Law Society of Scotland

Sanctions and Anti-Money Laundering Bill

Second Reading Briefing by the Law Society of Scotland

October 2017

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Pubic Policy Committee welcomes the opportunity to consider and respond to the Sanctions and Anti-money Laundering Bill. The Committee has the following comments to make on the bill.

General Comments

We agree that sanctions are an important foreign policy and national security tool and that the current sanctions regime needs revision to take account of the UK's withdrawal from the EU. The EU sanctions have their legal base in EU legislation which is brought into UK law by the European Communities Act 1972. When that Act is repealed there will need to be in place domestic UK legislation which creates the capacity to preserve and update UN sanctions and to impose autonomous UK sanctions. We note that the provisions of clauses 2 (financial sanctions), 3 (immigration sanctions), 4 (trade sanctions), 5 (aircraft sanctions) and 6 (shipping sanctions) are provided for within the context of the bill. We welcome this schematic which goes a long way to consolidation of sanctions legislation. This will be helpful and reduce some of the burden on legal and other advisors who may have to interpret these provisions.

We also note in clause 36 provision is made requiring the appropriate Minister to issue guidance about any prohibitions and requirement imposed by the regulations made under section 1. We agree that guidance on the sanctions regime should be consolidated and made available. It will be important for there to be an official communications campaign to assist legal and other advisers in becoming familiar with the UK sanctions regime. The Office of Financial Sanctions Implementation (OFSI) should also produce sector specific guidance covering the use of such issues as automated sanctions screening systems and legal professional privilege in the context of sanctions compliance.

We comment in this briefing only on the clauses in the bill where we have a specific observation to raise.

Specific Comments on the Bill

Clause 1 Power to make Sanctions Regulations

We acknowledge that clause 1 permits the "appropriate Minister" to make sanctions regulations where that Minister considers that it is appropriate to make the regulations. We note that the "appropriate Minister" is defined in clause 1 (7) as:

"(a) the Secretary of State;

(b) The Treasury".

We acknowledge that the Treasury has order making power under for example the Finance Act 2003 and other financial legislation however we believe that the sanction regulation making power should be restricted to Ministers. Ministers are fully accountable to Parliament for the exercise of such a regulation making power. Furthermore under the Interpretation Act 1978 schedule 3 "Secretary of State" means one of Her Majesties Principal Secretaries of State. Therefore any Principal Secretary of State could make the regulations if required. We believe the Government should give the provisions of clause 1 further thought in connection with who may make the regulations and the accountability for making the regulations and consequently for their amendment or revocation under Clause 38.

We agree that regulations made under clause 1 should fulfil the purposes set out in clause 1 (2). However we also believe that clause 1 (2) (a) should not be restricted to the prevention of terrorism but should include serious organised crime and trafficking.

We take the view that the Secretary of State should also maintain a register that lists all sanctions including descriptions of any designated person and the types of sanction which are imposed and also the exemptions from such sanctions. This register should be published on the internet on behalf of the Secretary of State and insure that the register is available for public inspection at all reasonable times.

Clause 14 Exceptions and Licences

We agree with the general principle that there should be provision for the exceptions and licences as detailed under clause 14. However there is no provision that regulations may provide for the procedure under which a licence or exception may be applied for. We believe that this would be a useful addition to the clause 14.

Clause 15 Information and Clause 16 Enforcement

We believe that the provisions regarding exceptions and licences should be clearly provided for in regulations. This is particularly where the licence relates to the provision of legal advice concerning the nature of the sanction and the law and practice of the sanctions regime.

In relation to clause 15 we are concerned about the maintenance of legal professional privilege/confidentiality which is central to the rule of law and has most recently been recognised in the

Investigatory Powers Act 2016. We note that schedule 1 paragraph 7 makes special provision regarding a limitation on the disclosure of material but this is not the same as the broad protection and safeguards for items subject to legal privilege which has been enacted in the Investigatory Powers Act 2016 section 55.

We believe that there should be explicit protection in clause 15 for items subject to legal privilege or confidentiality.

Clause 18 Power to vary or revoke designation made under Regulations

Clause 18(2) provides that a relevant designation may "at any time" be varied or revoked by the Minister. We encourage the Government to consider whether it would be more appropriate for there to be a fixed term for designations which would provide that designations. The fixed term would be revoked at a certain date subject to further amendment or extension.

Clause 20 Periodic review of certain designations

We note that the review period in terms of clause 20(4) is a period of three years beginning with the date when the Regulations are made and each further period of three years begins with the date of completion of the review. In our view it may be appropriate for there to be a shorter review period. In response to the Government's pre legislative consultation we suggested a one year review period but accept that this may be too short. Perhaps a two year review would be the best period to apply under this clause?

Clause 34 Rules of Court

We note that clause 34 relating to rules of court in connection with the review of Ministerial decisions does not apply to Scotland. The explanatory notes state "In Scotland, the power to make rules of court resides in the Court of Session, and this clause makes no provision in respect of those rules" (paragraph 107). It would be helpful were Ministers to explain why the clause does not extend to Scotland.

Clause 41 Money Laundering and Terrorist Financing etc.

We have no comments to make on clause 41 as such. The Society has been in discussion with the Treasury about the implementation of the Fourth Money Laundering Directive under the Money Laundering Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 "(the regulations").

We strongly support the Government's intention to strengthen the response to money laundering and terrorist financing threats to protect the safety of its citizens and the integrity of the UK financial system. We are therefore taking forward significant change to our AML supervisory regime following the implementation of the regulations.

It should be noted however that further legislative change is essential if we are to achieve the intentions of the Government. The ability to apply appropriate sanctions (eg: to apply significant fines and to stop a regulated person from practicing) following the identification of breaches of the regulations are essential tools for effective AML supervision. We require additional statutory powers and we are currently liaising with the Treasury and the Scottish Government to achieve the necessary changes to the law.

Clause 45 Parliamentary Procedure for Regulation

We note the terms of clause 45 and would draw attention to the fact that under clause 45(5) a statutory instrument containing regulations under Section 1 may repeal, revoke or amend any provision of primary legislation and that this is subject to the affirmative resolution procedure in each House of Parliament. Under clause 45(10) primary legislation includes:-

"(a) An Act of Parliament,

(b) An act of the Scottish Parliament,

(c) Measure or Act of the National Assembly for Wales, or

(d) Northern Ireland legislation."

And therefore it would be possible for a statutory interim to create a criminal offence or make retrospective provision.

In our view there should be statutory limitations on the extent to which regulations under Section 1 may repeal, revoke or amend primary legislation.

The procedure adopted of the affirmative resolution procedure is in our view insufficient for the scrutiny of such regulations where such changes are in contemplation and therefore it should be open to Parliament to provide which procedure would apply to such regulations.

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For further information, please contact:
Michael P Clancy
Director Law Reform
Law Society of Scotland
DD: 0131 476 8163
michaelclancy@lawscot.org.uk