



CASH IN POSTAL PACKETS BILL 2012

EXPLANATORY NOTES

These Notes are circulated for the information of Members with the approval of the Member in charge of the Bill, Mr Teare.

These Explanatory Notes relate to the Cash in Postal Packets Bill 2012. They have been prepared by the Treasury in order to assist readers of the Bill. They do not form part of the Bill and have not been endorsed by the House of Keys.

The Notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. They are in two parts –

- 1. Overview;*
- 2. Detailed notes on clauses.*

PART 1 OVERVIEW

GENERAL NOTE

This Bill, which is promoted by the Treasury, is intended to amend the law relating to cash sent in the mail to or from the Island, bringing such consignments within the scope of existing legislation concerned with –

- the requirement to declare cash which is above a prescribed amount (currently €10,000) and which is brought into, or taken out of, the Island; and
- the seizure of cash above a minimum amount (currently £1,000) that a customs officer or constable reasonably suspects to be recoverable property (within the meaning in the Proceeds of Crime Act 2008) or which is intended for use in unlawful conduct.

To achieve the above aims the Bill will amend –

- Part VA of the Customs and Excise Management Act 1986 (importation and exportation of cash);
- section 49 of the Post Office Act 1993 (inviolability of mails); and
- Chapter 3 of Part 1 of the Proceeds of Crime Act 2008 (recovery of cash in summary proceedings).

The Bill also amends section 15 of the Post Office Act 1993 (application of customs Acts) to add definitions for the purpose of that section.

In these Notes, unless the contrary intention is indicated –

- "cash" means -
 - (a) notes and coins in any currency;
 - (b) postal orders;
 - (c) cheques of any kind, including travellers' cheques;
 - (d) bankers' drafts;
 - (e) bearer bonds and bearer shares, found in the Island.

It also includes any kind of monetary instrument which is found in the Island, if the instrument is prescribed by an order of the Department of Home Affairs (DHA); and any of (a) to (e) above, or a monetary instrument prescribed by the DHA, which is a forgery or is counterfeit.

- "the initial 48 hours period" means the time after the cash was first seized by a constable or a customs officer, when it can be detained without judicial authority. The period is defined in section 47(3) of the 2008 Act as excluding –
 - (a) any Saturday or Sunday;
 - (b) Christmas Day;
 - (c) Good Friday; and
 - (d) any day that is a bank holiday under the Bank Holidays Act 1989.

If cash is to be detained after this initial period a constable or customs officer must apply to the High Bailiff within the 48 hours for an extension.

- "minimum amount" currently means £1,000, being the amount specified in an order made by the Department of Home Affairs under section 55 of the 2008 Act. The amount of any currency other than sterling is its sterling equivalent, calculated in accordance with the prevailing rate of exchange.
- "prescribed amount" in respect of cash being imported or exported means that amount currently specified in section 76A of the 1986 Act (currently €10,000 or its amount in any other currency).

- "recoverable property" is defined in sections 56 to 62 of the 2008 Act and, in essence, is property obtained by means of unlawful conduct, profits accruing as a result, or other property that represents the original property obtained as a result of unlawful conduct.
- "1986 Act" means the Customs and Excise Management Act 1986.
- "1993 Act" means the Post Office Act 1993.
- "2008 Act" means the Proceeds of Crime Act 2008.

STRUCTURE OF THE BILL

The Bill is structured as follows –

- Clause 1 Deals with the short title of the resulting Act.
- Clauses 2 and 3 Deal with the resulting Act's commencement and its expiry (as it is legislation that only serves to amend other legislation).
- Clauses 4 to 9 Amend Part VA of the 1986 Act to add provisions relating to the extension of the cash declaration regime to cash contained in postal packets.
- Clause 10 to 12 Amend the 1993 Act. A definition of "statutory provisions" is inserted into section 15 of the Act (and, as a consequence, a definition of "Community instrument" is also inserted). Section 49 is amended to remove inviolability from cash sent by post so as to facilitate any action necessary under Part VA of the 1986 Act or Chapter 3 of Part 1 of the 2008 Act.
- Clauses 13 to 19 Amend Chapter 3 of Part 1 of the 2008 Act to extend the provisions of that Chapter, for the seizure of cash above the minimum amount which it is believed is recoverable property or intended for use in unlawful conduct, to cash sent in postal packets.

PART 2
DETAILED NOTES ON CLAUSES

CLAUSE 1
Short title

This provides that the short title of the resulting Act is "Cash in Postal Packets Act 2012".

CLAUSE 2
Commencement

This provides that the resulting Act will be brought into operation by appointed day order. All of the provisions of the resulting Act may be brought into operation at the same time, or at different times, and subject to such transitional arrangements as are appropriate.

CLAUSE 3
Expiry

This clause provides for the resulting Act to expire on the day after its promulgation or, if all of its provisions are not in operation on its promulgation, on the day after the last provision is brought into operation. At that stage, all of the amendments to the 1986 Act, the 1993 Act and the 2008 Act will have taken effect.

It is clarified that the expiry does not affect the continuing operation of the amendment.

CLAUSE 4
Amendment of the 1986 Act

This clause introduces clauses 5 to 8, which amend the 1986 Act.

The amendments are made to Part VA of the 1986 Act. Part VA was inserted into the 1986 Act by Schedule 5 to the 2008 Act, and it introduced a definitive cash declaration regime to apply to cash with a value in excess of the prescribed amount (currently €10,000) which is brought into or taken out of the Island.

CLAUSE 5
Section 76A amended

This clause amends section 76A of the 1986 Act (interpretation of Part VA). Section 76A defines certain terms used in Part VA of the Act. The amendments –

- provide for the definition of "declaration" to include declarations from the sender or addressee of a postal packet containing cash above the prescribed amount – including where the packet has been detained and examined under proposed new section 76CB;

- add to the definition of "export" and "import" wording to include the transportation of cash to or from the Island in postal packets;
- add definitions of "postal packet" and "sender".

CLAUSE 6
Section 76B amended

This Clause amends section 76B of the 1986 Act (disclosure of cash).

Subsection (1) replaces subsection (1) of section 76B. The existing wording provides customs officers with a discretionary power to require a person importing or exporting goods to disclose if the goods involved consisted of, or included, cash in excess of the prescribed amount, and to answer any questions put to him or her by that officer in respect of that cash.

The new wording imposes a requirement on the person importing or exporting goods to disclose to a customs officer if the consignment consists of, or includes, cash in excess of the prescribed amount; and also to answer any questions put to him or her by a customs officer about the cash.

Accordingly, the heading for section 76B is changed to become "persons exporting or importing goods".

CLAUSE 7
New sections 76CA to 76CC

This clause inserts three new sections into Part VA of the 1986 Act.

New section 76CA (persons sending and receiving cash in postal packets) and 76CB (cash in postal packets) provide the main substance of the Bill in relation to the declaration requirements for cash (which exceeds the prescribed amount) contained in postal packets.

New section 76CA sets out that postal packets sent to or from the Island that contain cash above the prescribed amount must be the subject of a declaration to a customs officer. Where a postal packet is sent from the Island, the sender must make the declaration. In the case of postal packets sent to the Island, the addressee must make a declaration. The Treasury must by order prescribe the form and manner in which the required declarations are to be made.

New section 76CB deals with situations where a customs officer reasonably suspects that a postal packet contains cash with a value in excess of the prescribed amount. In such circumstances the officer may request that the Isle of Man Post Office detain and open the packet and may examine its contents.

If the postal packet is found to contain cash in excess of the prescribed amount, and a declaration has not been made in respect of that cash in accordance with section 76B(2) or (3), the Isle of Man Post Office may continue to detain the cash, but the postal packet and the rest of its contents must be forwarded to the addressee. In such circumstances, a declaration must be made in respect of the cash. In the case of a postal packet which has been sent to the Island, the addressee must make the declaration whereas the sender is responsible for making the declaration in the case of a packet which has been sent from the Island. In any case, declarations must be in the form and manner prescribed by the Treasury.

A packet which is opened and examined under section 76CB must be resealed with all of its contents and forwarded to the addressee if it does not contain cash in excess of the prescribed amount or a declaration has been received in respect of that packet.

New section 76CC (sections 76CA and 76CB: supplementary) provides that an order under section 76CA(4) or 76CB(7) prescribing the form and manner in which declarations are to be made, may make detailed provision in respect of any matter that the Treasury considers is necessary or expedient to give further effect to those sections.

CLAUSE 8 ***Section 76H amended***

This clause amends section 76H of the 1986 Act (notice of seizure of cash).

Section 76H provides that a customs officer who seizes cash under 76G (seizure of cash) must give written notice to the person who, immediately before the seizure of the cash had possession of the cash, or was, in the opinion of the officer, in possession of the cash.

This clause inserts a new subsection (2A) into section 76H to provide that, in the case of cash contained in a postal packet, the required notice of seizure must be given to the sender (if known) and the addressee.

CLAUSE 9 ***New section 76I***

This clause inserts a new section 76I (no excuse from complying with a requirement under Part VA) following section 76H. The new section provides that a person is not excused from complying with a requirement to make a disclosure or declaration about cash entering or leaving the Island on the grounds that –

- a. to do so might incriminate the person (or the person's spouse or civil partner) or
- b. the answer to the question concerned may be the subject of legal professional privilege or any other legal privilege.

However, a statement made in complying with the requirements of Part VA will not be admissible in evidence against the person (or their spouse or civil partner) in proceedings for any offence other than perjury.

The clause enables a person to freely declare, disclose or answer questions put by a customs officer about cash entering or leaving the Island without fear of self-incrimination, incriminating their spouse or civil partner, or breaching any legal privilege that they feel would otherwise restrict them.

CLAUSE 10

Amendment of section 49 of the Post Office Act 1993

Clause 10 provides that the 1993 Act is amended in accordance with clauses 11 and 12.

CLAUSE 11

Section 15 amended

Clause 11 amends section 15 of the 1993 Act (application of customs Acts).

Section 15 provides that, subject to the provisions of that section, statutory provisions for the time being in force relating to customs and excise apply to goods contained in postal packets brought into the Island or sent to a place outside the Island as they apply to goods otherwise imported, exported or removed into or out of the Island from or to any other place. There is also a power for the Treasury to make regulations which –

- (a) specify the postal packets to which section 15 applies;
- (b) provide for modifications and exceptions in the application of the statutory provisions to such packets;
- (c) enable persons engaged in the business of the Isle of Man Post Office to perform for the purposes of the statutory provisions and otherwise all or any of the duties of the importer, exporter or person removing the goods;
- (d) carry into effect any arrangement with the government of another country or overseas administration with respect to overseas postal packets; and
- (e) secure the observance of the statutory provisions and, without limiting any liability of any person under those provisions, for punishing any contravention of the regulations.

Clause 1 inserts a new subsection (7) which provides that, for the purposes of section 15, "statutory provisions" includes any Community instrument which applies to the Island under section 2(1) of the European Communities (Isle of Man) Act 1973, and any Community instrument applied to the Island under section 2A of that Act. A new subsection (8) defines the references to "Community instrument" in subsection (7).

Clause 11 also amends subsection (2)(e) to replace the word "enactments" with "provisions" to ensure consistency with the rest of the section.

CLAUSE 12

Section 49 amended

Subsection (1) of section 49 of the 1993 Act (inviolability of mails) provides that, subject to the provisions of that section, a packet in the post, anything contained in a packet in the post and a mail bag containing a packet in the post have immunity from examination, seizure or detention under a statutory power, seizure under distress or in execution and retention by virtue of a lien.

Clause 12 amends subsection (3) of section 49 so as to provide that subsection (1) does not apply to –

- (a) the powers conferred by Part VA of the 1986 Act in relation to cash contained in postal packets; and
- (b) the powers contained in Chapter 3 of Part 1 of the 2008 Act in relation to cash contained in postal packets.

CLAUSE 13 ***Amendment of the 2008 Act***

Clause 13 provides that the 2008 Act is amended in accordance with clauses 14 to 19. The main purpose of the amendments is to extend the regime for the civil recovery of cash to that sent in postal packets.

CLAUSE 14 ***Section 43 amended***

This clause amends section 43 of the 2008 Act (searches) to insert –

- a) a new paragraph (f) in subsection (6), which ensures that searches permitted under that section apply equally to situations where the suspect cash is forged or counterfeit; and
- b) a new subsection (7A), which provides that any forged or counterfeit cash is deemed to have the same face value as it would have had if genuine.

This clause is not directly related to the amendments made to extend the civil recovery powers to cash sent in postal packets. However, it applies to material sent by mail as it would in any other circumstance.

Section 43 of the 2008 Act allows for searches for cash above the minimum amount which is “recoverable property” or is intended for use in unlawful conduct. A customs officer or constable must have reasonable grounds to suspect that the cash is recoverable property or intended for use in unlawful conduct, and that it is above the minimum amount. The search may be of premises, persons or means of transport, but is only for the purposes of searching for the cash involved.

The powers under section 43 to conduct a search are only exercisable by a customs officer if the officer has reasonable grounds for suspecting that the unlawful conduct in question

relates to an "assigned matter" (i.e. a matter for which Customs and Excise has responsibility, and which are defined in section 184 of the 1986 Act).

The definition of "cash" in section 65 of the 2008 Act (general interpretation of Part 1) is for the purposes of interpreting references in Part 1 of the Act (civil recovery of the proceeds etc of unlawful conduct). That definition provides that "cash" has the meaning given by section 43(6) or (7). At present, those provisions do not include forged or counterfeit versions of instruments or notes and coins in any currency. The cash declaration provisions of the 1986 Act, however, do currently refer to forged or counterfeit currency or instruments (see section 76A of the 1986 Act). The opportunity is therefore being taken to clarify the law in this area, and bring the two interpretations into line with one another.

A constable or customs officer may seize cash, declared or undeclared, if he or she has reasonable grounds to suspect that it is (or that part of it is) recoverable property or intended for use in unlawful conduct. It is important, therefore, that the definitions in the two complementary pieces of legislation are aligned. In any event, it may not be immediately obvious to a constable or customs officer whether or not any cash is genuine or not, and this also serves to make the amendments to section 43 of the 2008 Act sensible.

CLAUSE 15 ***New section 43A***

This clause inserts a new section 43A into the 2008 Act. The new section is concerned with permitting searches of postal packets, subject to certain conditions, and how any such search is to be carried out.

The new section 43A provides that a constable or customs officer has to have reasonable grounds to believe that the postal packet in question contains cash which is "recoverable property" or is intended for use in unlawful conduct, and which exceeds the minimum amount. If they have such grounds they may ask the Isle of Man Post Office to detain and open the postal packet for examination.

Due to the amendment contained in clause 16 (which amends section 44 of the 2008 Act), it is a requirement that before such a search is undertaken the constable or customs officer involved must have the prior approval of the High Bailiff or a justice of the peace or, if that is not practicable, a senior officer (unless, in the circumstances, it is not practicable to obtain prior approval before exercising the power) – see below for more information.

The postal packet remains at all times in the control and custody of the Isle of Man Post Office. Should no cash that meets the criteria for seizure be found, the packet is resealed by the Isle of Man Post Office and sent on to the addressee. If cash is found and seized, the Isle of Man Post Office would send on the packet and the remainder of the contents to the addressee.

Notice of seizure would be sent in respect of any cash seized, and, if the packet was sent on to the addressee, a notice would be affixed to the packet explaining that it had been opened by the Isle of Man Post Office – this is standard practice where any packet has had to be opened by the Post Office for whatever reason.

CLAUSE 16
Section 44 amended

This clause amends section 44(1) of the 2008 Act (searches: prior approval), which is concerned with the seeking of prior approval for any search of persons, premises or means of transport for cash under powers conferred by section 43.

The amendment made extends the provisions of section 44 to include the new section 43A, thereby meaning that a search of a postal packet under that section may only take place with the prior approval of the High Bailiff or a justice of the peace or, if that is not practicable in the circumstances, a "senior officer".

For the purposes of section 44, a "senior officer" means –

- (a) in relation to the exercise of the powers in section 43 or 43A by a constable - a police officer of at least the rank of inspector; or
- (b) in relation to the exercise of those powers by a customs officer – an officer of at least the grade designated by the Collector of Customs and Excise as equivalent to the rank of inspector (currently a higher executive officer).

Section 44 also requires that if a search is undertaken without the approval of either the High Bailiff or a justice of the peace and either no cash is seized under section 46, or any cash seized is returned within the initial 48 hours period provided for in the Act, a written report must be made to either the Chief Constable or the Collector of Customs and Excise, as the case may be. This report must indicate why it was not practicable to seek the prior approval of the High Bailiff or a justice of the peace, and why the constable or customs officer concerned believed that the powers conferred by section 43 or 43A were exercisable.

CLAUSE 17
Section 45 amended

This clause amends section 45 of the 2008 Act (searches: code of practice) to require the making of a code of practice by the Department of Home Affairs (following consultation with the Isle of Man Post Office) to govern the use of the powers contained in section 43A to carry out searches of postal packets. The code must be brought into operation by order.

Existing search powers, exercisable under section 43 of the 2008 Act, and relating to searches of persons, premises and means of transport, are covered by an existing code of practice produced by the Department of Home Affairs (see section 45(1) of the Act).

CLAUSE 18

Section 49 amended

Section 49 of the 2008 Act (release of detained cash) deals with the release of cash which is detained under section 47 of that Act, where an application has been made to the High Bailiff by the person from whom it was seized. The High Bailiff may direct that the cash be released if the conditions in section 47 for the detention of the cash are no longer met. Clause 18 provides for an amendment to section 49 to deal with cash detained under section 47 after being found in a postal packet. In such circumstances the sender, or the person to whom the packet was addressed, may apply to the High Bailiff for release of the cash.

CLAUSE 19

Section 54 amended

The existing section 54 of the 2008 Act (compensation where no forfeiture order made) provides that if no forfeiture order is made in respect of cash detained under Chapter 3 of Part 1 of the Act, the person to whom the cash belongs or from whom it was seized may make an application to the High Bailiff for compensation. Clause 18 amends section 54 so as to enable the sender or the addressee of a postal packet to apply to the High Bailiff for compensation when no forfeiture order is made in respect of cash found in a postal packet and which is detained under Chapter 3 of Part 1 of the 2008 Act.

Firstly, if cash was not placed in an interest-bearing account after the initial 48 hours period following seizure, the High Bailiff may order compensation to be paid to the applicant (section 54(2)) which corresponds to the interest that would have been paid (section 54(3)).

Secondly, if the High Bailiff is satisfied that, taking account of any interest to be paid under section 48 (detained cash: interest) or any amount to be paid under section 54(2), the applicant has suffered loss as a result of the detention of the cash and that the circumstances are exceptional the High Bailiff may make an order for an amount of compensation (or additional compensation) the High Bailiff thinks reasonable, having regard to the loss suffered and any other relevant circumstances (section 54(5)).

If a forfeiture order has been made, but only for part of the cash detained, then a compensation order may be made in respect of the remainder of the cash (section 54(7)).

