

# The introduction of the consent regime into the Cayman Islands Proceeds of Crime Act (Revised)

The Proceeds of Crime Act (Revised) (**POCA**) was amended by the Proceeds of Crime (Amendment) Act 2023 (Act 12 of 2023) (the **Amendment**) and was published in the Cayman Islands Gazette No, 32 on 6 October 2023. The Amendment was due to commence on 30 April 2024 but was postponed to 2 January 2025.

Under Part 5 of POCA there are various money laundering and other criminal conduct offences.

## What is criminal conduct?

Criminal conduct is defined in section 144(2) of POCA to mean conduct which: (a) constitutes an offence in any part of the Cayman Islands; or (b) would constitute an offence in any part of the Cayman Islands if it occurred there.

## What is criminal property?

Property is criminal property if it constitutes a person's benefit from a criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly) and the alleged offender knows or suspects that it constitutes or represents such a benefit and includes terrorist property.

## How are the money laundering offences interpreted?

Typically:

- (a) It is immaterial who carried out the criminal conduct, who benefitted from it and whether the conduct occurred before or after the commencement of the POCA;
- (b) A person benefits from criminal conduct if that person obtains property as a result of or in connection with the conduct;
- (c) Where a person is required to make a determination as to whether property was obtained through criminal conduct under POCA:
  - (i) It is immaterial whether or not any money, goods, or services were provided in order to put the person in question in a position to carry out the conduct; and
  - (ii) It is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been criminal conduct;
- (d) If a person obtains a pecuniary advantage as a result of or in connection with criminal conduct, that person shall be considered to obtain as a result of or in connection with the criminal conduct of a sum of money equal to the value of the pecuniary advantage.

## What is money laundering?

Money laundering is an act which:

- (a) Constitutes an offence under sections 133, 134, or 135;
- (b) Constitutes an attempt, conspiracy, or incitement (essentially inchoate offences) to commit an offence specified in (a);
- (c) Constitutes aiding, abetting, counselling, or procuring the commission of an offence specified in (a); or

(d) Would constitute an offence specified in (a), (b) or (c) above if done in the Cayman Islands.

## What are the section 133, 134, and 135 POCA offences?

### Section 133 – The “concealing” offence

A person commits this offence if that person conceals criminal property, disguises criminal property, converts criminal property, transfers criminal property, or removes criminal property from the Cayman Islands.

Prior to the coming into force of the Amendment, the POCA allowed that a person does not commit an offence under this section if that person makes a disclosure to the Financial Reporting Authority (**FRA**) (usually by way of a suspicious activity report (**SAR**)) or a nominated officer but this does not apply to the person who committed or was a party to the act from which the property derives.

With the Amendment, POCA has been modified to provide that a person does not commit an offence under this section if he makes a disclosure to the FRA and has the consent of the FRA to commit the act but this does not apply to the person who committed or was a part to the act from which the property derives.

### Section 134 – The “arrangements” offence

A person commits an offence if that person enters into or becomes concerned in an arrangement which that person knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person. This section has been modified by the Amendment to allow that the person does not commit an offence if he makes a disclosure to the FRA and has the consent of the FRA to commit the act, but this does not apply to the person who committed or was a party to the act from which the property derives.

### Section 135 – The “acquisition, use and possession” offence

A person commits an offence if that person acquires criminal property, uses criminal property or has possession of criminal property. This section has been modified to allow that a person does not commit an offence if he makes a disclosure to the FRA and has the consent of the FRA to commit the act, but this does not apply to the person who committed or was a party to the act from which the property derives.

## Is disclosure to the FRA mandated under POCA?

Yes.

Under section 136 of POCA, A person commits an offence if:

- (a) That person knows or suspects or has reasonable grounds for knowing or suspecting that another person is engaged in criminal conduct;
- (b) The information or other matter on which that person’s knowledge or suspicion is based, or which gives reasonable grounds for such knowledge or suspicion, came to that person in the course of a business in the regulated sector or other trade, profession, business, or employment;
- (c) That person does not make the required disclosure to the competent authority as soon as reasonable practicable after the information or other matter in (b) comes to that person; and
- (d) The required disclosure is a disclosure of:
  - (i) The identity of the person who may be involved in money laundering, if that person knows it;
  - (ii) Information or other matter in the form and manner prescribed by regulations to the POCA;
  - (iii) The whereabouts of the property with respect to which the criminal conduct is committed, so far as that person knows it; and
  - (iv) The information or other matter mentioned in paragraph (b), or prescribed under section 201 for the purposes of section 136 of POCA.

A person does not commit an offence for not reporting if:

- (a) That person has a reasonable excuse for not making the required disclosure;
- (b) That person is a professional legal advisor or other relevant professional adviser and the information or matter came to that person in privileged circumstances; or
- (c) That person does not know or suspect that another person is engaged in money laundering and that person has not been provided by that person's employer with such training as is specified in the guidelines issued by the Cayman Islands Monetary Authority.

Nor does a person commit an offence under POCA if:

- (a) That person knows or believes on reasonable grounds that the criminal conduct is occurring in a particular country or territory outside of the Cayman Islands; and
- (b) The criminal conduct:
  - (i) Is not unlawful under the criminal law applying in that country or territory; and
  - (ii) Is not of a description prescribed in an order by the Attorney-General.

## Is tipping-off permitted?

No.

Under section 139 of POCA, A person commits an offence if:

- (a) The person knows or suspects that an activity in relation to which a disclosure is required to be made under POCA is about to take place, is taking place, or has taken place (whether or not a disclosure has been or is likely to be made); and
- (b) The person makes a disclosure which is likely to prejudice any investigation which might be conducted following the disclosure in (a), whether or not the investigation is conducted.

A person does not commit an offence if:

- (a) The disclosure of the information was done in accordance with information sharing obligations, under a financial group's group-wide programmes against money laundering and terrorist financing;
- (b) The disclosure is made in carrying out a function that person has relating to the enforcement of any provisions of POCA or of any other enactments relating to a criminal conduct or benefit from a criminal conduct; and
- (c) The person is a professional legal adviser.

## What are the consequences for breaching the money laundering offences?

A person who commits an offence under sections 133, 134, or 135 of POCA is liable:

- (a) On summary conviction, to a fine of C\$5,000 or imprisonment for a term of two years, or to both; or
- (b) On conviction on indictment, to imprisonment for a term of 14 years or to a fine, or to both.

A person who commits an offence under section 136 or 139 of POCA is liable:

- (a) On summary conviction, to a fine of C\$5,000 or imprisonment for a term of two years, or to both; or
- (b) On conviction on indictment, to imprisonment for a term of five years or to a fine, or to both.

## What to do when in doubt?

Forming a view as to whether there is a suspicion of money laundering is an entirely subjective matter. If ever a situation presents itself where there is a thought that a money laundering offence might be taking place, the safest route is to file a SAR with the FRA. Information on filing of SARs and the most updated version of the FRAs SAR template can be found

[here](#). For entities that are regulated, employees should liaise with the relevant officer, usually the money laundering reporting officer (**MLRO**) or the deputy MLRO, as appropriate in accordance with the usual internal controls and compliance policies, see [here](#).

The Amendment allows the Cabinet upon the recommendation of the Anti-Money Laundering Steering Group, the Cayman Islands Monetary Authority, and the FRA to make regulations prescribing the measures to be taken to prevent the use of the financial system and any other facilities provided in or from within the Cayman Islands for the purposes of criminal conduct measures – these include – establishing a framework under which reporters of suspicions of criminal conduct may seek and obtain a defence to specified money laundering or terrorist financing offences in relation to those reported offences. The prescriptive supporting regulations have not been published as yet. However, in the meantime, relevant financial businesses should review and update their internal controls, including but not limited to their anti-money laundering, counter terrorist financing, and counter proliferation financing procedures to reflect the consent regime as introduced under the Amendment.

Should you require any advice in relation to the consent regime, preparation and filing of SARs with the FRA, or any other regulatory disclosure obligations, please do feel free to contact the author or any of your usual Harneys contacts.



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