Salabiaku v France* and culminating in the decisions of the House of Lords in both *R v Lambert* and *R v Johnstone*.

The Sheldrake judgment also suggests that it should be easier to justify the reverse legal burden where there is a positive obligation on an accused to prove any facts that need to be proved in advancing the defence (and in the case of the New Offence, that it had "*adequately maintained and applied prevention procedures*" in place), as opposed to a negative obligation.

To conclude, we consider that a reverse legal burden of proof on a defendant in the context of the New Offence would be compatible with Article 6 of the ECHR.



## EXPLANATORY NOTE

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This Law amends the Proceeds of Crime (Jersey) Law 1999 to introduce 2 new offences – failing to prevent a person associated with a financial services business committing an offence of money laundering and liability of a person for an offence committed by a financial services business when committed with the consent or connivance of that person.

*Article 1* introduces the amendments to the Proceeds of Crime (Jersey) Law 1999 (“the principal Law”).

*Article 2* inserts a new Article 35A into the principal Law which makes it an offence for a financial services business to fail to prevent a person associated with the financial services business committing an offence of money laundering.

If the business is a corporate body the penalty is a fine. If the business is not a corporate body the penalty is a term of imprisonment not exceeding 2 years or a fine or both.

It is a defence for the business to prove that at the time the money laundering occurred it adequately maintained and applied procedures to prevent persons associated with the business from being engaged in money laundering. A person is associated with the business if that person is an employee, an agent, a person performing services for or on behalf of the business or a customer of the business or agent of such customer.

When deciding whether a business has maintained and applied prevention procedures the Court may consider any relevant code of practice or guidance.

*Article 3* deletes paragraphs (5) and (6) from Article 37 of the principal Law, which makes a person concerned in the management or control of a business which is guilty of an offence under paragraph (4) also guilty of the offence where it has been committed with the consent and connivance of that person. They are being removed as they are superseded by the provisions in Article 4 of this Law.

*Article 4* inserts a new Article 39A into the principal Law which makes a relevant person also guilty of an offence under the principal Law, or an Order made under it, where a financial services business commits that offence with the consent or connivance of the relevant person.

A relevant person is a partner in a limited liability partnership; a general partner in or limited partner who is participating in the management of, a separate limited partnership or an incorporated limited partnership; a director, manager, secretary, statutory officer or other similar officer in a body corporate (other than an incorporated limited partnership) or, if the affairs of that body corporate are managed by its members, a member who is acting in connection with the member’s functions of management; and any person purporting to act in any such capacity.

*Article 5* gives the name of the law and provides that it comes into force 7 days after it is registered.





Jersey

## DRAFT PROCEEDS OF CRIME (AMENDMENT No. 7) (JERSEY) LAW 202-

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Jersey

## DRAFT PROCEEDS OF CRIME (AMENDMENT No. 7) (JERSEY) LAW 202-

A LAW to amend further the [Proceeds of Crime \(Jersey\) Law 1999](#).

<i>Adopted by the States</i>	<i>[date to be inserted]</i>
<i>Sanctioned by Order of Her Majesty in Council</i>	<i>[date to be inserted]</i>
<i>Registered by the Royal Court</i>	<i>[date to be inserted]</i>
<i>Coming into force</i>	<i>[date to be inserted]</i>

**THE STATES**, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

### 1 [Proceeds of Crime \(Jersey\) Law 1999](#) amended

This Law amends the [Proceeds of Crime \(Jersey\) Law 1999](#).

### 2 **New Article 35A (offence of failure to prevent money laundering) inserted**

After Article 35 there is inserted –

#### **“35A Failure to prevent money laundering**

- (1) A financial services business (B) commits an offence, and is liable –
  - (a) if B is a body corporate, to a fine; or
  - (b) if B is not a body corporate, to imprisonment for a term not exceeding 2 years or to a fine or to both,
 if a person is engaged in money laundering when acting in the capacity of a person associated with B.
- (2) It is a defence for B to prove that when the money laundering occurred B adequately maintained and applied prevention procedures in relation to the activities of the person associated with B.
- (3) A person is engaged in money laundering if the person engages in conduct which constitutes money laundering, whether or not the person has been convicted of an offence in relation to that conduct.

- (4) A person acts in the capacity of a person associated with B if that person is –
  - (a) an employee of B who is acting in the capacity of an employee;
  - (b) an agent of B (other than an employee) who is acting in the capacity of an agent;
  - (c) any other person who performs services for or on behalf of B who is acting in the capacity of a person performing such services; or
  - (d) a customer of B, or an agent of a customer of B, in relation to any service performed by or on behalf of B.
- (5) In paragraph (2) “prevention procedures” means procedures designed to prevent persons acting in the capacity of a person associated with B being engaged in money laundering.
- (6) In determining whether B has adequately maintained and applied prevention procedures in relation to the activities of the person associated with B, the Court –
  - (a) may take account of any relevant Code of Practice or guidance that applies to B and is issued by the supervisory body exercising supervisory functions in respect of B; or
  - (b) if no such Code of Practice or guidance applies, may take into account any relevant Code of Practice or guidance that is issued by another supervisory body; or
  - (c) if there is no such relevant Code of Practice or guidance, may take account of any other relevant guidance issued by a body that is representative of B or any supervised business that is carried on by B.
- (7) For the purposes of paragraph (4)(c) the question whether or not the person is a person who performs services for or on behalf of B is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between that person and B.
- (8) In paragraph (4)(d) “customer” has the same meaning as in Schedule 3.
- (9) For the purposes of paragraph (6), “Code of Practice”, “supervised business”, “supervisory body” and “supervisory functions” have the same meaning as in the [Proceeds of Crime \(Supervisory Bodies\) \(Jersey\) Law 2008](#).

### **3 Article 37 (procedures to prevent and detect money laundering) amended**

Article 37(5) and (6) are deleted.

### **4 New Article 39A (offences by bodies corporate and others) inserted**

After the heading of Part 5 there is inserted –



**“39A Offences by bodies corporate and others**

(1) In this Article –

“relevant offence” means an offence under this Law or any Order made under it that is committed by a limited liability partnership, a separate limited partnership, an incorporated limited partnership or another body corporate;

“relevant person” means –

- (a) if the relevant offence is committed by a limited liability partnership, a partner of the partnership;
- (b) if the relevant offence is committed by a separate limited partnership or an incorporated limited partnership –
  - (i) a general partner, or
  - (ii) a limited partner who is participating in the management of the partnership;
- (c) if the relevant offence is committed by a body corporate other than an incorporated limited partnership –
  - (i) a director, manager, secretary, statutory officer or other similar officer of the body corporate, and
  - (ii) if the affairs of the body corporate are managed by its members, a member who is acting in connection with the member’s functions of management; and
- (d) a person purporting to act in any capacity described in subparagraphs (a) to (c) in relation to the partnership or body that commits the relevant offence;

“statutory officer” means any person who is required to be appointed by a financial services business under an Order made under Article 37.

(2) If the relevant offence is proved to have been committed by a financial services business with the consent or connivance of a relevant person, that relevant person is also guilty of the offence and liable in the same manner as the financial services business to the penalty provided for that offence.”

**5 Citation and commencement**

This Law may be cited as the Proceeds of Crime (Amendment No. 7) (Jersey) Law 202- and comes into force 7 days after it is registered.