

ICAEW REP 57/06

**NEW POWERS AGAINST ORGANISED AND FINANCIAL
CRIME**

*Memorandum of comment submitted in October 2006 by the Institute of
Chartered Accountants in England and Wales, in response to the
Home Office consultation of July 2006*

Comments	Paragraphs
Introduction and General Comments	1 - 4
Responses to Specific Consultation Questions	5 - 28

INTRODUCTION AND GENERAL COMMENTS

1. The Institute of Chartered Accountants in England and Wales ('the Institute') welcomes the opportunity to respond to the Home Office Consultation Paper "New Powers against Organised and Financial Crime" issued in July 2006.
2. The Institute has a public interest mandate and has been a leading contributor in the policy debate over the fight against financial and economic crime over the last decade or longer. As an accounting professional body, we are particularly aware of the damaging social and economic effects that are caused by financial and other business crime, including organised crime. Adverse business effects cause consequent distress and hardship to many individuals in the businesses affected, as well as flowing through into the economic well-being of the country as a whole.
3. Accountants make up the largest professional group of FTSE 100 chief executives, with 24 of the UK's largest companies having an accountant as CEO, and over 60% of FTSE Finance Directors are members of the Institute. As the largest accountancy body in Europe, the Institute's 128,000 members run and advise businesses of all sizes across virtually every economic sector.
4. We set out below our responses to the specific questions raised in the consultation. As a general point, we would like to reiterate our support for the strengthening of the law, to enable the better control of organised and financial crime. However, proportionality and appropriate controls must be maintained, to ensure that the interests of victims and innocent third parties are protected. Organised criminals undertake their activities for an economic effect – to profit by unfair means and to the detriment of others. The activities of the criminal justice system should not (however inadvertently) be allowed to prejudice the interests of those third parties further, whether they are individuals or businesses.

RESPONSES TO SPECIFIC CONSULTATION QUESTIONS

Chapter 1: Data-Sharing

Q1. Should public sector information on suspected fraudsters be shared more widely within the public sector and with the private sector to prevent and detect fraud? What sort of safeguards would you expect to see? What do you believe the most appropriate vehicle for data-sharing would be?

5. The principle of wider data sharing within the public sector and with the private sector, for the prevention and investigation of organised and financial crime is strongly supported, subject to the maintenance of appropriate controls to prevent misuse.
6. Safeguards need to be in place to ensure only persons (public or private sector) with a genuine anti-financial crime role and motive may access data. These safeguards could be supported by specific undertakings that the information will be used solely for the prevention or investigation of crime, and not for any other

purpose. This is important not only to ensure fairness, but also to ensure that information which could be of considerable value in identity theft and other financial crime could not be misused. The status of the data and its source would need to be clear on any shared search facility.

7. There should also be a clear exclusion, preventing any public or private organisation from sharing legally privileged information, to which it may have had access in the course of its regulatory or any other functions. There is specific reference in the consultation paper, for example, to sharing between the FSA and the Financial Reporting Council. This would affect audit firms and their clients whose confidential and privileged information may have been reviewed by the auditors and may feature on their audit files, which are subject to review by the Professional Oversight Board, a sub-body of the Financial Reporting Council. There should be an absolute bar on the sharing of privileged information in such circumstances. Extreme care should be taken over the sharing of confidential information, which may have a high commercial value which would make its dissemination subject to the risk of very damaging inadvertent or corrupt disclosure.
8. The Government must be aware of the importance of the perceptions of those whose information is to be shared, and that it is clear to them that appropriate controls are maintained at all times. For example, we understand that the disclosure of information to the tax authorities in this country is good, compared to other jurisdictions, with consequent advantages for the fairness of tax collection. Anything which damages the willingness of taxpayers to be open and above board with the tax authorities would be damaging to both the public purse and the economic well-being of the country – but any perception that the tax authorities would inappropriately pass information to other authorities could do just that.
9. In this section of the consultation paper, you note that the Department of Constitutional Affairs is considering increasing the penalties available to the Courts, in respect of misuse of personal information, under Section 55 of the Data Protection Act. We would strongly support such a reform. However, action should also be taken to guard against the misuse of corporate and other non-personal information. Businesses as well as individuals can be the victims of crime, and the people who work for, or invest in, them can suffer immense hardship as a result. In addition, many companies have a very limited number of employees, and so the individuals responsible for supplying intelligence can often be deduced from information that might otherwise be considered non-personal. The disclosure of business information from larger organisations can also cause considerable economic damage.
10. Consideration may usefully be given to using CIFAS as the focus for the sharing of data from the public to the private sector, at least in the short term whilst alternatives are considered by the public sector. Other existing partnership arrangements may also be utilised, where available and where the appropriate controls exist.

Q2. Should the scope of the National Fraud Initiative be expanded and placed on a statutory footing in order to increase its capacity to detect fraud within the public sector?

11. The scope of the National Fraud Initiative should be expanded. Proper use of public sector information to prevent and detect fraud against the public sector is an important weapon in the fight against financial crime and has, to date, been underused. It should be placed on a statutory footing to facilitate effective working and to remove barriers.

Q3. We would welcome your views on SOCA matching Suspicious Activity Reports received from the regulated sector against a range of public sector databases.

12. As a public sector database, the information in the SOCA Suspicious Activity Reports database could, where appropriate and proportionate, be used to match against other public sector databases. There are two important provisos, one that the reporter of such information must not be identifiable from this exercise by the owner of databases other than SOCA, and second that it must be recognised that much of the information on this database is based on suspicion only.

Q4. We would welcome your views on what you would regard as appropriate and targeted data mining of public and private sector databases to detect and prevent criminal activity, and what the appropriate safeguards for such exercises should be.

13. In principle, data mining could be a powerful weapon in fighting financial crime and to this extent would be supported. However, there would need to be strict safeguards to prevent commercial organisations obtaining from the public sector information that could be exploited for commercial reasons, and also to prevent this being used to facilitate identity theft.
14. It would probably require a new bureau or similar to be created to manage this process, procuring sources from the public sector and private sectors (e.g. such as the information contained in credit checking systems, CIFAS etc). Only very limited access could be granted to the private sector e.g. for checking of individual applications for credit, as it would be improper for information provided for governmental purposes to be provided wholesale to the private sector.
15. Actual data mining exercises should require a senior approval from the public sector body requesting the exercise, with the approval being required to demonstrate the crime-fighting objective and why data mining was the appropriate way to achieve this objective.

Chapter 2: The Criminal Law

Q5. Should Clause 2 be restricted to those who believe that an offence will take place or should this be widened?

16. We have some concern that the widening of the Law Commission's proposed offence for encouraging and assisting crime in the way suggested may have unintended consequences, in drawing into the criminal net less serious offences as well as the serious organised crime at which it is aimed. If, as we believe, it would be counter-productive and problematic to restrict the offence by a limitation to serious offences, on balance, we would prefer it to be limited to circumstances where the accused believes that an offence will be committed. The examples given by the Law Commission, for example, include such social offences as providing additional drinks to guests who are known to be likely to drive home. Driving while over the Statutory limit is an egregious offence, but it is very far from the organised and financial crime which the consultation seeks to address. The law should be framed in a way which will address issues of wilful blindness, but should also avoid extending the criminal law unnecessarily, or beyond what was intended.

Q6. Is the Government right to consider extending liability to those who indirectly encourage or assist a person (X) where they suspect this encouragement or assistance will aid X's criminal activities (as against specific criminal offences)?

17. We agree that encouraging and assisting a person or organisation, without necessarily knowing the nature of the criminal offence being encouraged should be an offence. However, as noted in the consultation, that framing of this offence will need to be very carefully considered.

18. The interests of innocent third parties should be taken into account, in decisions on prosecutions of organisations, whose staff have committed the inchoate offences on a corporate basis – it would not be appropriate for legitimate operations, and their law abiding staff, investors and customers, to be unnecessarily prejudiced, because of the illegal acts of some of their staff.

Chapter 3: Organised Crime Prevention Orders

Q7. The Government would welcome views on the kinds of conditions that might be attached to an organised crime prevention order.

19. Conditions would need to be carefully tailored to circumstances and would be most effective where capable of effective monitoring and enforcement. From this perspective, they need to be as simple as possible. Areas to consider include:

- restrictions on movement, supported by tagging;
- bans on operating a web site;
- restraint from operating a particular business or company, a business or company acting in a particular sector, or from operating any limited company;
- divestment of property or other assets;

- bans on any other activity, which might otherwise represent one of the inchoate offences;
- restrictions as to the number or type of bank accounts held; and
- restrictions on known associates and family members requiring them not to assist any circumvention of the order.

Q8. The Government would welcome views on the types of situation where an organised crime prevention order may prove useful and proportionate in preventing organised criminality.

20. Organised crime prevention orders are likely to be costly to enforce, and may take scarce resources from other policing priorities. They should not be used, except in circumstances where they have a positive cost benefit, in terms of criminal justice outcomes. Nevertheless, the mechanism should be capable of application to any serious organised crime scenario. Its use in depriving suspected criminals of support by professionals, advisers and associates should not be overlooked by imposing orders on them to desist from criminal assistance to the suspect.
21. Orders should not be imposed, however, in a way which prevents or deters the seeking or giving of legitimate professional advice. Such legitimate advice, by responsible professionals, would normally have a valuable contribution to preventing and deterring crime, that could be lost were professionals to fear straying over an unclear line.

Q9. Should the prosecution be required (whether by legislation or court rule) specifically to draw the court's attention to relevant facts about the impact of potential orders upon the interests of third parties?

22. Yes, this is a vital protection as the interests of legitimate business and uninvolved family dependants need protection.

Chapter 4: Proceeds of Crime

Q10. We would welcome your views on new measures to merge confiscation and enforcement hearings, to contract out enforcement of confiscation orders, to cancel orders which cannot be enforced, and to extend certain search and seizure powers to all financial investigators.

23. The measures to merge hearings are welcomed if they bring greater efficiency to the process.
24. Power to contract out enforcement of confiscation orders is a matter that will require considerable safeguards to be put in place to protect against poor quality or less than honest operators. Cases should only be contracted out where existing agencies lack sufficient specialised skills to handle efficiently complex recovery cases, or lack the necessary speed or resources, and a prosecutor would be required to certify that this is the case before the work was put out to tender.

External contractors should be authorised, subject to frequent quality review and under the jurisdiction of the Court. Proper regard to skills, as well as cost, will be vital in this process which should not be seen as a cost cutting opportunity but a method of maximising results.

25. The powers should be extended to all financial investigators provided there are adequate safeguards in place for those subject to action, possibly akin to those provided in civil search orders.

Q11. We welcome views and comments on further amending and improving the consent provisions in the Proceeds of Crime Act 2002 in a way which a) maintains the existing benefits to law enforcement agencies in terms of seizing and restraining suspect assets and disrupting criminal activity and b) enables the reporting sectors in industry to suspend transactions or activity with a client without making him/her suspicious.

26. It needs to be understood that there is no way of suspending normal commercial activity in a manner that does not cause suspicion and/or frustration in clients.
27. The existing system has presented a considerable challenge to the accounting profession and, given that accountants will often report suspicion which relates to the non-client counterparty to a transaction or situation, has also threatened to disrupt the legitimate activities of innocent people and businesses. However, it is recognised that there is a law enforcement value to the consent regime, and with increasing efficiency from, and co-operation with, the UK FIU, this has been managed reasonably well. An important issue for the accountant in many instances where consent is required is to have certainty within a short timescale as to whether the activity may proceed. That allowed for in POCA would, in most cases, be too long to be managed sensibly with clients and other parties but in practice is usually considerably shortened.
28. It is recognised that financial institutions, banks in particular, have considerable problems with operating this regime and may require an addition to the law to allow them, within certain conditions, to be allowed to continue activity whilst providing an extended opportunity for law enforcement intervention. Such an option may also have a use for certain situations encountered in other sectors.