

STATES OF JERSEY



DRAFT PROCEEDS OF CRIME (AMENDMENT No. 3) (JERSEY) LAW 201-

Lodged au Greffe on 9th April 2018
by the Chief Minister

STATES GREFFE



Jersey

DRAFT PROCEEDS OF CRIME (AMENDMENT No. 3) (JERSEY) LAW 201-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Chief Minister has made the following statement –

In the view of the Chief Minister, the provisions of the Draft Proceeds of Crime (Amendment No. 3) (Jersey) Law 201- are compatible with the Convention Rights.

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

Chief Minister

Dated: 27th February 2018

REPORT

Background

The Draft Proceeds of Crime (Amendment No. 3) (Jersey) Law 201- (the “draft Law”) proposes amendments to the Proceeds of Crime (Jersey) Law 1999 (the “1999 Law”) following the publication of the 4th round report on Jersey’s compliance with the FATF Recommendations (2003) by the Council of Europe’s Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (“**Moneyval**”). The draft Law is lodged further to recommendations by the Jersey Financial Crime Strategy Group, which makes recommendations to the Government on financial crime policy for Jersey.

Definition of criminal property

Article 29 defines “criminal property” for the purposes of the 1999 Law.

The Moneyval report on Jersey (paragraphs 205 and 246) recommended amending the definition to cover property obtained through the commission of an offence consistent with the definition of criminal property in Article 1(e) of the UN Convention against Transnational Organised Crime (Palermo) –

“Proceeds of crime” shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence.”

It has also been recommended by the Financial Crime Strategy Group that the definition should be further widened to include instances where property is used in or intended for use in unlawful conduct.

The draft Law therefore amends the definition of “criminal property” in Article 29 of the 1999 Law as follows –

- (a) to include property obtained, directly or indirectly through the commission of an offence; and
- (b) to include property that is used in, or intended to be used in criminal conduct.

Assumptions in Article 5 of the Proceeds of Crime (Jersey) Law 1999

Under Article 5 of the 1999 Law, assumptions as to ‘criminal conduct’ are only available if the defendant is being sentenced for at least 2 qualifying offences (i.e. which attract a maximum penalty of one or more years’ imprisonment, and the court is satisfied that they are offences from which the defendant has benefited), or he has in the previous 6 years been sentenced for one or more qualifying offences.

The Moneyval Report criticised this and, in order to meet the concerns of Moneyval and to enhance the effectiveness of confiscations, it has been recommended by the Financial Crime Strategy Group that a ‘one qualifying offence’ threshold should apply for the assumptions in Article 5 of the 1999 Law.

The draft Law therefore amends the position so that the assumptions should be made available to the court when asked to do so by H.M. Attorney General, or on its own motion to make those assumptions to determine if the defendant has benefitted from criminal conduct and, if so, to what extent, when a defendant is being sentenced for one qualifying offence.

Collective responsibility under Standing Order 21(3A)

The Council of Ministers has a single policy position on this proposition, and as such, all Ministers, and the Assistant Ministers to the Chief Minister, are bound by the principle of collective responsibility to support the proposition, as outlined in the Code of Conduct and Practice for Ministers and Assistant Ministers ([R.11/2015](#) refers).

Financial and manpower implications

There are no financial or manpower implications for the States arising from the adoption of this draft Law.

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. 3) (Jersey) Law 201-

These Notes have been prepared in respect of the Draft Proceeds of Crime (Amendment No. 3) (Jersey) Law 201- (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 Data Law is compatible with the European Convention on Human Rights (“**ECHR**”).

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

The principal change in the Law is to amend Article 5 of the Proceeds of Crime (Jersey) Law 1999 (“the 1999 Law”) so that the assumptions in respect of the provenance of property acquired by the Defendant after the crime will apply after conviction for a single offence. This is a stricter regime than exists in England and Wales under the Proceeds of Crime Act 2002, which look to a course of conduct involving multiple offences so as to evidence a “criminal lifestyle”.

If an individual commits an offence as defined in Schedule 1 (i.e. essentially any serious offence), then the property is assumed to be a product of that offence unless shown otherwise (Article 5(7) of the 1999 Law.)

The question may be viewed both in terms of Article 1 of Protocol 1 – as to whether their right to possessions is being disturbed otherwise than by law – or Article 6 – a right to a fair trial when determining civil rights. The question is whether they have a right to possess the property in question, and it makes little difference which way it is analysed. If the process for determining whether it is their property is arbitrary, then the rights will not have been infringed “by law” – and in these circumstances that is much the same question as person concerned has been given a fair hearing on the issue.

Ultimately, the provision relates to the burden of proof that applies when a convicted defendant has assets and has been convicted of a serious offence. It is for the Defendant to prove that assets held or transferred after the offence came by reason other than crime. Whether the assets were criminal property is a question of fact for the court, and it often will matter little where the burden actually is, once evidence is brought forward by the parties. For example, in taxation appeals the burden is on the taxpayer to prove that the assessment is wrong, yet that burden is seldom a relevant factor once evidence is called. In a world of increasingly electronic transactions, it is seldom an onerous burden to prove the provenance of assets. So there is nothing strange or irregular with such a burden. This is particularly the case, given that such confiscation proceedings, whilst taking place in a criminal trial, are a civil rather than a criminal matter for the purposes of Convention Rights (see *Director of the Assets Recovery Agency v Jia Jin He* [2004] EWHC 3012 (Admin).)

The change made by the amendment is that the provision will apply after only one offence rather than 2 (or 3, depending on the period of offending) – but the essential danger of the issue to be tried by the court remains the same.

As the civil rights and property rights involved will be considered by process of law, and there is no reason to doubt the fairness of that process, the draft Law is plainly compatible with the Human Rights (Jersey) Law 2000.

Article 29

Article 29 is not a provision relating to property or other rights. It amends the definition of criminal property, and expands it to include property that is used in, or intended to be used in, criminal conduct. It does not change the mental element required for the offence.

It is not at first the clearest provision, but once it is understood that it cannot be read as applying to simply any property that has historically been used in crime, then its meaning has the clarity required of a criminal offence. An item with no purpose outside crime will be caught, as will more neutral items where there is an intent to use them in crime.

Explanatory Note

This Law further amends the Proceeds of Crime (Jersey) Law 1999 (the “principal Law” as defined in *Article 1*).

Article 2 amends Article 5 of the principal Law so that there is no requirement for there to have been 2 qualifying offences within a period of 6 years ending when the proceedings were instituted against the defendant for the Royal Court (the “Court” as defined in Article 1(1) of the principal Law) to make the assumptions provided for in that Article.

Article 3 amends Article 29 of the principal Law to widen the definition “criminal property” in that Article to include property derived from or obtained, directly or indirectly, through criminal conduct (as defined in Article 1 of the principal Law) and property that is used in, or intended to be used in, criminal conduct.

Article 4 provides the title of this Law and provides for it to come into force 7 days after it is registered.



Jersey

DRAFT PROCEEDS OF CRIME (AMENDMENT No. 3) (JERSEY) LAW 201-

A **LAW** to further amend the Proceeds of Crime (Jersey) Law 1999

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

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

1 Interpretation

In this Law “principal Law” means the Proceeds of Crime (Jersey) Law 1999¹.

2 Article 5 amended

In Article 5 of the principal Law –

(a) for paragraph (1) there shall be substituted the following paragraph –

“(1) This Article applies for the purposes of Article 3 where a defendant appears before the Court to be sentenced in respect of a qualifying offence –

- (a) if the Attorney General asks the Court to apply it for the purposes of that Article; or
- (b) if the Court considers that, even though the Attorney General has not asked it to do so, it is appropriate for it to do so.”;

(b) paragraph (3) shall be repealed;

(c) in paragraph (5) the words “since the beginning of the relevant period” wherever they occur in that paragraph shall be deleted.

3 Article 29 amended

For Article 29(1) there shall be substituted the following paragraph –

- “(1) For the purposes of this Part –
‘criminal property’ includes –
- (a) any property derived from or obtained, directly or indirectly, through criminal conduct, if the alleged offender knows or suspects that the property is derived from or obtained, directly or indirectly, through criminal conduct; and
 - (b) any property that is used in, or intended to be used in, criminal conduct, if the alleged offender knows or suspects that the property is used in, or is intended to be used in, criminal conduct.”

4 Citation and commencement

This Law may be cited as the Proceeds of Crime (Amendment No. 3) (Jersey) Law 201- and shall come into force 7 days after it is registered.

¹ *chapter 08.780*