The White Collar Crime Centre

Unexplained Wealth Orders:
thoughts on scope and effect in the UK

Briefing Papers

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FOREWORD

The proposed introduction of a free-standing procedure which compels an individual to explain the source of his wealth is a radical development in English law. More usually, Judges are required to adjudicate upon matters relating to disclosure of information where the issue arises during the course of civil proceedings, or where a defendant seeks to explain the legitimate origin of his assets in confiscation proceedings following criminal conviction.

Under the new provision, to be known as an Unexplained Wealth Order ("UWO"), there is no need for any civil or criminal proceedings to have been initiated. It is sufficient if the State investigating authorities apply to the High Court in circumstances where an individual is a politically-exposed person, or there are reasonable grounds for suspecting that an individual has been involved in serious crime. Associates of these persons are also captured. Failure to respond to a UWO will precipitate civil recovery proceedings with a presumption in favour of asset confiscation. Contempt of court proceedings can also be instituted. Providing false or misleading information in response to a UWO will constitute a criminal offence punishable by a maximum term of two years' imprisonment.

In seeking to fulfil its objective to provide a cerebral voice in the public square, The White Collar Crime Centre has produced a series of briefing papers written by five bright young lawyers, drawn from practice and academia, interested in exploring the legal response to corruption and organised crime. The papers cover a range of perspectives and their purpose is to assist our legislators in Parliament to establish legislation which is efficacious and fair, and which does not violate fundamental rights and offend the Rule of Law. The quality of the five essays is extremely high and they make important points on which the UK's legislators are encouraged to reflect.

In the first paper, **Charlette Bunn** raises a vitally important issue which has not been publicly considered in the UK until now. Since one of the objectives of the new UWO is to assist in the fight against the kleptomaniac conduct of a small number of foreign government officials who have brought their illicit gains to the UK for the purposes of investment or enjoyment, it is inevitable that some of these officials will seek to claim the benefit of immunity from legal process which is afforded to State officials under the norms of international law. The intersection between UWOs and international law is a matter which needs to be urgently explored, for if there are limitations on the application of UWOs, it is best to be forewarned than taken by surprise.

More domestically, **Anita Clifford** explores in the second paper the potential scope of a UWO and how material produced pursuant to UWO could be deployed in civil and criminal proceedings. She raises an issue as to whether fundamental rights could be compromised where material produced in response to a UWO is used to trigger a criminal rather than a civil investigation. The question of the type of evidence which could be produced by an individual subject to a UWO is also the subject of consideration. Anita Clifford concludes that there is a strong case for Parliament to require the Secretary of State to issue some formal Guidance which addresses these issues.

Natasha Reurts develops this point during her fascinating review of experiences in Australia, Columbia and Ireland. In particular, Natasha Reurts alludes to the Australian experience where

individuals served with a UWO have been able to discharge the burden of explaining the source of their wealth by pointing to the receipt of an unexpected bonus, such as winnings from gambling or horse racing. It would be a shame if the UK's experience were to be similarly constrained.

In the fourth paper, **Dominic Thomas-James** addresses a controversial issue relating to the decision not to enact a criminal offence of illicit enrichment in the UK but instead to rely upon the concept of a UWO to spearhead the latest attack on handling the proceeds of corruption. At the end of a stimulating account, Dominic Thomas-James concludes that the UK government was right to eschew the creation of another new criminal offence and instead introduce the UWO order as a springboard for civil recovery proceedings in appropriate cases.

In the final paper, **Sara Trainor** explores the proposed introduction of UWOs through a criminological lens. Her conclusion raises a fundamental issue which has not been addressed in the pre-legislative materials and which now requires some speedy thought. Having articulated deterrence as a touchstone for criminal intervention, Sara Trainor asks whether the impact of introducing UWOs might achieve no more than the shifting of illicitly obtained monies from the UK into other jurisdictions where corrupt foreign officials and serious criminals are not subject to the same level of investigative scrutiny as in the UK. If this is correct, the new legislation may reduce the volume of illegally obtained monies in the UK but it will not have assisted in the broader objective to reduce the incidence of international corruption and organised crime.

Jonathan Fisher QC
Bright Line Law Services Ltd

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The White Collar Crime Centre was set up by Bright Line Law Services Ltd to promote research into financial wrongdoing and produce high quality policy and strategic briefings. Established in 2016, The White Collar Crime Centre is non-partisan and independent of government and external funding.

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The Interaction between Immunity Principles and UWO Proceedings

By Charlette Bunn

This piece examines the UK's proposed new Unexplained Wealth Order ("UWO") regime and its relationship with the principles of immunity. Broadly, it explores whether the immunities afforded to State officials could hamper one of the regime's intended purposes – to compel corrupt foreign Politically Exposed Persons ("PEPs") to explain their inexplicable wealth.

Introduction

In its present form, the UWO regime requires a High Court judge to be satisfied of certain criteria to a civil standard before an individual is compelled to explain their financial affairs to enforcement authorities. The Court must be satisfied that: either (a) the respondent is a foreign PEP; or (b) there are reasonable grounds for suspecting that the respondent or a connected person has been involved in a serious crime. A PEP, by definition, includes: an individual who is, or has been, entrusted with prominent public functions by a State (other than the United Kingdom or another EEA State); a family member of that person; or a person known to be a close associate of that person. It is unsurprising that the proposed regime focuses on PEPs as *"most cases of grand corruption are likely to feature public officials and […] PEPs. This is because the power and access that public office can afford can be abused by those who commit corruption and embezzle public funds."*[1]

The definition of a PEP clearly encompasses those who have been entrusted with prominent public functions of the State yet how this interacts with immunities of State officials is not clear on the face of the Bill. Accordingly, the purpose of this piece is to explore the intersection between PEPs who may be subject to a UWO and immunities afforded to State officials under international law.

At its simplest, there are two broad types of immunity that attach to State officials that could act as a procedural bar to UWO proceedings. The first is personal immunity, also known as *rationae personae*. Personal immunity is not linked to any conduct in particular and instead extends complete immunity to a person, by virtue of their office or status, for so long as they carry out representative functions.[2] Significantly, there is no exception to personal immunity based on the seriousness of the alleged crime, or whether the acts were private or official because the rationale is irrelevant to the conduct. In essence, the person is inviolable. The breadth of the immunity means that it is limited both in terms of time and the category of office holders to whom it applies. The established rationale for personal immunity is to ensure that State officials who represent the State at the international level enjoy 'safe passage' and to encourage effective international relations and dispute resolution.

The second type of immunity is functional immunity, also known as *rationae materiae*. Functional immunity protects conduct carried out on behalf of the State. In this vein, it covers the official acts of all State officials and is

[1] Transparency International, 'Empowering the UK to Recover Corrupt Assets: Unexplained Wealth Orders and other new approaches to illicit enrichment and asset recovery' (March, 2016), 9.

[2] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 3, Joint Opinion of Judges Higgins, Kooijmans and Buergenthal, 54.

determined by referring to the nature of the acts in question rather than the office that the person holds. As such, functional immunity can be claimed by a former State official, including a former head of State, even after they leave office, for all official acts carried out.

Personal Immunity

Diplomats

The *Vienna Convention on Diplomatic Relations* (1961) represents the most comprehensive codification of rules relating to immunities of State officials. The rules provide that a diplomatic agent, whilst serving in a host country, enjoys personal immunity.[3] This personal immunity provides that the diplomat is immune from the criminal, civil and administrative jurisdiction of the host State. After the diplomat has served their term in the host State, the diplomat enjoys a residual functional immunity making them subject to the criminal jurisdiction of the host State for any crimes they committed in their personal capacity.[4] This position is subject to an important exception, discussed below.

Heads of State

It is widely accepted following the ICJ *Yerodia / Arrest Warrant* case[5] and the UK House of Lords decision in *Pinochet (No.3)*[6] that heads of State enjoy a broad personal immunity while in office. The position regarding heads of State presents a difficulty for the future application of the UWO regime. Plainly, they would fall within the scope of a PEP, as defined in the Bill but owing to the breadth of personal immunity, a UWO would seem unable to be ordered against them. In *Pinochet (No.3)* the Law Lords agreed that a serving head of State has personal immunity and the *"nature of the charge is irrelevant; his immunity is personal and absolute."*[7] This includes immunity from prosecution in domestic courts for international crimes.[8]

Foreign Ministers and other high officials

The position is less clear when it comes to Ministers and other high officials. Commentators have, for example, criticised the extension of personal immunity to a potentially wide range of Ministers in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* without justification.[9] In that case, the ICJ determined that a Foreign Minister enjoyed a personal immunity which could not be set aside by a national court decision to charge the Minister with war crimes or crimes against humanity. Further still, the ICJ recognised personal immunity for heads of State, heads of government and Ministers of Foreign Affairs and *"left a door open for other Ministers"*.[10] It is unclear how far open the door is.

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[3] See *Vienna Convention of Diplomatic Relation* (1961) art 29-31.

[4] Cryer, Friman, Robinson & Wilmshurst, '*An Introduction to International Criminal Law and Procedure'* (3rd ed, Cambridge University Press, 2009), 543.

[5] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium),* Judgment, 14 February 2002, (2002) ICJ Rep 3. (Also known as 'Yerodia').

[6] R *v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [1999] 2 All ER 97, HL at 111, 119-20, 152, 168-9, 179 and 181.

[7] R *v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [1999] 2 All ER 97 at 179 (Millett).

Note there is an exception before the International Criminal Court.

[8] Above n 5. The ICJ made it clear that such immunity exists even where it is alleged that an international crime has been committed. It later reaffirmed its judgment as regards heads of State in *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)* Judgement of 4 June 2008, ICJ General List no 136.

[9] Akande "International Law Immunities and the International Court" (2004) 98 *The American Journal of International Law* 407, 412.

[10] Above n 4, 544.

Additionally, in the decision of *Mofaz*,[11] the role of a Minister of Defence was said to attract personal immunity, whereas other Ministerial roles such as culture, sport or education were considered less likely to.[12] This suggests that not all PEPs would have the opportunity to invoke the broad immunity, but at least some may be able to. Consequently, enforcement agencies are likely to focus resources upon those unable to invoke any type of immunity, resulting in a targeting of PEPs who are not at the pointy end of the political apparatus.

Functional Immunity

Recalling that functional immunity relates to the conduct and its authorisation by a State, all State officials, including those who do not enjoy personal immunity whilst in office, are entitled to immunity for acts performed in their official capacity. In the context of UWOs, it is conceivable that a PEP could include a former or incumbent official. This is because a PEP includes an individual who *"is, or has been, entrusted with prominent public functions by a State."*[13] The breadth of functional immunity and, specifically, its application to civil proceedings has been the subject of much contemporary debate amongst international lawyers. However, there could be a conceptual argument that a PEP could invoke functional immunity from UWO proceedings. If an argument of this kind were raised, a relevant factor to be satisfied is whether the PEP obtained the property specified by the UWO by virtue of an *"official act"*. Quite how an argument of this kind could be raised without providing at least in part an explanation of how the property was acquired (and therefore perhaps submitting to the jurisdiction) is far from clear.

What is an official act?

Functional immunity only covers acts performed by officials and former officials in the exercise of their official functions. If an official or former official purchased property with funds obtained though bribery or corruption, would this qualify as an official act? The intuitive answer is of course, no. However, in practice it may not be so easy to discern. Take a corrupt Minister of Natural Resources for example, he or she could, in theory, purchase a flat in West London for the purpose of State business yet in practice also put the property to personal use. The funds would not necessarily be traceable to their corrupt roots if they were filtered through a number of different bank accounts. And, in any event, it would at least be arguable that the property acquisition occurred within the course of State business or, in another words, was an *"official act"*. Whether functional immunity could ever be claimed depends on each case. Certainly, functional immunity could not be invoked in UWO proceedings by a foreign public official, say a member of the shadow cabinet or a deputy head of department, in circumstances where they have received funds derived from illicit activity and used those funds to purchase a number of valuable paintings for their private holiday home. This would clearly fall outside the scope of their official function.

In relation to functional immunity, since the *Pinochet (No.3)* case, it is increasingly accepted that international crimes do not constitute official acts and so do not give rise to functional immunity.[14] In the light of this, one could argue that bribery, corruption and dealing with the proceeds of crime would also fall outside what would be considered an official act. However, one point for consideration is that bribery, corruption and

[11] *Mofaz*, reproduced (2004) 53 *International and Comparative Law Quarterly* 769.
[12] Above n 4, 544.
[13] Criminal Finances Bill 2016, s 362B(7).
[14] Above n 7.

dealing with the proceeds of crime are neither recognized as crimes against humanity nor *"international crimes"*, unlike the conduct in question in the *Pinochet (No 3)* case.[15] Although there is a case for bribery and corruption being considered as an *"international crime"* this is not the present position. As such, it would appear peculiar if functional immunity could be invoked in the face of a UWO where the conduct in question related to bribery, corruption and/or dealing with or in the proceeds of crime.

Exceptions to immunity

The *Vienna Convention on Diplomatic Relations* (1961) provides exceptions to the position on immunity. Article 31 confirms the customary international law position that a diplomatic agent enjoys immunity from criminal, civil and administrative jurisdiction of the receiving State.[16] However, a diplomatic agent does not enjoy immunity from such jurisdictions for actions relating to the *"private immovable property suited in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission"* and actions relating to *"professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions."*[17] These are important exceptions which could be relied on by enforcement authorities considering pursuing a UWO against a diplomat's property. Applying these exceptions to the UWO context, it is foreseeable that the UWO mechanism could be applied to a diplomatic agent in circumstances where the immovable property was held in their personal capacity or alternatively where the property the subject of the UWO was received outside of official functions. Importantly, Article 37 of the Convention extends the immunities afforded to diplomatic agents (as contained in Articles 29 -36 of the Convention) to their family members and members of their household.[18] This extension of immunity may also serve to limit the effectiveness of the UWO regime.

However, as recognized in Article 32 of the Convention, diplomatic agents and other persons enjoying diplomatic immunity (such as their family members) can be expressly waived by the sending State.[19] This reflects the general international law position that the State concerned is able to waive the immunity to prevent it acting as a procedural bar.[20] The ability of the State to waive an official's immunity is reflective of the general notion that the immunity is granted not for the personal benefit of the individual (e.g. diplomat or the head of State), but it is for the benefit of the State itself, and as such immunity is the right of the State. However, whether it would ever be politically palatable to waive the immunity which protects a diplomat or a head of State is, of course, a different question.

Conclusion

The above discussion shows that commencing UWO proceedings against a PEP who holds a high political office is plagued with difficulties. Four short points can be distilled. First, personal immunity will act as a procedural bar to the bringing of UWO proceedings against a serving head of State. Secondly, the position as regards diplomats is different owing to a codified exception. Thirdly, the door is at least open to other high level Ministers relying on personal immunity as a bar to UWO proceedings but the scope of who can invoke it is unsettled. Lastly, whether functional immunity could also be claimed in certain circumstances is a live question. These points are raised so as not to

15 In 1998, Senator Augusto Pinochet, former head of State of Chile, was visiting the United Kingdom when Spain issued a request for his extradition. The charges included torture and conspiracy to torture.
16 Above n 3, art 31.
17 Ibid, art 31(1)(a), art 31(1)(c).
18 Ibid, art 37.
19 Ibid, art 32.
20 Above n 4, 543.

defuse support for the proposed UWO regime but rather to encourage discussion about the intersection between PEPs and functional and personal immunity. Arguably, the scope of the UWO regime might not be as wide as some might think.

The Investigative Reach of UWOs

By Anita Clifford

This piece reflects upon the large role that Unexplained Wealth Orders ("UWOs") could play in an investigation, without any qualifications on the use of the explanation. It prompts thought on whether further caveats beyond the self-incrimination privilege are required where a person has been compelled by the State to provide information.

Introduction

Appearing in Part 1 of the Criminal Finances Bill 2016, the UK's proposed UWO regime has been lauded as an important new tool for enforcement authorities charged with dismantling the UK's image as an illicit wealth haven. Although tweaks to the regime are inevitable as the Bill moves through Parliament, alteration of the critical elements is unlikely. In brief, it is envisaged that an enforcement authority could apply to a High Court judge for an order that a non-EEA politically exposed person ("PEP"), their associate or relative, or person suspected of serious crime or their connection explain the legitimate provenance of their specified property where its value exceeds £100,000.[21] The making of the order would be subject to a low evidential threshold, namely the Court's satisfaction that there are 'reasonable grounds to suspect' a person's known sources of lawful income are disproportionate to the specified property. [22] Once made, a UWO would serve as a lever to property freezing as well as non-conviction based ("NCB") confiscation proceedings under Part 5 of the *Proceeds of Crime Act* 2002 ("POCA"), if the person's explanation of their wealth was considered inadequate by the enforcement authority.[23]

The proposed regime which, if the person is a PEP or indeed 'associated' with a PEP, does not require any information at all about criminal activity for a UWO to be made against them has been hailed as a major improvement to the UK's capability to recover illicit proceeds[24] and a new bar to 'stolen wealth' flowing into the country. At first glance, therefore, one might think that the single purpose of a UWO is its severe *consequences* for an individual and their property. After all, in addition to the deprivation of property, it is envisaged that the failure to respond to a UWO would trigger a recoverability presumption [25] along with contempt of court proceedings. Providing false or misleading information would also attract criminal prosecution. [26] These features, however, are deserving of reflection in their own right as they point to a distinct dual purpose of UWOs – to radically *enhance the process* of investigating illicit wealth and, in so doing, reduce the investigative burden for enforcement authorities. The use of the UWO as an investigative tool and the implications of this are the focus of this piece. Following a discussion of its potential reach, it concludes that in its present

[21] Criminal Finances Bill 2016, s 362B(4).
[22] Ibid, s 362B(2).
[23] Ibid, s 362A(7) defines an "enforcement authority" as the NCA, HMRC, FCA, DPP and Director of the SFO.
[24] Explanatory Notes, Criminal Finances Bill 2016, at 4.
[25] Above n 21, s 362C(2).
[26] Ibid, s 362E.

form, the UWO regime has the potential to deliver something far greater than perhaps initially appreciated by those who would fall within its scope as well as Parliamentarians and the wider public. In these circumstances, before the proposal is enacted, there should be careful consideration of the need for further legislative safeguards and published guidance on the use to which a person's explanation of their wealth can be put.

The UWO as a distinct investigative tool

The Explanatory Notes to the Criminal Finance Bill 2016 mention rather than address in any detail the investigative purpose of the proposed UWO regime. A problem faced by enforcement authorities, referred to at page 5, is that it is often difficult to obtain evidence sufficient to ground asset freezing and NCB proceedings under POCA. This is particularly so where information which could support a property's dubious origins would require the cooperation of sources outside of the UK. Despite its brevity, the UWO Impact Assessment Report, published in November 2016 by the Home Office, expands upon this problem with clarity, setting out that the UWO regime creates *"a new investigative power"*, such that *"if evidence is provided, it could be used by the investigative agency to further develop their case against the individual in a civil recovery investigation."* Accordingly, it is squarely envisaged that any information or documents that a person provides in response to a UWO would be used against them in eventual NCB confiscation proceedings.

A close examination of the Bill, however, reveals that the UWO regime, as presently configured, does not limit the use of the information to NCB proceedings or contain any detailed restrictions on how it can used, the period for any use and by whom it can be used. Instead, the Bill permits an enforcement authority to take copies of and retain any documents or information produced by the UWO respondent and does not prevent dissemination.[27] Where the property specified in the UWO has been frozen, it is proposed that an enforcement authority would have 60 days to consider a respondent's explanation and determine whether it will commence future POCA proceedings against the property specified in the UWO.[28] The regime, however, would permit the enforcement authority to change its mind.[29] Other than this, there is no 'use-by' date or limitation period attached to any information provided. Indeed, if the property specified by a UWO is not frozen, it is open to an enforcement authority to consider future investigatory or enforcement proceedings *"at any time"*. [30] Accordingly, a UWO respondent's explanation could remain on file and be revisited again and again. Although it is axiomatic that coercing a person to provide information squarely engages their right to privacy, the Bill's Privacy Impact Assessment Report, published by the Home Office in December 2016, surprisingly fails to shed light on the limitations that would apply to the use of information in response to a UWO beyond the preservation of the self-incrimination privilege.

The single caveat?

The single legislative caveat applicable to information provided by a person in response to a UWO would appear to be that it cannot be used *"in evidence against that person in criminal proceedings."*[31] This is an important qualification as permitting an enforcement authority to use information that a person has been coerced by the State into providing only to prosecute them with it is deeply unpalatable in a country espousing the Rule of

[27] Ibid, s 362G.
[28] Ibid, s 362D.
[29] Ibid, s 362D(6).
[30] Ibid, s 362D(5).

[31] Ibid, s 362F – except in a criminal prosecution for providing false or misleading information in response to a UWO.

Law. But the preservation of the self-incrimination privilege in the manner envisaged is not to say that a person could refuse to provide certain information about their property and its origins in reliance upon it. The stick, after all, is that severe sanctions await those who provide false or misleading information or refuse to offer any explanation at all. In reality it is highly questionable how many UWO respondents who, for example, have invested the proceeds of tax evasion and bribery in specific property would choose to be frank about their conduct. Theoretically, however, the regime compels them to be transparent about their wealth, including its dubious origins. The only slight comfort is that that the information provided could not be used to prosecute him or her.

Potential implications of the response

When this important but sole caveat is put to one side, a critical question arises. Although the information provided pursuant to a UWO could not be used to charge the respondent with a criminal offence, to *what extent* could it be used? In the absence of any dissemination prohibition imposed by the Court, as the Bill presently stands, there appears to be few parameters and a variety of possibilities.

Draft guidance is yet to be published on the type of information that an enforcement authority would expect in answer to a UWO. Although the Bill makes clear that a person is not required to provide information that would be protected by legal privilege,[32] the level of detail required of a respondent is uncertain. This includes, for example, how far back should a person go in explaining the source(s) of the funds put towards property specified by a UWO or the kind of records or financial evidence that should be produced to satisfy an enforcement authority of its legitimate provenance.

Whether in due course there will be any clarity over what is required to satisfy an enforcement authority of a property's legitimacy remains to be seen. There is, accordingly, the potential for a person to respond to a UWO in a vacuum. Arguably, if none is forthcoming, the decision may be an intentional one directed at assisting enforcement authorities. In the absence of guidance, a UWO respondent may disclose a considerable volume of information and personal and financial data not otherwise known to enforcement authorities in a bid to demonstrate their lawful ability to afford the property and avoid further POCA proceedings. But this, of course, cuts two ways. In disclosing a raft of information, such as details of bank accounts, business partners, income-generating investments and beneficial interests, a UWO respondent is effectively handing over information and potential evidence to enforcement authorities on a platter. They are offering up new leads on money flows, detailing persons of interest, business structures and identifying other property for scrutiny. Effectively, they are dishing out breadcrumbs on the money trail and enabling enforcement authorities to widen or, indeed, tighten the net as the case may be.

It follows that the strength of the UWO as an investigative tool is immense. Against a background of strained enforcement resources and increased concern over illicit wealth, this is good news. However, it is perhaps cause for a little discomfort that a regime is about to be introduced in the UK which is directed at compelling a person to provide information (potentially without any guidance on what is required) with a view to it being used against them in property deprivation proceedings and, indeed, potentially other matters of gravity.

[32] Ibid, s 362G which would preserve s 361.

To what use?

The Bill expressly permits an enforcement authority to copy documents and retain information provided by a UWO respondent "for the purposes of *any* legal proceedings" (emphasis added).[33] This, in turn, suggests that the door is open to the information provided being used beyond NCB confiscation proceedings affecting the respondent. Indeed, the single caveat status ascribed to the self-incrimination privilege and absence of a legislative bar to dissemination suggests that information or documents could be shared with other authorities. This could extend to the sharing of information with domestic as well as international bodies, to assist in their use of non-criminal but still wide investigative and enforcement powers against the person in question or, indeed, anyone referred to in the respondent's UWO response.

Separately, there would also seem to be nothing to prevent the information or a document provided by the respondent being passed to, for example, a police force to develop a criminal investigation into persons other than the respondent, including corporate entities, which they have identified. The likelihood of this is enhanced by the proposed ability to obtain a UWO against a person who is not a PEP, but rather a person who is associated with a PEP, or a person who is not a criminal suspect but is instead connected to a criminal suspect. Against this backdrop, it is conceivable that so long as there were 'reasonable grounds to suspect' a disparity between a person's lawful wealth and their property– a low evidential burden[34] – an enforcement authority could obtain a UWO against an associate to glean financial information and, in so doing, develop or strengthen a criminal case against a more significant person for money laundering or tax evasion. The self-incrimination privilege, as preserved in the Bill, would not operate to prevent this occurrence.

In a similar vein, there would also appear to be scope for information or documents that a UWO respondent provides on say, their commercial interests and investment structures, to be used to commence or further a criminal investigation by UK or international authorities into companies in which they hold a beneficial stake. Although the question arises as to whether the self-incrimination privilege could serve to shield a respondent's companies from criminal investigation or prosecution, there is at least an argument that the privilege would not apply owing to the distinction between the company and the individual.

Final thoughts – longer reach than anticipated?

The UWO proposal has the potential to be far more than a new lever to NCB proceedings under Part 5 of POCA. There is ample scope for information that a UWO respondent provides under compulsion to be used to further other ends, including certain criminal investigations which would not engage the self-incrimination privilege and other legal proceedings in the UK and elsewhere. Certainly, this would seem to be in keeping with the Bill's broad emphasis of enhancing cooperation between enforcement authorities and assisting investigations. For many, this will be welcome – arguably, the public interest in eliminating illicit wealth and its underlying wrongdoing justifies the interference with a person's privacy and an innovative use of UWOs, beyond simply being a new property deprivation device. However, the coercion of a

[33] Ibid, s 362G(5).

[34] As to what evidence would need to be produced by the enforcement authority to satisfy the threshold, and how comprehensive it would need to be, is also presently unclear.

person – including those not themselves suspected of serious criminal activity or holders of political office – to provide information which can be used against them in non-criminal but still serious proceedings, and potentially as a means to target others is a mechanism which should be used cautiously and subject to clear processes. There is, otherwise, a risk that the process could be used unfairly. To mitigate against this, consideration might be given to the inclusion in the Bill of a provision requiring Guidance to be published on the type of evidence that an enforcement authority might produce to support a UWO application and similarly, that a person could produce to satisfactorily explain the legitimacy of their wealth. Rather fittingly, there is a strong case for *explaining* the kind of information that an enforcement authority would require to be satisfied that property has been legitimately obtained and for enforcement authorities to be transparent about the use to which a respondent's explanation can be put.

Unexplained Wealth Laws: The Overseas Experience

By Natasha Reurts

This piece canvasses the international experience of implementing, enforcing and utilising unexplained wealth laws with the aim of drawing out important loopholes to close and lessons to learn for the UK.

Introduction

Since the 1990s, there has been a worldwide review of national legal frameworks and approaches to addressing criminal as well as suspicious wealth. More recently, governments have considered unexplained wealth laws as a legislative option to enhance domestic efforts to confiscate and forfeit wealth from individuals involved in nefarious activities. Of these, a variety of legal routes have been pursued. Some countries, like South Africa, Canada and – in some respects, the UK - have partially adopted aspects of the unexplained wealth concept by introducing presumptions in favour of confiscation and forfeiture for specific offences. In contrast, other countries have adopted illicit enrichment offences as provided for in the *United Nations Convention Against Corruption*, with variations such as limiting the offence to circumstances where there is specific underlying activity or the offender in question is a politically exposed individual.

Only three countries, namely Ireland, Australia and Colombia have fully adopted, implemented and executed unexplained wealth orders. This piece focuses its attention on the Irish and Australian experience, not least because of the similarities in legal traditions but also because of the commonality in language. Moreover, in 2014 the Colombian Congress repealed Law 793 of 2002 – which contained the 'pure' unexplained wealth laws regime – in favour of reforms to the asset forfeiture regime and a statutory commitment to basic liberties to individuals involved in asset confiscation proceedings.[35]

Understanding and learning from the Irish and Australian experience will not only inform policy makers of issues for consideration but will also provide enforcement authorities and interested

[35] Byrnes & Munro, 'Money Laundering, Asset Forfeiture and Recovery and Compliance – A Global Guide' (LexisNexis, 2 November 2016).

parties with a 'heads up' on what to expect should the proposed UK regime receive royal assent.

The Australian and Irish UWO regimes

Broadly speaking, both the Australian and Irish unexplained wealth regimes provide for non-conviction based assed confiscation/forfeiture proceedings that do not require a predicate offence to be established. Moreover, both the regimes contain a reversal of the burden of proof by requiring the respondent to the proceedings to explain the lawful source of the specified property. These three features are common to both Australian and Irish unexplained wealth laws frameworks – indeed, all three appear in the proposed UK regime, however there exist specific nuances to each. These nuances, along with a brief history and background, are drawn out below.

From the outset, it is also worth noting that unlike the UK proposed framework, neither the Australian nor Irish UWO regime legislatively focus attention on foreign politically exposed persons.[36] Instead, the regimes target persons reasonably suspected of being involved in serious crime.

Australia

In 1999, the Australian Law Reform Commission ("ALRC") released a report highlighting the disappointing and ineffective conviction-based confiscation regime established in the Proceeds of Crime Act 1987 (Cth), noting that they were not having their intended deterrent effect and were producing little by way of amounts being recovered/confiscated. [37] In 2000, the state of Western Australia ("WA") was the first jurisdiction in the federation to introduce unexplained wealth laws as part of the *Criminal Property Confiscation Act* 2000 (WA). The Northern Territory ("NT") followed suit and in 2003 implemented the *Criminal Property Forfeiture Act* 2002 (NT). The NT model closely mirrored the WA regime but contained expansions and improvements. Commentators point to aspects of the NT regime that account for its *"perceived success"*. [38] One such aspect is an incentivisation mechanism provided for in the legislation enabling criminal sentencing courts to take into consideration, in favour of the offender, the offender's cooperation in forfeiture proceedings.[39]

In 2002, spurred on by international trends targeting illicit wealth, the Commonwealth government considered whether to introduce unexplained wealth laws into the federal confiscation framework. Ultimately, owing to the *"comprehensive"* asset-forfeiture statute containing options for *in rem* and *in personam* proceedings, as contained in Proceeds of Crime Act 2002 (Cth), the decision was made to shelve the introduction of unexplained wealth laws in light of them being regarded as a *"step too far"*.[40] In 2006, an independent inquiry (commonly known as the Sherman Report) was commissioned to review the Proceeds of Crime Act 2002 with the objective of assessing its impact, identifying limitations and making recommendations for improvement. [41] In short, the Sherman Report noted that although the Act was more effective than its predecessor legislation, more needed to be done to combat, deter and prevent crime.[42] Reference was made to the WA and NT unexplained wealth laws noting their effective use but questioned the appropriateness of its introduction at the federal level citing concerns

[36] See Criminal Finances Bill 2016, s 326B(4)(a); Importantly, the Bill requires that the respondent to a UWO application be *either* a politically exposed individual or, where there are reasonable grounds for suspecting, a person who is or has been involved in serious crime (in the UK or elsewhere) or a person connected with the respondent, or has been, so involved.

[37] Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987,* (June,1999) <http://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc87.pdf>; see also King, Walker (eds), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate Publishing Limited, England, 2014), 121.

[38] King & Walker (eds), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate Publishing Limited, England, 2014), 129.

[39] Ibid.

[40] Booz, Allen & Hamilton, '*Comparative Evaluation of Unexplained Wealth Orders'* (Washington, DC: Department of Justice, January 2012), 69.

[41] Ibid.

[42] Sherman, *Report on the Independent Review of the Operation of the Proceeds of Crime Act (2002),* July 2006 <http://pandora.nla.gov.au/pan/33012/20071102-1423/www.nationalsecurity.gov.au/www/agd/agd.nsf/Page/Publications_Proceedsofcrimereview-October2006.html>.

over potential infringement to the individual's rights and the interests of the community.[43] Once again, the introduction of UWOs at the federal level was postponed. In 2008, another inquiry was initiated, again examining and reviewing the federal approach to combating organized and serious crime. [44] Following from this inquiry, the Commonwealth government introduced the *Crimes Legislation Amendment (Serious and Organised Crime) Act* 2010 (Cth), amending the *Proceeds of Crime Act* 2002 to introduce, among other measures, the federal UWO regime. Shortly after the introduction of UWOs at the federal level, a raft of other Australian states, such as New South Wales, Queensland and South Australia, implemented state-based UWO regimes. For completeness, important differences do exist as between each jurisdiction's unexplained wealth order regimes. For example, the Commonwealth UWO regime requires a nexus or linking, but not a conviction, to a Commonwealth offence before an order can be made. This is not only an additional hurdle but, arguably, an important safeguard. Moreover, the Commonwealth UWO regime provides for three different types of orders namely unexplained wealth restraining orders, preliminary unexplained wealth orders and a final unexplained wealth orders, which in effect is a confiscation order. Each designed for a specific purpose dependent on the stage of proceedings and each with their own requirements. [45] Importantly, as distinct from the proposed UK regime, it is the court, as opposed to the enforcement agency, that has to be satisfied as to the individuals explanation of their wealth before making the final order.

Ireland

In 1996, Ireland became the first European country to enact a civil forfeiture regime. The Proceeds of Crime Act 1996 and the *Criminal Assets Bureau Act* 1996 ("CAB") form the basis for the Irish two-pronged approach to tackling illicit and suspicious wealth. Its leadership in the area of non-conviction based asset confiscation and imposition of a reversed burden was initially – and in some respects, still continues to be – met with strong criticism, dissent and resistance. Although the Irish regime does not use the "UWO" term, its features are near to identical to the unexplained wealth law concept. The *Proceeds of Crime Act* 1996 enables property to be the subject of confiscation proceedings without needing to establish a predicate offence. Moreover, the regime is triggered by *"belief evidence"* or, reasonable grounds for suspecting that a person owns or possesses property obtained either directly or indirectly from criminal activities and is rebutted via a reversed burden which requires the respondent to show the legitimacy of the subject property. [46] Importantly, the Irish regime applies retroactively making property acquired before or after the introduction of the Act vulnerable to confiscation.[47]

Essential to a comprehensive understanding of the Irish civil-based confiscation regime is an appreciation of the CAB – which forms the multidisciplinary agency charged with implementing the Proceeds of Crime Act 1996 and body largely attributed with the success of the Irish confiscation regime. [48] Members of the CAB, which include officers of Garda, the Revenue Services and Social Welfare, pull together resources, skills and vital information under the umbrella of a single agency to form an effective and forceful institution to deal with and respond to crime.

Evaluating the Australian and Irish Experience

While UWOs have operated for quite some time in Australia, no comprehensive review measuring their effectiveness has taken place. However, the limited evidence available suggests that the effectiveness and use has been mercurial at best. As at December 2016, the UWO regime in Western Australia had seen 28 applications for unexplained wealth declarations since 1 January 2001.[49] 24 of these applications had been successful, three unsuccessful and one pending,

[43] Ibid, 39.
[44] Inquiry initiative by the Parliamentary Joint Committee of the Australian Crime Commission.
[45] For more information on the three types of orders and their requirements see above n 38, 128-129.
[46] Above n 40, 125.
[47] *Proceeds of Crime Act (Amendment) Act* (2005) s.3(a)(i).
[48] Above n 40, 126.
[49] M Smith & G Smith, "Trends & Issues in Crime and Criminal Justice: Procedural Impediments to Effective

noting importantly that between the period of 2004-2008 no unexplained wealth declarations were made – commentator posit this 'silence' on extensive public criticism of the UWO regime.[50] From these successful applications a total of AUD $6.9 million had been confiscated.[51] In the Northern Territory, the total amount of unexplained wealth forfeiture thus far is approximately AUD $3.5 million. Since implementation in 2010, the total amount recovered in NSW is AUD $2.6million, but this figure rises to $14.4 million once the amount determined by negotiated settlements, a specialist feature of the NSW regime, are factored in.[52] These low forfeiture figures can be attributed to numerous factors including, but not limited to: judicial push-back to the use of UWOs' prosecutorial resourcing deficiencies; lack of public support; inter-agency disputes over jurisdiction and in some cases the application of alternative confiscation laws which obviate the need for an UWO.[53] Evidence is scant as to the Australian interrelationship between UWOs and the dealing with the proceeds of crime deterrence.

This picture sits in sharp contrast to the Irish regime with evidence suggesting a 100% success rate in civil-based confiscation proceedings.[54] Evidence notes that the total amount of assets forfeited since 2004 totals USD $15,744,100.[55] Research has further suggested that the Irish regime has had a significant impact on reducing, disrupting and dismantling criminal activities in Ireland, with the two-pronged approach proving a major setback for the Irish criminal fraternity.[56] For completeness, it should be noted that some evidence suggests that in fact criminals have moved their illicit monies to other jurisdiction, such as Holland and Spain, in fear of Irish seizure.[57]

The success of the Irish civil non-conviction based asset recovery regime has largely been attributed to the multidisciplinary CAB agency. By combining the resources and personnel of different departments, CAB becomes a highly specialized body that is able to 'attack' illicit wealth from three angles namely, "*forfeiting property constituting proceeds of crime, taxing it and denying social welfare payments to the respondents who own or control such property.*"[58] The importance of adopting a CAB-like model has recently been highlighted by the Australian Institute of Criminology which noted the importance of collaboration and information sharing between national agencies and specialist financial investigators, the lack of which is presenting an impediment for some of the Australian jurisdictions.[59] Indeed, a national scheme governing unexplained wealth is gaining traction in Australia.[60] The CAB is no doubt an interesting model, one that UK should give serious thought to as it operates to tackle illicit wealth from a holistic and multidisciplinary point of view.

Like the Irish experience, the enactment of unexplained wealth laws in Australia was met with fierce resistance and opposition. Common to both experiences have been a plethora of legal and constitutional challenges to the operation of UWOs, specifically the reversed burden and the argument that they are, in essence, a disproportionate punitive measure that infringes upon fundamental rights such as the presumption of innocence and the right not to self-incriminate. Despite the many challenges, and indeed an acknowledgement by the courts of their breadth, the UWO regime has survived extensive judicial scrutiny in both Australia and Ireland. No doubt, if passed, the UK regime will likely face its own legal challenges. One that comes to mind would be a challenge to the lack of a criminal nexus in the case of PEPs or their associates.

Interestingly, the Australian experience draws out one loophole that UK enforcement authorities should take particular note of. Australian courts have

Unexplained Wealth Legislation in Australia", Australian Institute of Criminology, No 523, December 2016, 2.

[50] Bartles, 'Trends & Issues in Crime and Criminal Justice: Unexplained Wealth Laws in Australia", Australian Institution of Criminology, No 395, July 2010, 2.

[51] Above n 49, 2.

[52] Ibid, 7.

[53] Above n 40, 2.

[54] Ibid, 148.

[55] Ibid, 134.

[56] Ibid, 132.

[57] Ibid, 132-133.

[58] Ibid, 148.

[59] Above n 49, 4, 6.

[60] Connery, "Progress Toward a National Scheme Targeting Unexplained wealth?" *Australian Strategic Policy Institute* (16 October 2015) <https://www.aspistrategist.org.au/progress-towards-a-national-scheme-targeting-unexplained-wealth/>.

considered it sufficient for respondents to point to gambling and/or horse racing winnings, gifts or inheritances received from relatives aboard, as the lawful source to explain the wealth.[61] This is attributed to the fact that the Australian tax regime does not require funds acquired through gambling or overseas inheritance or gifts to be recorded for tax purposes.[62] The same might arise in the UK if an individual subject to a UWO proceeding says that their unexplained wealth is the result of successful trips to William Hill.

Conclusion

UWOs are an innovative legal tool in the fight against illicit wealth and crime more generally. However, based on the above brief examination of the Australian and Irish experiences their impact is country, context and content specific. Ireland has shown how powerful and effective the tool can be in the fight against crime generally, whilst the Australian experience has been moderate, at best. From the above discussion, UK-interested stakeholders should be mindful of the importance and effectiveness of the CAB model, and the integral and active role it can play in enforcement and deterrence whilst keeping an eye out for potential loopholes, such as the provision of a gambling-related explanation, respondents may exploit in explaining their wealth.

Does the UK need to create a criminal offence of illicit enrichment — or is the *Unexplained Wealth Order* provision of the Criminal Finances Bill 2016 a welcome compromise?

By Dominic Thomas-James

This piece considers the proposed UWO regime in the context of other recommendations for targeting illicit wealth in the United Nations Convention Against Corruption. Specifically, it examines why UWO are more suitable to the UK than the offence of illicit enrichment.

Introduction

The Criminal Finances Bill was introduced to the UK Parliament on 14 October 2016. The Bill contains various proposed legislative measures which, if implemented and adequately enforced, ought to have a positive effect in the prevention and control of economically motivated and serious crime in the UK. With the UK at the forefront of the international anti-corruption and anti-money laundering regimes the Bill is timely, particularly being introduced in the aftermath of the first global Anti-Corruption Summit convened in London in May 2016. Moreover, it re-emphasises the deterrent function of law by delivering a clear message that crime is becoming increasingly *less profitable*. With London being home to one of the world's major financial markets, it is ever more important that the UK is seen as an attractive yet secure place to do business. However, the benefits of this also make the UK a magnet for foreign corrupt officials and criminals alike wishing to conceal assets funded by criminality.

This briefing paper focuses on illicit enrichment and unexplained wealth in light of the Bill's proposals. Article 20 of the *United Nations Convention Against Corruption* ("UNCAC") recommends that signatories consider implementing a criminal offence of illicit enrichment. However, to date, the UK has not implemented a criminal offence to this effect. Therefore, this piece addresses two questions.

[61] Above n 40, 79.

[62] Ibid.

The first is whether the UK needs to establish a criminal offence of illicit enrichment. The second is whether Unexplained Wealth Orders ("UWO"), as proposed by the Bill, are a welcome compromise in line with public policy goals and consistent with the spirit of the UNCAC and the UK's other international obligations. This paper commences with an outline of UWO as per the Bill's proposal. Subsequently, the possibility of an illicit enrichment offence, in line with Article 20, will be examined with its advantages and shortcomings acknowledged. This analysis will conclude by suggesting that a separate offence of illicit enrichment is inappropriate for the UK. Transparency International's recommendations will also be considered in support of this paper's overall conclusion that UWO are a welcome addition under the civil asset recovery regime. They are correctly applied to 'all' serious crime — not just corruption, and far more appropriate than the creation of a criminal offence to deal with unexplained wealth, as per the UNCAC's recommendation.

Unexplained Wealth Orders

UWO stem from the idea of illicit enrichment and are, one might say, two sides of the same coin. Both concepts refer to criminal proceeds being used to buy and hold assets. Both presume guilt on the part of the individual (although UWO presume that the property was funded by crime, rather than that the individual is guilty of a crime). In the context of UWO, the presumption is a rebuttable one which can be refuted by the accused's explanation as to the legitimate source of the asset(s) in question. In essence, UWO are about lifestyle and income which appear incommensurate to a suspect's known level of income or wealth. For example, a foreign public official may be known to make a public sector salary of $50,000 per annum — yet owns property in the UK worth £5 million. UWO would presume that said public official's property in the UK was not acquired legitimately and was funded by criminality, unless he can explain otherwise.

UWO are civil measures, rather than criminal. It will allow law enforcement agencies, defined in the Bill, to apply for a court order against an individual who they suspect has assets incommensurate to their known income. The requirement is that the individual is a politically exposed person ("PEP"), which essentially means someone holding foreign public office — or someone linked to serious crime,[63] as defined by the *Serious Crime Act* 2007.[64] Family and close associates are also included in the scope of the order. The asset(s) in question can be single or collective and, in any case, must be valued greater than £100,000. The individual must disclose his interest in the property and provide an explanation as to its source and how costs were met. If the explanation is insufficient, the assets can be frozen for a period which allows investigators more time to gather evidence in respect of the individual and the asset. This is currently problematic, particularly when the individual is located in a foreign jurisdiction and the source of the asset(s) originated in that jurisdiction. As is the case with most transnational crime, issues arise with information exchange, mutual assistance and transnational co-operation. Thus, an extension of the period to investigate while assets are frozen is particularly welcome.

Do UWO suffice? Or should there be a separate 'illicit enrichment' criminal offence?

Unlike an UWO, which is rooted in the civil recovery regime, illicit enrichment is a creature of the criminal law and has been criminalised in

[63] Criminal Finances Bill 2016, Part 1.

[64] Serious Crime Act 2007, Schedule 1.

many jurisdictions.[65] To this effect, there are various international treaties which deal with it. Most pertinent is Article 20 of the UNCAC which stipulates that countries should consider adopting legislation and other measures to establish a criminal offence of illicit enrichment. This is defined as a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income. As alluded to earlier, illicit enrichment is very similar in nature to UWO. However, there are differences which are important in the context of this debate. The first is that, in the absence of any provision for extra-territoriality, illicit enrichment appears to be focused on domestic public officials — for example, if the offence was introduced in the UK, Members of the UK Parliament ("MPs") would fall within its scope. Conversely, UWO are concerned with foreign public officials and/or, importantly, others linked to serious crime. The UK has implemented various disclosure obligations upon public officials, such as a register of business interests, which affect MPs. However, the UK has not explicitly criminalised illicit enrichment. Article 20, as a supranational sentiment, encourages use of the criminal law to deal with those who cannot reasonably explain disproportionate wealth. The prosecution simply needs to prove beyond reasonable doubt that the asset in question was obtained using criminal proceeds — rather than proving that the individual is guilty of each element of the offence of bribery. While advantageous, as it obviates the need for the prosecution to adduce evidence to prove the defendant's guilt as to the original criminal act — and particularly given the terrific difficulty in convicting corruption-based offences — there are fundamental issues with this approach.

The most calamitous consequence of illicit enrichment criminalisation is that it reverses the burden of proof onto the defendant to prove his innocence. No doubt the reversal of the burden in a criminal trial is a radical change to due process rights. A move of this kind might well be proportionate to extensive corruption issues faced by developing nations. However, this is ill-suited to the UK on many grounds, but the two most pertinent are that it has the potential to undermine due process and infringe human rights. As per Lord Sankey's speech *Woolmington v DPP* [1935] AC 462, the prosecution's duty to prove the defendant's guilt is the 'golden thread' of English criminal justice. While it is acknowledged that reversing the burden sometimes occurs in criminal cases (for example, when raising a defence of diminished responsibility, the burden is on the defendant to prove that his responsibility was diminished by, for example, a mental illness), reversing the burden on the defendant in illicit enrichment would stand inconsistent with UK criminal law. This is suggested because while the public's right to live in a corrupt-free society is important (although, arguably far more important in the context of developing nations), illicit enrichment offences will subvert the golden thread that runs through the UK criminal justice system. The prosecution is given an easier task of not having to put forward evidence to the same degree and extent as it would in, say, a serious fraud trial. In respect of human rights, criminalising illicit enrichment eradicates the presumption of innocence — a hallmark of Article 6 of the European Convention on Human Rights: the right to a fair trial. The presumption is an enshrined feature of the UK criminal justice system and in most common law jurisdictions. The principle behind this is that the presumption of innocence, while rebuttable, prevents the conviction of innocent people. As per

[65] For example in Ethiopia (Art. 419 Criminal Code), Lithuania (Art. 189-1 Criminal Code), Romania (Art. 267 Criminal Code), Argentina (Art. 286 Criminal Code), India (Art. 13 Prevention of Corruption Act 1988).

Blackstone's formulation, it is better to acquit a guilty man than convict an innocent one. The prosecution's burden of proving the elements of the offence in question is an essential assurance that the defendant receives a fair trial. While an illicit enrichment offence might serve convenience, it is not compelling enough to reverse the burden and alleviate the often challenging, but fair, prosecutorial burden.

As is often the case with international treaties, there are many non-mandatory provisions and Article 20 is one such. Caveats assist nations in translation and transplantation, as well as effective implementation in line with their own norms and laws. In Article 20's case, the recommendation of creating a criminal offence of illicit enrichment is subject to the fundamental principles of a country's legal system. If contrary, then the country can choose not to implement it. The provision also encourages countries to consider other measures in the spirit of the recommendation which, it is suggested, the UK has done to some extent. Importantly, the UWO provision in the Bill might appear more consistent with fundamental principles of the UK's system.

Transparency International were of the view that burden-shifting in the civil context is more viable and acceptable than in the criminal context. This is consistent with the recent decision of the European Court of Human Rights which has been slow to criticise reverse burdens in the civil context. [66] In its 2016 Report on UWO, [67] Transparency's Taskforce gave recommendations consist with the above position. They concluded that Article 20 was disproportionate and that greater use of civil recovery against assets was more viable — particularly since this regime was under-developed at present and, in their view, currently not fit for purpose.

UWO also have far greater reach for agencies. Civil recovery allows recovery of criminal assets without the need to obtain a conviction. This is hugely important given that economic crime occurs transnationally. In proposing a civil offence which is not restrictive to domestic public officials — nor even foreign public officials — but encompassing all those linked to serious crime, gives UWO far-reaching scope and application.

Conclusion: UWO *a welcome compromise?*

Domestic sentiment begs the question as to whether UWO are proportionate in light of the above concerns with illicit enrichment in general and its likelihood of being effective. If the criminal law is perceived to be disproportionate (i.e. burden shifting, infringing the presumption of innocence and other human rights, undermining the criminal trial process, or not clearly defining what the prohibited conduct might be), then the Bill's proposition ought to be seen as welcome in this context. Transparency International concluded that burden-shifting is appropriate only at the civil level. With the concerns which may manifest, this seems sensible. It would also seem sensible to utilise the civil recovery system at first instance rather than venturing into the more aggressive, and potentially problematic, criminal context. Such might pave the way for dangerous precedent and a wave of appeals.

UWO therefore appear to be a positive endeavour and a welcome compromise. It is crucial for the UK to improve its enforcement record. It is prima facie consistent with the spirit

[66] *Gogitidze and Others v Georgia* (Application no. 36862/05) (Decided 12 May 2015).

[67] Transparency International, 'Empowering the UK to Recover Corrupt Assets: Unexplained Wealth Orders and other new approaches to illicit enrichment and asset recovery' (March, 2016).

of Article 20 and reflects a tough stance against misconduct. UWO are wider in scope that the general objectives of illicit enrichment measures and presents a more direct route to enforceability. It also protects the rights of the accused in attributing civil recourse over the assets, rather than criminal liability over the individual.

What are the Potential Deterrence Effects of Unexplained Wealth Orders? A Criminological Exploration

By Sara Trainor

This piece considers the deterrent effect of the proposed UWO regime from a criminological perspective. It concludes that the small number of UWO that are envisaged, at least in the beginning, may not be sufficient to effectively deter individuals from placing their suspicious wealth in the UK.

Introduction

When any new criminal justice policy is proposed, one must consider whether it will actually achieve its intended objective. Otherwise, policies that appear "tough on crime" may in reality have little effect. Against this background, a question for consideration is will Unexplained Wealth Orders ("UWO"), a proposed civil mechanism, contribute to making the UK more hostile to illicit wealth?

The proposed mechanism is suitable for a criminological analysis. UWO fundamentally aim to deter persons from investing their illicit wealth in the UK and, in this sense, may be conceived by criminologists as a form of punishment. This is because criminology does not distinguish between criminal and civil mechanisms, including in the context of punishment. Instead, criminology is the scientific study of unlawful conduct and the measures developed to respond to it from a sociological perspective. In turn, an understanding of Deterrence Theory and Rational Choice Theory, two prominent theories which assist criminologists in exploring individual and societal reactions to changes in the law, may be relevant when considering the likely effectiveness of UWO. A case for applying these theories will be made in this piece, with thoughts shared on whether those which fall within the scope of the proposed regime are likely to be deterred from placing their suspicious wealth in the UK.

Two theories for consideration

Deterrence Theory provides a framework for policy makers to contemplate the different components of punishment. By considering the elements of Deterrence Theory, policy makers can determine what aspect of punishment their policies impact. That is whether the policy (i) increases the severity of punishment, (ii) increases the certainty of punishment or (iii) decreases the time between the crime or wrong being committed and punishment being imposed.[68]

The concept of deterrence was first noted by Beccaria in 1764 when he stated, "[*S]ee to it that men fear the laws and nothing else*".[69] To further

[68] These are the three components of punishment according to Deterrence Theory.

[69] Beccaria, *On Crimes and Punishment* (David Young translator, Hackett Publishing Co 1986) 75 [translation of *Dei delitti e delle pene* (first published 1764)].

develop Deterrence Theory, criminological theorists integrated economic/utility ideas into the crime decision-making process,[70] formulated hypotheses regarding sanction threats and individual characteristics,[71]incorporated elements of the rational choice perspective,[72] whilst other leading academics in the field considered the intangible benefits that hinder deterrence[73] and individual perceptions towards sanction threats.[74] Accordingly, Deterrence Theory is primarily concerned with the relationship between *perceived sanction threats and criminal offending*.[75] The theory accepts that individuals exercise free will and are amenable to being dissuaded from illegal acts when sanctions are "likely (*certain*), sufficiently harsh (*severe*), and swiftly administered (*celerity*)" .[76]

Some policy makers assume that harsh punishment will create a safer society, as would-be-offenders are disincentivised from committing illegal acts. [77] Certainty of punishment, however, is believed to be the most important element of the deterrence framework.[78] Recent studies have centered on assessing individual perceptions of sanction certainty. [79] Commentators posit, *"examining perceptions is the most direct way to test Deterrence Theory as the theory asserts that it is the individual's fear of sanctions that prevents crime"*.[80] Consistent with this, criminological researchers have found that arrest rate statistics influence an individual's perception of the certainty of arrest,[81] whilst other academics contend individual experiences with punishment affect individual perceptions of sanction threats. [82] Contrastingly, other commentators consider the influence of certainty is least effective amongst individuals with a strong present orientation or, in other words, those more concerned with their immediate wellbeing.[83] It follows that sanction severity may be less significant as certainty of sanction continues to gain empirical support, [84] but is nevertheless still relevant.[85]

The final element regularly analysed within the deterrence framework is celerity. Celerity is

[70] Becker, "Discrimination, economic" in Sills, *International Encyclopedia of Social Sciences* Vol 4, Cumu to Elas (Macmillian, New York, 1968).
[71] Andeneas, *Punishment and Deterrence* (University of Michigan Press, Ann Arbor, 1974).
[72] Cornish & Clark, *The Reasoning Criminal: Rational Choice Perspectives on Offending* (Springer, New York, 1986).
[73] Katz, *Seductions of Crime: Moral and Sensual Attractions in Doing Evil* (Basic Books, United States of America, 1988); Stafford & Warr, 'A Reconceptualization of General and Specific Deterrence' (1993) 30 *Journal of Research in Crime and Delinquency* 125.
[74] Piquero, Paternoster, Pogarsky & Loughran, 'Elaborating the Individual Difference Component in Deterrence Theory' (2011) 7 *Annual Review of Law and Social Sciences* 335.
[75] Worral, Els, Piquero & TenEyck, 'The Moderating Effect of Informal Social Control in the Sanctions-Compliance Nexus' (2014) 39(2) *American Journal of Criminal Justice* 341.
[76] Ibid, 343.
[77] Above n 74.
[78] Nagin, 'Criminal Deterrence Research at the Outside of the Twenty-First Century' (1998) 23 *Crime and Justice: A Review of Research* 1.
[79] Above n 74.
[80] Matthews & Agnew, 'Extending Deterrence Theory: Do Delinquent Peers Condition the Relationship Between Perceptions of Getting Caught and Offending?' (2008) 45 *Journal of Research in Crime and Delinquency* 91, 92.
[81] Piquero, Piquero, Gertz, Bratton & Loughran, 'Sometimes Ignorance is Bliss: Investigating Citizen Perceptions of Certainty and Severity of Punishment' (2012) 12 *American Journal of Criminal Justice* 630. See also, Walker, *Sentencing in a Rational Society* (Penguin Press, Harmondsworth, 1969); Parker & Grasmick, 'Linking Actual and Perceived Certainty of Punishment' (1979) 17 *Criminology* 366.
[82] Stafford & Warr, 'A Reconceptualization of General and Specific Deterrence' (1993) 30 *Journal of Research in Crime and Delinquency* 123.
[83] Nagin & Pogarsky, 'Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence' (2001) 39 *Criminology* 404.
[84] See for example above n 77; above n 73; Zimring & Hawkins, *Deterrence: The Legal Threat in Crime Control* (University of Chicago Press, Chicago, 1973).
[85] Jacobs & Piquero, 'Boundary-crossing in Perceptual Deterrence: Investigating the Linkages Between Sanction Severity, Sanction Certainty, and Offending' (2013) *International Journal of Offender Therapy and Comparative Criminology* 57(7) 792.

premised on Pavlovian conditioning [86] and provides, *"the extent to which people take into account distant possibilities… will affect whether they choose crime or non crime"*. [87] In other words, offenders will discount sanction threats when such threats are distal. [88] This is supported by research which found that participants are willing to pay to delay an electric shock by an hour than to have it immediately administered and even more to avoid having the shock administered after one year has passed. [89] Thus, when punishment or consequences are administered has a bearing on a person's choices. Against this, however, analyses of the relationships between impulsivity, self-serving bias and deterrence indicate that both sanction certainty and severity predict offending, whilst sanction celerity does not. [90]

A second prominent criminological theory is Rational Choice Theory which takes into account the decision maker's subjective expectations of the rewards and costs of offending and assumes the decision to offend is based on rationally balancing the two.[91] In other words, a crime will only be committed if the benefits to be gained by committing the crime outweigh the associated costs. The theory is premised on the assumption that all offenders are rational.

Why is this relevant to UWO?

According to the Home Office UWO Impact Assessment Report (2016) UWO seek to *"fill a gap by creating a new investigative power"*. The information obtained is intended to *"assist investigative agencies to build evidence for the purposes of bringing a non-conviction based asset recovery case*."[92] In other words, UWO can lead to the permanent deprivation of property believed to have been acquired through illicit activity. Accordingly, at a macro-level, UWO and its potentially severe consequences can be seen as a form of punishment. Indeed, the non-conviction based asset recovery regime was designed to prohibit a person suspected of being involved in illicit activity from benefitting in circumstances where conviction is unlikely. At its simplest, it strives to ensure that there are still consequences for a person's actions.

An important question, therefore, is whether UWO will have a bearing on the detection of illicit wealth and, indeed, underlying illicit activity. Put briefly, will it change behaviour and deter people from placing the proceeds of illicit activity in the UK as is intended? Before this question can be answered, it is necessary to consider who is the intended target of UWO.

Robert Barrington, Transparency International, said the following when discussing UWO:

> *"Unexplained Wealth Orders would fill a key gap in the UK's anti-corruption legislation, and make sure that the UK is no longer seen as a safe haven for corrupt wealth ... This is a chance for the UK to step back from complicity in crimes of corruption."* [93]

[86] Above n 82.
[87] Wilson & Hermstein, *Crime & Human Nature: The Definitive Study of the Causes of Crime* (Free Press, New York, NY 1985) 44-45.
[88] Above n 84.
[89] Lowenstein, 'Anticipation and the Value of Delayed Consumption' (1987) 97 *Economic Journal* 666.
[90] Above n 82; Nagin & Pogarsky, 'An Experimental Investigation of Deterrence: Cheating, Self-Serving Bias, and Impulsivity' (2003) 41 *Criminology* 167.
[91] Paternoster & Simpson, 'Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime' (1996) 30(3) *Law & Society Review* 549.
[92] See Impact Assessment on Criminal Finances Bill – Unexplained Wealth Orders by the Home Office (12 November 2016) 1.
[93] Transparency International, *Transparency International Response to Criminal Finances Bill* (13 October 2016) Transparency International <http://www.transparency.org.uk/press-releases/transparency-international-response-to-criminal-finances-bill/>

UWO intend to target two primary groups: politically exposed persons ("PEP") and those related or associated to them[94] as well as those suspected of being involved or who have been involved or are connected to a person involved in serious crime.[95] According to the Home Office PEP are considered *"high risk"* pursuant to UK and international anti-money laundering rules, justifying their inclusion. Regarding the second group, a person is suspected of being involved in serious crime if they are engaged in an activity identified in Part 1 of the *Serious Crime Act 2007*.[96] This includes, for instance, fraud and drug trafficking.

Applying criminological theory to assess deterrence

As discussed, Deterrence Theory points to punishment certainty as a key consideration and influencer of behaviour. Accordingly, the certainty that a UWO will be made is likely to be a factor for consideration by an individual assessing their next steps in, say, their financial affairs.

With this in mind, it is notable that the Home Office predicts that in its infancy, there will only be 20 UWO cases annually.[97] The envisaged limited application reduces the risk of detection and thus, the certainty of asset-recovery proceedings or 'punishment'. Given the very large number of people who potentially fall within the definition of a PEP, a PEP's associate, or a person suspected of serious criminal activity, it would seem that perhaps more UWO need to be considered for the new mechanism to have any bearing on future conduct. The simple point is, if only 20 UWO a year are going to be pursued it is questionable to what extent UWO will actually deter an individual from placing their illicit wealth in the UK?

Furthermore, Rational Choice Theory is premised on the individual being a rational actor, informed by a costs / benefit analysis. This prompts the question, are those who could be subject to UWO rational actors? For concision, the following discussion is limited to the criminological literature surrounding the rationality of fraudsters being one group of persons who may have large amounts of unexplained wealth and who would fall within the scope of those targeted by UWO (see s362B(9)(a)).

Criminological research is divided on whether fraudsters are rational actors. On one hand, some researchers posit that, *"corporate crimes are almost never crimes of passion"*[98] and others contend that offenders acting within a corporate setting are calculated and deliberate.[99] Similarly, Braithwaite & Makkai[100] premise a deterrence model for corporate crime on a cost-benefit utility model and research shows that fraudsters are rational actors, because creativity and intelligence are required when identifying fraudulent opportunities.[101]

Research by Schuchter & Levi presents a mixed picture. After interviewing 13 elite Swiss and Austrian fraudsters to test the Fraud Triangle,[102]

[94] Criminal Finances Bill 2016, s 362B (4)(a).
[95] Ibid.
[96] Criminal Finances Bill 2016, s 362B (9)(a).
[97] See Impact Assessment on Criminal Finances Bill – Unexplained Wealth Orders by the Home Office (12 November 2016).
[98] Braithwaite & Geis, 'On Theory and Action for Corporate Crime Control' (1982) 28 *Crime & Delinquency* 292, 302.
[99] Kadish, 'Some Observations on the Use of Criminal Sanctions in the Enforcement of Economic Sanctions' in Geis & Meier (eds) *White Collar Crime Offences in Business, Politics and the Professions* (Free Press, New York, 1977).
[100] Braithwaite & Makkai, 'Testing an Expected Utility Model of 'Corporate Deterrence'' (1991) 25(1) *Law and Society Review* 7.
[101] Levi, *The Phantom Capitalists: The Organisation and Control of Long Firm Fraud* (Ashgate, Andover, 2008).
[102] Schuchter & Levi, 'Beyond the Fraud Triangle; Swiss and Australian Elite Fraudsters' (2015) 39 *Accounting Forum* 176. The elements of the Fraud Triangle consist of opportunities, motivations and rationalisations and is often

they found that some fraudsters experience an inhibiting inner voice before the crime and a guilty conscience after whilst others (who were unaware their actions amounted to wrongdoing) reported no *"inner voice"* or *"guilty conscience"*. One interviewee even said that *"the appeal was greater than the inner voice"* arguably illustrating some level of rationality in the decision making process to commit fraud.[103]

Schuchter & Levi's research points to diversity amongst fraudsters in regards to the decision-making process. [104] In a similar vein, latest research indicates that certainly not all fraudsters are rational.[105] Choices may be subject to biases or systematic errors and the preference order possessed by an individual is not always stable.[106] That is, a fraudster's rationality may be affected by heuristics (such as misperceiving a risk or event or ignoring reality), over-considering improbable outcomes, optimism, self-deception, emotions and overconfidence. Campana's research shows *"slippery slope fraud"* (defined by Levi (2008) as deceptions occurring in the context of trying to rescue an insolvent business) [107] is not necessarily committed by rational actors.[108] His study found that the CEO of Parmalat acted irrationally by failing to assess adequately the company's changing circumstances whilst the motive for falsifying accounts was to keep control over the company he had created. Similarly, the fraudsters interviewed by Schuchter & Levi who had no *"inner voice"* fall into the category of 'slippery slope fraudsters' and, like the CEO of Parmalat, could be considered irrational actors.[109]

It follows that only rational or pre-planned fraudsters as opposed to 'slippery slope fraudsters' are likely to take into account the risk of UWO when considering their conduct. Consequently, UWO may have limited effect on those involved in fraudulent activity who are irrational or motivated by desperate situations. Further, considering the aforementioned research, it would seem that targets must genuinely fear they will be caught by a UWO in order for it to influence any cost/benefit analysis.

Conclusion

This piece has sought to prompt thinking about the deterrent value of UWO having regard to two prominent criminological theories. At a broad level, UWO possess the potential to impact the severity and certainty of punishment – factors which influence the behaviour of certain individuals – but research suggests that any noticeable effect on conduct will depend on the risk of UWO proceedings being instituted and indeed, the type of individual. The application of Rational Choice Theory suggests that UWO may have limited deterrent effects on fraudsters, as only rational fraudsters are likely to take UWO into account during their cost/benefit analysis. Nevertheless, future research may wish to consider other groups who would fall within the ambit of UWO and whether they are likely to be deterred by the new regime. Additionally, future research could focus on whether UWO displace crime. That is, instead of tackling illicit wealth at its source, do UWO merely result in it being invested in jurisdictions outside the UK? It is worth considering whether they divert rather than deter.

used to explain fraud. Schuchter & Levi (2008) show that not all of the elements need to be present in order for fraud to be committed.

[103] Ibid, 184.

[104] Ibid.

[105] Campana, 'When Rationality Fails: Making Sense of the 'Slippery Slope' to Corporate Fraud' (2016) 20(3) *Theoretical Criminology* 7.

[106] See also Kahneman, Knetsch & Thaler, "The Endowment Effect, Loss Aversion and Status Quo Bias" (1991) 5(1) *Journal of Economic Perspectives* 193.

[107] Above n 100.

[108] Above n 104.

[109] Above n 101.