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Public Registers of Beneficial Ownership in the British Overseas Territories via the Criminal Finances Act 2017: Does Britain Know Best? The Case of Bermuda

LLM 2016-2017

International Corporate Governance, Financial Regulation and Economic Law (ICGFREL)

Institute of Advanced Legal Studies
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Abbreviations

AML	Anti-Money Laundering
BMA	Bermuda Monetary Authority
BOT	British Overseas Territory
BVI	British Virgin Islands
CbC	Country by Country Reporting
CFT	Combatting the Financing of Terrorism
CRS	Common Reporting Standards
CSP	Corporate Service Provider
EU	European Union
FATF	Financial Action Task Force
G8	Group of Eight
IMF	International Monetary Fund
MCAA	Multilateral Competent Authority Agreement
ML	Money Laundering
MNC	Multi-National Corporation
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Cooperation and Development
POCA	Proceeds of Crime Act
PRBO	Public Register of Beneficial Ownership
TCI	Turks and Caicos Islands
TIEA	Tax Information Exchange Agreement
TJN	Tax Justice Network

1 Introduction

This paper focuses on proposed Amendment 167 of the Criminal Finances Act 2017, by which Bermuda (and other British Overseas Territories) would be forced to adopt public registers of beneficial ownership. This paper assesses the potential legal imposition of a public register of beneficial ownership via Order in Council on Bermuda both practically and theoretically. Ultimately, this piece attempts to answer the broad question of: Is an imposition of a public register of beneficial ownership by the UK in Bermuda justified? To this end, an all-encompassing legal discussion will ensue, utilising academic and practitioner thought, political discourse, and legislative assessment to lend clarity to an emerging legal theme: company ownership transparency broadly, as well as specifically in relation to UK-Bermuda. Standing at the intersection of regulatory policy and international legal relations, this paper finds the exact value of public registers not only questionable in current academic and practitioner thought, but also unnecessary in the unique case of Bermuda. Further, it is found, after analysis of Bermuda's financial sector, legal framework, and tax system that the imposition of a public register in Bermuda is fundamentally flawed on both a legal and logical basis. Because of the two points made above, it is concluded overall that the UK imposition of a public register in Bermuda cannot be justified.

1.1 Background

Ahead of the 39th Group of 8 (G8) Summit hosted by the UK on the 17th and 18th of June 2013, British leaders signified commitment to a series of provisions intended to promote greater cooperation between tax jurisdictions and overall greater

tax transparency.[1] Prime Minister David Cameron expressed his determination to make considerable progress on both ensuring tax compliance and promoting greater transparency, two of three main thematic discussions of 2013's G8 Summit.[2] These discussions spoke to the Prime Minister's broader agenda: "fairer taxes, open trade and increased transparency"[3]. Dubbed 'the three t's', taxes, trade and transparency were demonstrated to have profound importance for 21st century governance. It is important to understand, from the outset, that the challenge the UK is trying to tackle is very real: "In November, the Tax Justice Network (TJN) published the biggest ever survey of global financial secrecy. An estimated $21 to $32 trillion of private financial wealth is located, untaxed or lightly taxed, in 'secrecy jurisdictions' (or tax havens)[4] This was further conveyed in David Cameron's foreword as Prime Minister on the 2013 UK G8 Presidency Report:

"[The three t's] are all essential components of the global economic race we're in. When taxes are not paid, people suffer and public trust in business is corroded. When trade isn't free, all our economies lose out. When transparency is lacking, the wealth of a nation cannot be properly shared with its people. All these areas demand political leadership in equal measure."[5]

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[1] Daniel Boffey et al 'Tax havens agree to Cameron clampdown' The Guardian (London, 15 June 2013) < https://www.theguardian.com/world/2013/jun/15/tax-havens-cameron-clampdown> last accessed 2/4/2017

[2] United Kingdom Government, 'UK Presidency of G8' (UK, date N/A) <https://www.gov.uk/government/topical-events/g8-2013 > last accessed 4/4/2017

[3]United Kingdom Government, 'Trade, Tax & Transparency: The 2013 UK G8 Presidency Report' (2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271676/G8_report_WEB_FINAL.PDF > last accessed 4/4/2017

[4] Ethical Consumer, 'The UK is the most important player in tax havens' (Date N/A) <http://www.ethicalconsumer.org/commentanalysis/ethicaleconomics/theukandtaxhavens.aspx> last accessed 5/4/2017

[5] (no3)

But where do Britain's Overseas Territories (BOTs), commonly referred to as "tax havens", fit into such an encompassing agenda? As a matter of fact, the UK is closely interlinked to a wider "network of British secrecy jurisdictions around the world"[6] comprising of 3 crown dependencies and 14 overseas territories, including "offshore giants"[7] the British Virgin Islands (BVI), Cayman Islands, and Bermuda. Public discourse surrounding such jurisdictions has seen a steady rise in recent years, with critics claiming that "such places are used by companies for tax avoidance or evasion"[8] facilitated through jurisdictional hallmarks of "low taxes and light touch regulation"[9] These micro-jurisdictions were, however, at the forefront of G8 transparency talks. David Cameron made clear his intention to bring about heightened scrutiny to British professionals who use shell companies in "offshore tax havens" in an attempt to conceal the identity of ultimate beneficiaries, accusing some territories of "doing enough to tackle tax evasion and money laundering"[10]. In a letter to 10 BOTs ahead of the G8 Summit, Cameron urged jurisdictions to ""get their house in order"[11], encouraging commitment to international treaties on tax which included obligations such as the automatic exchange of information and central registers of beneficial ownership. As a result of UK-OT negotiations stemming from G8 initiatives, BOTs reached automatic information exchange agreements with the UK, France, Germany, Italy, and Spain. Further to this, OTs fully committed to both the OECD's Multilateral Convention on Mutual Administrative Assistance in Tax

[6] Tax Justice Network, 'Narrative Report on United Kingdom' Financial Secrecy Index (2015) <http://www.financialsecrecyindex.com/PDF/UnitedKingdom.pdf > last accessed 3/4/2017
[7] ibid
[8] BBC, 'David Cameron warns overseas territories on tax' BBC Business (London, 20 May 2013) <http://www.bbc.com/news/business-22592662 > last accessed 7/4/2017
[9] ibid
[10] Rowena Mason, 'David Cameron says not enough is being done to tackle tax evasion' The Guardian (London, 30 September 2015) <https://www.theguardian.com/business/2015/sep/30/david-cameron-tax-evasion-british-overseas-territories > last accessed 3/4/2017
[11] (no7)

Matters[12] and the establishment of central registries of beneficial ownership.[13] These noteworthy steps, just two of many since, signify a considerable advancement towards Cameron's aim of greater tax transparency in the OTs, as UK and other signatories of the Convention will be better able to access information imperative to the prosecution of cross-border tax evasion and avoidance such as detailed bank account data and beneficial ownership of overseas assets.

With the above taken in consideration, it is plain to see that both the UK and its OTs have a public commitment to the emerging global agenda of transparency. The UK's own commitments explored later in this paper coupled with legislative advancement in the OTs display a clear willingness to engage in cooperative policy making on a regulatory front. These commitments and legislative advancements, however, were almost immediately perceived to be inadequate as the Panama Papers leak rocked the offshore, and wider, world in 2015. Consisting of 11.5 million documents amounting to the records of 214,000 offshore companies, the Panama Papers is the biggest data security breach history, surpassing even the Snowden Files. The anonymous source had captured the entire internal database of major Panamanian law firm Mossack Fonesca, which specialised in setting up anonymous offshore shell companies.[14] This massive leak, unsurprisingly, left a immense impression on a global scale: "…show[ing] how a global industry of law firms and big banks sells financial secrecy to politicians, fraudsters and drug traffickers as well as billionaires,

[12] Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Matters (1988,2010) OECD <http://www.oecd.org/ctp/exchange-of-tax-information/Convention_On_Mutual_Administrative_Assistance_in_Tax_Matters_Report_and_Explanation.pdf > last accessed 24/4/2017

[13] Gabelle Tax, 'Singapore and British Overseas Territories agree to tax transparency' Abbey Tax (London, 21 June 2013) <http://www.gabelletax.com/blog/2013/06/21/singapore-and-british-overseas-territories-agree-to-tax-transparency/> last accessed 21/4/2017

[14] Bastian Obermayer et al, "The Panama Papers: Breaking the Story of How the Rich and Powerful Hide Their Money" (2017)

celebrities and sports stars"[15], helping clients to evade or avoid taxes. The high profile nature of Mossack Fonesca clients embroiled in the leak further exacerbated global outrage, exposing "…offshore companies controlled by the prime minister of Iceland, the king of Saudi Arabia, and the prime minister of Pakistan…"[16] It now appeared in plain sight that "those who dutifully paid their taxes were, in fact, dupes. The rich...had exited from the messy business of tax long ago."[17] This triggered harsh reaction from both governments and societies across the world, especially as leaked documents were found to "also include at least 33 people and companies blacklisted by the U.S. government because of evidence that they'd been involved in wrongdoing, such as doing business with Mexican drug lords, terrorist organizations like Hezbollah or rogue nations like North Korea and Iran." [18] Public anger surrounding the leak and offshore jusridtions was considerable, as "the Panama Papers reinforce the perceptions of widespread injustice in the financial and taxation systems", raising serious questions surrounding global and nationality inequality. Offshore jurisditions were seen to be a large part of the problem with fragmented taxation systems believed to establish a "disproportionate burden on individual taxpayers, exacerbate inequality, and resort to debt by governments" [19] Non

[15] Lisa Main et al, 'Panama Papers and Mossack Fonesca Explained' ABC News (Australia, Date N/A) <http://www.abc.net.au/news/2016-04-04/explained-what-are-the-leaked-mossack-fonseca-panama-papers/7270690 > last accessed 26/4/2017

[16] International Consortium of Investigative Journalists, 'Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption' ICIJ (3 April 2016) <https://panamapapers.icij.org/20160403-panama-papers-global-overview.html > last accessed 6/3/2017

[17] (no13)

[18] (no16)

[19] Hira, 'Understanding Offshore Finance: The Panama Papers in Perspective' (SFU, 2016) < https://wpsa.research.pdx.edu/papers/docs/anilhira.pdf > accessed 20/4/2017

Governmental Organisations (NGOs) demanded steps be taken to tackle tax evasion and avoidance, citing moral obligations for governments worldwide to take action.[20]

In the wake of such backlash, the British government promised a series of measures intended to counteract tax avoidance and evasion. This culminated in the Criminal Finances Act 2017, a ground-breaking legal step towards transparency. Included in the Act are heightened powers and controls, including HM Revenue and Customs (HMRC)'s ability to "impose civil penalties on accountants, advisers, and other financial professionals who give planning or advice or physically move funds offshore."[21] This legislation will be at the centre of this paper's discussion, and must be fully viewed in the context of UK's push for greater transparency in it's territories as established through this section.

Of particular focus within the Act itself is is a proposed Amendment 167 put forth by Baroness Stern during the 2nd day of the Criminal Finances Bill Committee debate in the House of Lords, a clause directly relevant to Carribean BOTs as it would force them to adopt public registers of beneficial ownership:

"...the Secretary of State must provide all reasonable assistance to the governments of—(a) Anguilla;(b) Bermuda;(c) the British Virgin Islands;(d) the Cayman Islands;(e) Montserrat; and(f) the Turks and Caicos Islands,to enable each of those governments to establish a publicly accessible register of the beneficial

[20]Fiona Gartland, 'Panama Papers: NGOs call for transparency on taxation' The Irish Times (Ireland, 4 April 2016) <https://www.irishtimes.com/news/ireland/irish-news/panama-papers-ngos-call-for-transparency-on-taxation-1.2597795 > last accessed 24/4/2016

[21] Richard Crump 'UK Softens Ownership Rules for Overseas Territories' Law360 (London, 24 April 2017) <https://www.law360.com/articles/916452> last accessed 25/4/2017

ownership of companies registered in that government's jurisdiction.(3) The second step is that, no later than 31 December 2019, the Secretary of State must prepare an Order in Council, and take all reasonable steps to ensure its implementation, in respect of any Overseas Territories listed in subsection (2) that have not by that date introduced a publicly accessible register of the beneficial ownership of companies within their jurisdiction, requiring them to adopt such a register."[22]

It is vital to note that such a bold legal position did not suddenly appear: rather it is a result of years of gradual progress towards tax transparency in the UK-OT relationship. From the context gained through this section, it is logical to conclude that the UK felt frustrated by its OTs in the Panama Papers, triggering anger within British lawmakers as previously celebrated accomplishments were perceived to be insufficient. This work explores the legal, philosophical, and logical arguments surrounding such a drastric legislative proposal in the form of proposed Amendment 167.

1.2 Framing of the Problem

The signifigance of an imposition of a public beneficial ownership registry in the case of Bermuda as put forward by Amendment 6 to the Criminal Finances Bill 2017 via Order in Council must not be understated. As will be become evident throughout this piece, acts of forceful legislation by Britain upon its territories is a bold, and drastic, legal measure. This is often waged against Bermuda, along with other territories, as a threat. Such a legal act from one self-governing nation to another must be justified. This work aims to lend legal grounding to a highly emotive issue in

[22] HL Deb 3 April 2017, vol 782, col 833

public discourse, by assessing the justification of such a measure upon Bermuda through the exploration of more specific research questions.

In researching this piece, Bermuda emerged as a clearly unique case. Commonly grouped with, Cayman, BVI, and TCI meticulous research suggested this association was not always beneficial, or fair, to mid-Atlantic Bermuda. The largest in population, and most developed of the BOTs, the island enjoys some of the highest standards of living in the world; having "the fourth highest per capita income in the world, about 70% higher than that of the US."[23] Commonly branded a "secrecy jurisdiction" or "tax haven", it was found throughought the research process that Bermuda is largely misunderstood in public and political discourse. Difference in legal framework, constitution, industry, financial regulation, geography, population, development, and most importantly the registering of beneficial owners, all set Bermuda apart from its Carribean siblings. By presenting the legal and governmental data gathered throughout research, this work sets out the case of Bermuda, emphasising its exceptionality and assessing the jurisdiction in regards to the potential imposition of a public beneficial ownership registry. As this paper continues, it will become apparent that there are signifigant fundamental flaws in the UK position, both on a legal and logical basis. It is important to note that this work considers beneficial ownership extremely important in combatting the use of corporate vehicles for illicit purposes. There is, however, a distinction between beneficial ownership registers and *public* beneficial ownership registers. The latter, it will be argued, is not appropriate

[23] Central Intelligence Agency, 'The World Factbook' CIA (Date N/A) <https://www.cia.gov/library/publications/the-world-factbook/geos/bd.html> accessed 5/5/2017

for Bermuda at this time, given its current legal framework and state of international commitments to such a register.

Just as Britain's threat to legislate for Bermuda must be justified, this research must be justified. With an extremely contemporary legislative focus, the findings of this piece have the potential to be a call for further scrutiny of such legal methods threatened by lawmakers as evidenced in chapter 2. This piece finds the case for Bermuda's unique treatment in terms of Amendment 167, exposing an explicit need for lawmakers to assess each BOT individually, as a "one size fits all" approach is not only unfair, but also potentially damaging to Bermuda. The findings of this research imply the need for a shift in thinking in terms of Bermuda as a financial centre. The significance of such a legal imposition upon Bermuda (and other OTs) is to be recognised in both literature and political discourse. In addition to this, academic literature on the Overseas Territories on all fronts is severely insufficient, especially in the case of Bermuda. In undertaking the analysis of potential UK legislation directly relevant to Bermuda, this work may serve to call for further research on Bermuda as a unique jurisdiction while also helping to fill the gap in literature.

This dissertation will continue as follows:

Chapter 2 builds the foundation of this study by assessing proposed Amendment 167 of the Criminal Finances Act 2017. Firstly, the motives, legal method via Order in Council, and political rhetoric surrounding Amendment 167 will be explored as the legislative proposal under scrutiny in this work. Secondly, understanding of the matter of imposition- a public beneficial ownership registry- will

be built by elaborating the importance of beneficial owners, the objectives and arguments of such a register, and the UK's own register. Lastly, academic thought in the form of tax morality will be explored in direct relation to the Panama Papers, the perceived trigger of the desire for such a register. This chapter will enable the reader to gain an understanding of the subject matter under scrutiny throughout this research.

Chapter 3 presents the case of Bermuda in regards to proposed amendments to the Criminal Finances Act. Research of Bermuda's industry, financial sector, and relevant points of constitution will be presented, lending voice to a vastly under-researched perspective. Bermuda's current legal framework for a beneficial ownership registry will be analysed as well as recent bilateral and multilateral terms. This chapter builds the lens through which the subject matter in chapter 1 is looked upon.

Chapter 4 will merge chapters 2 and 3, as the subject matter explored in chapter 2 is analysed through the lens of Bermuda as built in chapter 3. This chapter will contain key analysis by cross-examining Bermuda's current legal framework and the UK's potential public beneficial ownership registry imposition. Comparative analysis of both the UK and Bermuda's legal beneficial ownership regime will unfold, making useful statements regarding the justification of such an imposition. Cost and benefit analysis of a public register of beneficial ownership in Bermuda will follow, presenting the stark reality of such an imposition. Lastly, and most critically, the legal challenges of the UK's legal intention will be explored, unearthing constitutional violations and legal uncertainty.

Chapter 5 will present the final argument of this work in line with previously examined research findings, looking toward the future in Britain's push for company ownership transparency in Bermuda and other territories.

1.3 Objectives of the Research

- Analyse Bermuda's beneficial ownership regime in contrast to UK
- Assess the necessity for a public beneficial ownership registry in Bermuda
- Assess the legal viability of the UK imposition of a public register of beneficial ownership in Bermuda via Order in Council

In reaching these research objectives, this work is able to answer the broader question at hand:

- Can the imposition of a public register of beneficial ownership by the UK on Bermuda be justified?

1.4 Research Questions

- How does Bermuda's beneficial ownership regime compare to the UK's?

- How comprehensive is Bermuda's current legal framework regarding beneficial ownership?

- Is the potential use of Order in Council relating to matters of company ownership legally viable in the case of Bermuda?

- Can the imposition of a public register of beneficial ownership by the UK on Bermuda be justified?

1.5 Methodology

This study utilises desktop-based research. Evidence and sources for analysis were gathered in an attempt to fulfill specific research objectives. These include governmental documents from both Bermuda and the UK, parliamentary debate and communications, academic books and journals, reports from various multilateral organisations, and contemporary articles from various news and legal internet sources. This work focuses upon the Criminal Finances Act 2017, drawing sources from both UK and Bermuda legislation in an attempt to view the proposed UK imposition of public registers of beneficial ownership through the lens of Bermuda's legal framework.

1.6 Scope and Limitations

Telling of Bermuda's widespread misconception is the aim of this research project at it's inception. Originally, this work was intended to analyse the necessity and legal basis for an imposition of a public beneficial ownership registry upon Bermuda, BVI, and Cayman. However, as research progressed Bermuda emerged as a unique in relation to its Carribean siblings, presenting a far more complex case than originally imaged. The scope of this piece is adjusted to reflect such findings. Further to this, due to time and resource constrains, this work was unable to grapple with theoretical questions of tax evasion vs avoidance and financial secrecy vs. privacy. These discussions require inclusion of an enormous amount of academic writing. This could be possible if further work regarding this subject, in PhD format, was

undertaken. Lastly, as the focal point of this piece is an extremely contemporary topic, there was a noticeable lack of secondary academic writing upon relevant matters. Though this posed an obstacle, this piece attempts to fill such a gap through the use of UK and Bermuda Government documents, reports and briefings. In addition to this, writings from multilateral organisations such as FATF and the OECD proved invaluable to this work

Chapter II: Britain's Appetite for Transparency

2.1 The Criminal Finances Act 2017

The Criminal Finances Act 2017 ('the Act'), receiving royal assent on 27 April 2017, is a hallmark piece of legislation in Britain's push for transparency. The Act can essentially be viewed as Britain's legislative response to the Panama Papers scandal, encapsulating modern views towards company ownership and indeed transparency in policy overall. It acts to "amend the Proceeds of Crime Act 2002; make provision in connection with terrorist property; create corporate offences for…facilitation of tax evasion; and for connected purposes"[24] The Act is split into three fundamental parts, with Part 1 concerning money laundering, crime proceeds, new enforcement powers, and civil recovery. Authorities are granted new powers to seize assets and request information. Part 2 deals with terrorist property, extending AML and asset recovery capabilities to matters falling under POCA and the Terrorism Act 2002, making. Part 3, of specific relevance to this dissertation, create

[24] UK Parliament 'Criminal Finances Act 2017' Parliamentary Publications (Date N/A) <http://services.parliament.uk/bills/2016-17/criminalfinances.html > last accessed 3/5/2017

two new corporate offences of failure to prevent facilitation of tax evasion: failure to prevent facilitation of both UK and overseas evasion. [25]

The introduction of two new criminal offences displays the UK government's intention to clamp down on relevant professionals who intentionally facilitate the tax evasion of their clients. The corporations employing such professionals will be held accountable for their actions, risking corporate failure to prevent the facilitation of tax evasion and therefore falling foul of the law. This criminal offence joins a range of statutory offences for evading tax, including section 72 of the Value Added Tax Act 1994[26] and Section 106A of the Taxes Management Act 1970[27]. The extension of legislation as evidenced in Part 3 gives authorities more teeth in terms of scrutinising corporate behaviour. [28]

Proposed Amendment 167 to the Act, as put forth by Baroness Stern, can be seen as a clear extension of these offences. Whilst targeting *corporations* believed to facilitate tax evasion, it appears the proposed amendment intends also to target *jurisdictions* believed to facilitate tax evasion. In essence, offences related to facilitation have been broadened immensely in Amendment 167; from corporations to nations. As discussed in the first chapter, BOTs are often accused of being 'tax havens', facilitating tax evasion by providing low-tax environments shrouded in

[25] HL, 'Criminal Finances Bill' (Delegated Powers and Regulatory Reform Committee, 21/3/2017) <https://publications.parliament.uk/pa/ld201617/ldselect/lddelreg/140/140.pdf > last accessed 1/5/2017

[26]"makes it a crime to be knowingly concerned in, or take steps with a view to, the fraudulent evasion of value added tax" *Value Added Tax Act 1994*

[27] creates a similar offence in relation to income tax. (refer to no3) *Tax Management Act 1970*

[28]UK Parliament 'Criminal Finances Bill: Explanatory Notes' (Date N/A) <https://publications.parliament.uk/pa/bills/cbill/2016-2017/0075/en/17075en03.htm > last accessed 1/5/2017

secrecy. It is plain to see that their inclusion in Baroness Stern's proposal is an attempt to target those jurisdictions widely perceived to facilitate such evasion.

2.2 Proposed Amendment 167: A Closer Look

In order to fully and accurately assess Bermuda's standing in regards to the proposed amendment requiring the establishment of a public register of beneficial ownership, it is imperative to understand the motivations of, exceptions to, and legal means of such a proposal. On the second day of the Criminal Finances Bill Committee debate in the House of Lords on 3 April 2017, Baroness Stern rose to lend clarity to amendment as a proposed new clause.

The amendment specifically calls for the UK government to strengthen its stance on transparency in its OTs, ensuring that all OTs with financial centres (Anguilla, Bermuda, BVI, Cayman, Montserrat and TCI) permit the publication of beneficial ownership information as collected by their central registries. What is first required is that the UK government assist targeted territories with the process of establishing such registers, to be in place and fully functioning, by 2018. Stern goes a step further, proposing "that if help, support, and encouragement is not successful in getting registers into the public domain, the Government should secure compliance through an Order in Council by December 2019."[29] The imposition of public registers on OTs was met with widespread support in both the House of Lords and Commons, where a similar amendment was previously tabled, receiving cross-party

[29] (no32)

support.[30]More details on legal imposition via Order in Council will be expanded upon in upcoming subsection 2.1.2.

The amendment's focus upon the British Overseas Territories as offshore centres was justified by Stern calling attention to the resignation of the Prime Minister of Iceland, who lost the faith of his electorate as information about wealth held in a company registered in BVI came to light.[31] Stern also echoed sentiments expressed in the House of Commons International Development Select Committee's 2016 report 'Tackling Corruption Overseas' that "lack of transparency in the [OTs]…will significantly hinder efforts to curb global corruption and continue to damage the UK's reputation as a leader on anti-corruption."[32]

The motivations behind the proposal have been outlined as distinctly moral in nature as it intends to "address offshore banking and the secrecy that surrounds it"[33]. Baroness Stern stated that the amendment "stems from [the Government's] concern to fight grand corruption and tax evasion- two ills that damage the wellbeing of millions of people in a large number of countries, and increase insecurity, instability and violence worldwide." [34] Citing an Oxfam report [35] quoted by the International

[30]George Crozier, 'Criminal Finances Bill clears Commons' Chartered Institute of Taxation (London, 7 March 2017) <http://www.tax.org.uk/media-centre/blog/media-and-politics/criminal-finances-bill-clears-commons > last accessed 8/5/2017
[31] HL Deb 3 April 2017, vol 782, col 833

[32] HC, 'Tackling corruption overseas' (International Development Committee, 19 October 2016) <https://publications.parliament.uk/pa/cm201617/cmselect/cmintdev/111/111.pdf > last accessed 24/4/2017
[33] (no31)
[34] ibid
[35] Oxfam 'An Economy For the 1%' (18 January 2016) <https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp210-economy-one-percent-tax-havens-180116-summ-en_0.pdf > last accessed 6/4/2017

Development Committee, Stern implied that Bermuda, along with other OTs, inflicts considerable damage upon those in the developing world:

"Almost a third (30%) of rich Africans' wealth—a total of $500bn—is held offshore in tax havens. It is estimated that this costs African countries $14bn a year in lost tax revenues. This is enough money to pay for healthcare that could save the lives of 4 million children and employ enough teachers to get every African child into school"[36]

Citing the previously discussed Panama papers, Stern stated that the scandal "revealed to the world very clearly the connection between offshore financial operators, shell companies, and secrecy"[37]. Of equal importance is NGO involvement in matters of tax transparency as hinted in subsection 1.1. In their 2016 'Tax Battles' report, Oxfam named Bermuda as the world's worst tax haven. The impact of such public lobbying is not only damaging to Bermuda's reputation, but also extremely influential in both the House of Commons and Lords as evidenced in Stern's reference to previous Oxfam reports. NGOs including Oxfam and ChristianAid have been particularly aggressive in their stance towards the OTs, believing that "[a]llowing our Overseas Territories and Crown Dependencies to operate as tax havens undermines Britain's efforts to be an outward-facing, responsible member of the international community. It's time to end this embarrassing contradiction in our own backyard." [38] This further speaks to the distinctly moral motivation behind proposed amendment 167, in which a set of British lawmakers perceive the potential legal imposition as justified on moral grounds. This will become of particular

[36] (no31)

[37] (no31)

[38] Oxfam 'Bermuda named world's worst tax haven' (12 December 2016) <http://www.oxfam.org.uk/media-centre/press-releases/2016/12/bermuda-named-worlds-worst-tax-haven > last accessed 3/3/2017

relevance to this study in upcoming section 2.3, where academic thought surrounding tax morality will be explored in relation to this matter.

Interestingly, the Crown Dependencies and Gibraltar, whom are also financial centres, are excluded from Stern's proposal. Reason for the exclusion of CDs was cited by the Baroness as consitituional complexity.[39] Further to this, Gibraltar's "unique status"[40] was recognised. This special exception was also reiterated in the House of Lords during debate surrounding a previously mentioned proposal similar to Stern's, in which Conservative MP Robert Neill stated that Gibraltar should not be 'lumped in' with other OTs due to the jursidiction's unique consitution aswell as it being subject to EU standards.[41] As this research unfolds, it will become increasingly apparent that Bermuda's legislative framework and consitution also provide for special status in terms of amendment 167 as enjoyed by Gibraltar.

2.2.1 Legality of such a Proposal

It is no far reach to perceive the proposed use of Order in Council to implement PRBO in Bermuda and other OTs as a legally extreme measure. Controversy surrounding such a measure is considerable as the UK legislating for law-abiding, self-governing territories must be fully justified. Stern echoed this, as she recognised "it is not ideal for the Government to have to make threats of using

[39] (no31)
[40] ibid
[41] (no30)

Orders in Council. It would be infinitely preferable if the Orders in Council did not have to be used…"[42]

Her Majesty makes Orders in Council, whose use is provided for in proposed amendment 167, with advice of the Privy Council.[43] Orders in Council legislating for the BOTs are made under either an Act of Parliament or in exercise of the Royal prerogative. In the proposed amendment, an Order in Council would be waged as a tool under powers conferred by the Criminal Finances Act 2017. This would utilise such legal power to legislate in Bermuda for the specified purpose of company ownership transparency. This reservation of power for the UK is present in many OT constitutions, including Cayman and BVI by which power to legislate via Order in Council is permitted for the peace, order, and good governance of the OT in question.

The power to legislate for OTs can also be found in British legislation. Section 2 and 3 of the British Settlements Acts 1887 and 1945[44] reiterate such a legal ability. Section 2 permits Her Majesty by Order in Council to impose legislation perceived to be essential for the peace, order and good government of "…Her Majesty's subjects and others within any British Settlement."[45] Section 3 "provides that notwithstanding any delegation of Her Majesty's powers under the Acts to any local person or authority, Her Majesty may exercise all or any of the powers under the Acts."[46] These sections lead to confusion surrounding whether or not the express reservation of power found within OT constitutions is absolutely necessary. In modern trends

[42] (no31)
[43] Ian Hendry et al, 'British Overseas Territories Law' (21 March 2011) 57

[44] British Settlements Act 1887
[45] (no43) 16
[46] ibid

whereby there is an observable distancing from colonialism, it can be expected that a self-governing territory's constitution are to hold immense legal weight and is to be respected first and foremost. Provisions regarding such powers for the Crown in direct relation to the Constitution of Bermuda will be analysed in subsection 3.1.2 of this work.

Orders in Council have previously been utilised on matters directly pertaining to morality and human rights. This was expressed by Baroness Williams of Trafford in the Second Reading of the Criminal Finances Bill, in which she stated that "[w]e have the power to legislate for the [OTs]…but we do so almost always with consent. Where we do not, it is on moral and human rights issues, such as homosexuality and the death penalty. However, just because we can…does not mean that we should do so when we are working with them…on a consensual basis."[47] Not only does this display the limited scope in which these powers are exercised, but also the explicit hesitancy on part of the UK of doing so. This is a further testament to the controversy such powers have the potential to cause; so much so that the UK government is hesitant in their utilisation. Academics have also noted the controversial nature of the use of Orders in Council, noting the UK government's "…reluctance to do this because of the controversy they cause".[48] As Williams stated, Orders in Council have previously been used in relation to capital punishment and the illegality of homosexuality. In 2001, despite controversy, an Order in Council was passed forcing OTs to decriminalise homosexual acts between consenting adults in private.[49] It is important to note that the matter of the legalisation of homosexuality, along with the

[47] HL Deb 9 March 2017, vol 779, col 1516
[48] Peter Clegg, 'The UK Overseas Territories: a decade of progress and prosperity?' [2011] CCP 14
[49] ibid

abolition of capital punishment, are matters far removed from company ownership transparency. The former directly relate to human rights issues, while the latter relates to Britain's quest for increased transparency. Though Baroness Stern argues for the introduction of a public beneficial ownership register on moral grounds, it will become evident in the development of this research that the moral argument in relation to Bermuda is insufficient to justify use of Order in Council, especially in relation to previous instances whereby such legal means were utilised.

In legislating for OTs, the UK walks a very fine line. It is logical to infer that the Crown may prefer the interests of the United Kingdom despite the potential for UK interests to directly conflict with those of the territory, specifically in this case Bermuda. In order to assess the justification for the use of Order in Council to matters pertaining to company ownership transparency, it is important to fully comprehend the matter of imposition; a public register of beneficial ownership. The following section will explore the importance and motivations of, as well as arguments for and against, public registers of beneficial ownership in order to build comprehensive understanding of amendment 167. This will enable us to accurately assess Bermuda's case in the face of such a proposal.

2.3 Public Registers of Beneficial Ownership

Companies and other forms of corporate vehicles play a legitimate, and vital role in the global economy. They can, however be misused for illegitimate and criminal purposes. FATF describes corporate vehicles as being used for money laundering (ML), tax fraud, terrorist financing, bribery, corruption, and insider

dealings.[50] Criminals attempting to thwart anti-money laundering (AML) and counter-terrorist financing (CFT) misuse corporate vehicles as a means to launder proceeds of criminal activity.[51] In order to bypass regulations, organised criminals and terrorist financiers rely on financial secrecy. For this reason, untraceable shell companies have become an important means to mask and convert criminal proceeds before reintroduction into the financial system: "[f]or criminals moving large sums of dirty money internationally, there is no better device than an untraceable shell company."[52] Shell companies, in brief terms, are incorporated yet typically have no assets or significant functioning. Arranged so they cannot be linked back to individuals with significant control, authorities and law enforcement face an impenetrable corporate veil. In recognising the opportunities presented to criminals through the misuse of shell companies, multilateral organisations including FATF have responded by introducing new and increased transparency standards, especially in regards to beneficial ownership.

Beneficial ownership, as defined by FATF, *"…refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.*[53]

[50] FATF 'Transparency and Beneficial Ownership' FATF Guidance (October 2014) <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf> last accessed 23/4/2017

[51] ibid

[52] Jason Sharman et al 'Global Shell Games: Testing Money Launderers' and Terrorist Financiers' Access to Shell Companies' Griffith University (Date N/a) <https://www.griffith.edu.au/__data/assets/pdf_file/0008/454625/Oct2012-Global-Shell-Games.Media-Summary.10Oct12.pdf> last accessed 15/6/2017

[53] (no50)

Amendment 167 as proposed can be observed as stemming from standards outlined by FATF. The FATF Recommendations[54] require details regarding the beneficial ownership of corporate vehicles to be accurate, adequate, and accessible by relevant authorities in a "timely fashion"[55] These standards are intended to hinder the misuse of shell companies and other corporate formations. Shell companies, complex ownership and control structures, and the use of bearer shares amongst others are believed to obscure the true identity of beneficial owners. When beneficial ownership information is inaccurate, difficult to attain, or non-existent, FATF describes the impact as aiding criminals to disguise their identity, the true purpose of accounts or assets held by a corporate vehicle, and/or their origin.[56]

These standards have recently evolved and culminated into the Anti-Corruption summit of May 2016, a clear continuing trend established in the previously discussed 2013 G8, in which countries publicly committed to the establishment of a public register of beneficial ownership under the summit's theme of increased transparency. Directly after the summit, just six countries were reported as having committed to creating PRBOs, including the UK, Afghanistan, Kenya, France, the Netherlands and Nigeria[57] (though that number has since gradually grown). While the summit was criticized for having minimal impact, 29 countries committed to the collection and sharing of beneficial ownership information between governments (though not publicly). Bermuda was included in this agreement.

[54] FATF 'The FATF Recommendations' (February 2012) < http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf >
[55] ibid
[56] ibid
[57] UK Parliament 'Shining a light on beneficial ownership: what's happening in the UK and elsewhere?' Commons Library Analysis (17 June 2016) < http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7616#fullreport >

Australia, New Zealand, Jordan, Indonesia, Ireland, and Georgia all considered moving toward public registers; merely committing to "exploring the possibility".[58]

Other countries however have previously outright rejected notions of public registries. In July 2016, France argued that the public nature of the proposed registry was unconstitutional as it directly infringes upon the right to privacy as set out by Article 2 of Declaration of the Rights of Man and the Citizen of 1789[59]. The Constitutional council later confirmed the publicity of the register to be a constitutional violation. This raises questions surrounding the legitimacy of an imposition of public registers in direct relation to the Bermuda constitution, addressed in chapter three of this work. Also of particular relevance is the US reluctance to adopt such a PRBO. The US did not commit to share registers of beneficial ownership, with David Cameron stating he "would keep pushing the Americans to be more accountable."[60] Lord Naseby expressed frustration at the US unwillingness to waiver: "...the tragedy...is that somehow... we in the [UK] ...have never managed to persuade the [US]...to have a central, non-public register...they do not even have a central beneficial ownership register."[61] As Bermuda's biggest trading partner, this undoubtedly influences Bermuda's predicament as later explored in chapter 3.

2.3.1 Importance of Beneficial Ownership Information

As previously discussed, criminals operate using complex chains of companies and other entities in order to conceal their identities and distance

[58] ibid
[59] Declarations des Droits del Homme et du Citoyen de 1789 (FR)
[60] (no57)
[61] HL Deb 25 April 2017, vol 782, col 1324

themselves from their crimes. These crimes include corruption, terrorist financing, sanctions evasion, money laundering and tax evasion. They specifically operate these chains across multiple jurisdictions in order to exploit secrecy laws and insufficient and incomplete mechanisms for information exchange. Finding out the true identity of those who really own and control corporate vehicles is therefore a very real obstacle for relevant authorities and law enforcement

.

It is increasingly clear that a fragmented system, where information is not freely shared between jurisdictions, is no longer admissible in a world where cross-border investigations to tackle all forms of illicit finance have become commonplace. Largely, unless jurisdictions have a comprehensive public register of beneficial ownership, this information can only be accessed through exchange of information on request. The issue presented here is that the investigators must already know a certain level of detail. If investigators do not know the name of the company and jurisdiction of incorporation, it is nearly impossible to uncover whether or not a specific individual is linked to a corporate vehicle. This is further exacerbated by the fact that investigators are unable to request ownership information from all countries at once. This can cause severe delays in the process of investigation, also severely limiting investigator's ability to tailor a particular strategy to the prevention of financial crime. In order for law enforcement to unravel the complex cross-border chains used by criminals, including terrorists, access to wider beneficial ownership information is therefore essential. Providing public access to beneficial ownership registries has been argued to be key in this regard. Though this has been addressed through the agreement of automatic exchange of beneficial ownership elaborated later in this

work (to which Bermuda is a signatory), the obstacles to justice presented above serve to convey the importance of such information.

"Transparency [has become] the new buzzword in private wealth circles." Transparency initivates , as previously discussed, evolve regularly and emanate from the OECD, EU, and often UK government. Unsurprisingly, with increased transparency comes the loss of privacy for all, "including those who comply scrupulously with their tax and other obligations."[62] The proposed creation of public registers is one way in which transparency of information, and more specifically ownership information, has legislatively manifested.

2.3.2 Objectives of a Public Register

A public register of beneficial ownership is a clear step up from the timely exchange of information between governments. The United Kingdom desires central registries of beneficial ownership to be compiled in a digital database and searchable free of charge. This publicly accessible register should contain beneficial ownership information regarding companies and limited liability partnerships while being searchable by both corporate entity and individual identity. This forms the basis of a new 'gold standard' surrounding ownership transparency.[63]

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[62] Gowling WLG 'Public registers and the right to privacy' Lexology (10 November 2016) <https://www.lexology.com/library/detail.aspx?g=5e0cef38-7dea-4389-a3f9-35b658a57a11 > last accessed 4/6/2017

[63] Government of Bermuda 'Exchange of Notes between the Government of the United Kingdom and the Government of Bermuda in respect of the sharing of beneficial ownership information' Ministry of Finance (9 April 2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/624225/Bermuda-_Sharing_beneficial_ownership_information.pdf >

The objectives of such a standard are clearly defined in the face of the previously discussed threat of misuse of corporate vehicles ('shell companies') to mask criminal proceeds and evade taxes rightfully payable. FATF explicitly states its standards surrounding ownership transparency are an attempt to "prevent misuse of corporate vehicles…[but also]…support the efforts to prevent and detect other designated categories of offences such as tax crimes and corruption"[64]

A publicly accessible register is perceived to alleviate some of the ills of information exchange previously discussed. Investigators will no longer need to know a certain level of information in order to request information imperative to the prosecution of cross-border financial crimes, specifically regarding tax evasion. In addition to this, time delays that may negatively impact the strategy and outcome of investigations into illicit finance are avoided, as the public registers will be freely accessible instantly, on a 24-hour basis.

2.3.3 Arguments

Arguments surrounding such a public register as proposed in Amendment 167 have surfaced both for and against the proposition. In favour of such an amendment, practitioners and lawmakers alike argue that reducing the means by which criminals can mask and hide 'dirty money' is a key dimension to the governmental role in the global quest for transparency. In line with this notion, public registries have become increasingly popular, with the UK, Norway, and the Netherlands (amongst others previously listed) committing to developing registers and publishing their contents.

[64] (no54)

While arguments in favour of open registers have been touched upon in previous sections, public registers which rely on self-declaration are also found to be inexpensive to operate, with agency fees low for countries who already have a digital register: "…[I]t essentially involves adding a few extra fields to an existing form."[65] Registers of this nature are praised for offering universal, unrestricted, and immediate access to information vital to holding the powerful to account, by providing for "many eyes" to scrutinise contained data.[66]

Baroness Meacher, speaking during the 2nd day of the Criminal Finances Bill Committee in the House of Lords, supported Baroness Stern's proposed amendment, stating that

"…the Government have already accepted that in order to properly tackle corruption, this information must be open to public scrutiny. Journalists, NGOs and the public must be able to examine the information, not just for us in the UK but also for those developing countries which suffer most from corruption and need access to the information the most."[67]

Baroness Kramer, during the same debate, echoed support for the public availability of such information: "I have found no one who believes it is true that enforcement authorities would be able to act through those central registries in ways sufficient to close down the routes and effectively shut out so many of the people who we think

[65] Maya Forstater 'Beneficial Openness: Is More Transparency Always Better?' Centre for Global Development (4 May 2017) <https://www.cgdev.org/blog/beneficial-openness-more-transparency-always-better > last accessed 5/52017
[66] ibid
[67] HL Deb 3 April 2017, vol 782, col 888

should be shut out from the legitimate financial world. The only route I can see to make this reasonably…effective is transparency."[68] In line with this, it is believed that "law enforcement, civil society and journalists could use [a public register] to uncover wrongdoing."[69]

Despite considerable support for such an amendment, it is also evident that there are legitimate arguments against its effectiveness. Practitioners, lawmakers, and surprisingly multilateral organisations and law enforcement agencies alike have all expressed scepticism regarding such an extreme legislative proposal. Lord Leigh of Hurley best put this forward during the same Criminal Finances Bill Committee debate, in which he described how law enforcement agencies and multilateral organisations do not support public registers. David Lewis "formerly of the National Crime Agency (NCA) and now heading…FATF"[70] told the Commonwealth anti-corruption summit that "incomplete, unverified, out of date information in a public register is not as useful as law enforcement agencies being able to access the right information at the point they need it."[71] Public registers have also been criticised in writing, for simply being too simplistic of a solution to such a multidimensional issue. Registers of this nature, as proposed by Baroness Stern, fail to assess the quality of information filed into it. This perpetuates tax authority and law enforcement barriers to information, as they cannot be sure the information they have unrestricted access to is indeed accurate to the date of searching. This has the potential to create an illusion of regulatory security by encouraging AML and CFT processes to be dependent upon

[68] HL Deb 3 April 2017, vol 782, col 900
[69] Robert Palmer et al 'What Does the UK Beneficial Ownership Data Show Us?' Global Witness (22 November 2016) <https://www.globalwitness.org/ru/blog/what-does-uk-beneficial-ownership-data-show-us/ > last accessed 12/6/2017

[70] HL Deb 3 April 2017, vol 782, col 902
[71] ibid

unverified information. In addition to this, those in opposition of such a register have cited potential impacts on privacy; "…it may not always be best to opt for maximum financial transparency since it infringes on the privacy of individuals and commercial confidentiality."[72] Privacy is a human right, as stipulated in Article 12 of the United Nations Universal Declaration of Human Rights.[73] This is also acknowledged in the European Convention on Human Rights 1950[74], which also sets out the right to privacy in Article 8. This sees proposed Amendment 167 with the potential to infringe upon fundamental human rights in self-governing territories via legal imposition. In addition to this, corporate confidentially has been described as "important to allow businesses to gather information, to make decisions and undertake negotiations and to work on ideas and innovations before they launch them."[75]

Perhaps more surprising is the OECD stance on public registers. OECD Secretary-General Angel Gurria stated, "a proliferation of different standards is in nobody's interest." The multilateral organisations holds that for taxpayers to fulfil their tax obligation, they "need to have confidence that the often sensitive financial information is not disclosed inappropriately"[76] The fear of the inappropriate disclosure of extremely personal financial details is further found in lawmaker concerns: "the potential for kidnap of innocent very rich people with large balances held in our overseas territories needs consideration. Clearly, none of us would want to create a system which would increase the risk of kidnap."[77] Further to this, it is also argued that public registers have the potential to "counterintuitively reduce the transparency

[72] (no65)
[73] UN Universal Declaration of Human Rights
[74] European Convention for the Protection of Human Rights and Fundamental Freedoms
[75] (no65)
[76] ibid
[77] HL Deb 3 April 2017, vol 782, col 886

of activities being undertaken in the UK and negatively impact fee revenue generation from UK incorporate companies."[78] This is made possible because criminals may file invalid information (as discussed) or may simply undertake activities via a non-UK company, pushing crime further out of reach of enforcement authorities. In addition to this, law-abiding citizens involved in business who value privacy may also choose to undertake activity in a non-UK incorporated company, "…decreas[ing] the number of UK incorporate companies, and therefore fee income for Companies House."[79]

But where does the demand for transparency end? How does one measure the impact of public registers vs. central registers accessible by relevant authorities? How does the public listing of beneficial ownership information fit into long-standing privacy rights? It would appear that when looked at closely, the matter of Amendment 167's position provides more questions than answers. The effectiveness of such a mechanism is not known for sure, and is fiercely debated in relevant literature: "transparency can become a hamster wheel; you can always ask for more detailed and widespread disclosures without moving closer to the ultimate goal of more responsive public institutions, more effective markets and a stronger social contract between governments and their people."[80]

Despite valid arguments from both sides of the fence, what matters is that British lawmakers find public registers of beneficial ownership valuable enough to threaten legal imposition upon Bermuda. This subsection has analysed the arguments

[78] Jersey Finance 'Public Registries: A New Global Standard? (Date N/A) < https://www.jerseyfinance.je/media/PDF-Marketing/Beneficial%20Ownership-Public%20Registries%20%E2%80%93%20A%20new%20global%20standard.pdf > last accessed 25/5/2017
[79] ibid
[80] (no65)

for and against public registers to build fuller comprehension of the matter under scrutiny. In order to assess Bermuda's standing in the face of such an imposition, it is vital to understand the strengths, weaknesses, and theories surrounding the matter of imposition. It is also imperative to this work to analyse the UK's own registry. This will enable the reader to assess Bermuda's standing with the imposing nation, lending clarity to the wider justification of such a proposal as addressed in the fourth chapter to this piece.

2.3.4 UK's Own Beneficial Ownership Registry

A public register of beneficial ownership is an extremely recent development in the UK's legal framework for ownership transparency. Prior to the steps discussed in this subsection, the UK did not hold a central register of beneficial ownership. Unfamiliar with the mechanism but displaying an express willingness to adopt such a measure, the UK government introduced provisions concerning heightened transparency as part of the Small Business, Enterprise and Employment Act 2015[81] (section 7). Section 81 and schedule 3 are intended to amend the previous Companies Act 2006[82], requiring companies to keep a register of "people who have significant control over the company"[83] often known as persons with significant control (PSCs) or beneficial owners.

[81] Small Business, Enterprise and Employment Act 2015
[82] Companies Act 2006
[83] (no57)

The legislation above has provided for the establishment of a comprehensive central register of beneficial owners to be stored and maintained by Companies House. The register will, of course, be publicly accessible and contain information directly regarding companies, limited liability partnerships, and Societates Europaeae incorporated in the UK[84]. The database will be digital, available online and searchable free of charge by "both name of corporate entity and name of individual."[85] It is stipulated that under certain exceptional circumstances, beneficial ownership information will be suppressed from the public register: "Approximately 30 beneficial owners have been successfully granted the right to keep their name off the register due to concerns about their security."[86] Despite this, both public and non-public information regarding beneficial owners will be accessible by UK relevant authorities.

Through this, companies were now required to register beneficial owners from 6 April 2016. This data regarding the owners was to be declared to Companies House from 30 June 2016 alongside the company's annual statement. In line with this, the Companies House register is expected to be complete by 29 June 2017.[87]

Due to standards mandated above, companies will be required to:[88]

1. Identify the people with significant control (PSCs) over the company and confirm their information (see paragraph 9);

2. Record the details of the PSC on the company's own PSC register;

[84] (no63)
[85] ibid
[86] (no69)
[87] (no57)
[88] ibid

3. Provide this information to Companies House as part of the annual Confirmation Statement (formerly the Annual Return); and

4. Update the information on the company's own PSC register when it changes, and update the information at Companies House when the next Confirmation Statement is made.

Note that the information contained within the register relies upon self-reporting which alludes to previously discussed concerns: "Criminals can be expected to conceal their interests."[89] In addition to this, also note that companies are required to file information with Companies House on an annual basis as part of their Confirmation Statement. This in turn means that the register is updated a mere once a year, with the potential of being multiple months out of date as ownership structures change with being sold or transferred. This further alludes to the previously discussed concern of accurate information stemming from the NCA, by which data contained within the register was feared destined to be incomplete, unverified, and inaccurate.

In identifying persons with significant control (beneficial owners), three broad conditions are presented[90]:

1. *An individual who holds more than 25% of shares in the company.*

2. *An individual who holds more than 25% of voting rights in the company.*

[89] (no78)
[90] (no57)

3. *An individual who holds the right to appoint or remove the majority of the board of directors of the company.*

The condition stipulated by the UK government are in line with the standards emanating from FATF and further specified by the EU's third and fourth AML Directives, utilising the figure of 25% to assess someone's true and ultimate ownership of a corporate vehicle. This is quite a high threshold as evidenced in relation to Bermuda, and may give criminals room to arrange their affairs in a way as to avoid reaching such a condition.

It is plain to see in this section that the UK's public register is not perfect. Though a commendable step forward in ownership transparency, little definitive analysis of the new register has been undertaken due to its extremely recent implementation. This new feature of the UK's beneficial ownership legislative framework must be tried and tested in order to fully gauge the effectiveness and therefore worth of such a measure. NGO Global Witness appears to be the first to attempt such analysis, though severely lacking in depth. In their study, they found considerable discrepancies in register data: "you can write anything in the nationality field and we found over 500 ways of putting 'British', including ten people who wrote 'Cornish'."[91] The Global witness study uncovered further discrepancies: "2,160 beneficial owners born in 2016. Now either these are a very precocious bunch of toddlers or the data has been entered incorrectly."[92] Further to this it was found that

[91] (no69)
[92] ibid

"[j]ust under ten percent of companies…have no beneficial owner. This is possible…because you have to own at least 25 percent of a company to be considered its beneficial owner…that's quite a high threshold, which could be exploited by people looking to stay under the radar."[93]

This displays observed problems concerning the 25% threshold, mandated by the EU and observed by the UK as hinted above.

2.4 Chapter Conclusion

Through comprehension of specific features of Britain's recent propulsion toward transparency we are better able to more fully assess the case of Bermuda in the face of Baroness Stern's proposed legal imposition. Context surrounding the Criminal Finances Act 2017 was put forward, with the focus of this work- Amendment 167- focused upon. The motivations and political discourse surrounding the proposal have been analysed to lend understanding of the exact nature of the amendment. It was found that the amendment was tabled on distinctly moral grounds. This is directly relevant to the legality of the amendment, serving as the foundation to lawmaker arguments that an Order in Council to impose a public register upon Bermuda is necessary and justified. In addition to this, constitutional and legislative provisions providing for Crown legislative power in the OTs was compiled. While it was found that provision for these powers could be found in territory constituions and British law, the notion that the constituions of self-governing nations should be considered first and foremost above seemingly colonial British legislation. The matter of imposition- public registries- came under scrutiny as the importance, objectives,

[93] (no69)

arguments for and against, and the UK's own register were analysed. It was found that while beneficial ownerhsip information is recognised to be important, there was a plethora of arguments against making public of such information. It was also found that while the UK has taken an important step forward in their transparency agenda, their register has been observed to have concerning flaws in its infancy. These include the inaccuracy of contained information, as well as the possibility for criminals to potentially arrange their affairs in a way as to avoid the high 25% criteria of ownership.

The discussion undertaken in this chapter is vital to this research project. The data contained in this chapter, along with the following chapter, will enable us to undertake an accurate, contextual, and legislatively-aware analysis of the forceful introduction of a public register in Bermuda. To this end, the following chapter 3 will put forth the case of Bermuda.

Chapter III: Bermuda; Building a Perspective

3.1 Bermuda: A Unique Case

As the research process for this work developed, Bermuda clearly emerged as an exceptional and unique case. Bermuda, the oldest of the UK territories, differs from other OTs in geographical location, population, development, affluence, industry, constitution, and legal framework (specifically regarding beneficial ownership information). Bermuda is often lumped in with Cayman and BVI as a 'prominent Caribbean tax haven' however is in fact not in the Caribbean, but the Mid-Atlantic: "Settled in 1609 by shipwrecked colonists en route from England to Virginia,

Bermuda has long represented a Mid-Atlantic waypoint between England and America."[94] Bermuda, with 70,196[95] residents, is the largest OT in population and surpasses second largest Cayman by over 10,000. Also one of the most developed OTs, Bermuda does not rely on foreign development funding. The affluence of the island is statistically observable: "Bermuda, as of 2016, had the fourth highest per capita income in the world, about 70% higher than the US."[96] Bermuda's primary international business functions are insurance and reinsurance, in stark contrast to previously mentioned Caribbean OTs. Bermuda's constitution differs from other OTs in its relationship with the Crown, enjoying the one of the highest degrees of self-governance with limited colonial interference. Bermuda, most importantly to this piece, also differs from its Caribbean siblings in its beneficial ownership regime: it has maintained a registry for 70 years.

Despite these considerable differences and overall uniqueness, Bermuda's offshore financial services industry has suffered reputational damage from "an unfortunate kind of guilt by association with less scrupulous jurisdictions."[97] This has been a reality for Bermuda since the acceleration of international business in the late 1980s: "The island's name has, at times, been in danger of becoming a synonym for "tax haven", a byword for sleaze and international financial crime."[98] This unjust association has seen Bermuda become the subject of highly-emotive attacks on the island's perceived lack of regulation: "one of the key economic

[94] Christopher Bruner, 'Re-imagining Offshore Finance: Market-dominant Small Jurisdictions in a Globalizing Financial World' (2016) 51
[95] ibid
[96] ibid
[97] Royal Gazette, 'Separating fact from tax-haven fiction' The Royal Gazette (Bermuda, 4 May 2016) <http://www.royalgazette.com/editorials/article/20160504/separating-fact-from-tax-haven-fiction > last accessed 20/4/2017
[98] ibid

planks in US Secretary of State John Kerry's ill-fated 2004 presidential campaign was directed specifically at Bermuda."[99] Arianna Huffington, launching a citizen-activist campaign entitled 'The Bermuda Project', aimed to abolish the island's propensity for international business because she believed "big corporations are abandoning our country and setting up phony tax shelters in the sands of Bermuda."[100] Most recently, Jeremy Corbyn "no distinction whatsoever between Bermuda and other, more laxly regulated British Overseas Territories that operate offshore financial services industries"[101] as he argued that the UK "should impose direct rule"[102] upon the islands in matters regarding tax transparency.

This chapter intends to bring legislative analysis to political and public discourse by putting forth the case for Bermuda's exceptional treatment in regards to Amendment 167, as is the case with Gibraltar mentioned in section 2.2 of this work. This will unfold through analysis of Bermuda's financial centre, constitution, and international standing as differences between Bermuda and the other OTs are highlighted. Bermuda's current regime of the collection of beneficial ownership information will be detailed through the presentation of extensive legislative research, as well as Bermuda's bilateral and multilateral commitments. This will assist the reader in understanding Bermuda's willingness to adhere to international transparency

[99] ibid
[100] Our Future 'Corporations Using Offshore Tax Dodges Are Deserting America In A Time Of Trouble, Says The Bermuda Project' (Washington DC, Date N/A) <https://ourfuture.org/media_releases/corporations-using-offshore-tax-dodges-are-deserting-america-time-trouble-says-bermuda > last accessed 24/5/2017
[101] (no97)
[102] Peter Walker et al 'UK could impose direct rule on tax havens, says Jeremy Corbyn' The Guardian (London, 5 April 2016) <https://www.theguardian.com/news/2016/apr/05/uk-could-impose-direct-rule-on-tax-havens-says-jeremy-corbyn-panama-papers > last accessed 12/4/2017

standards, dispelling misconceptions that the island is a jurisdiction shrouded in secrecy and steeped in suspicion.

3.1.1 Financial Sector

As previously noted, the financial centre of Bermuda - unlike its commonly associated partners Cayman and BVI - does not rely on the "more buccaneering world of banking"[103]. Nor is it reliant on tax avoidance strategies by MNCs and individuals. Bermuda is often referred to as the "world's risk capital", as the government has fostered the steady growth of the industry.[104] Bermuda surfaced as the leader in the development and regulation of captive insurers an astounding 40 years ago: "today it is the home of underwriting operations for more than 30 major international insurance and reinsurance firms."[105] Due to the worldwide need for greater access to property and casualty (re)insurance, Bermuda has witnessed an insurance boom; especially in the last 20 years. These immense insurance firms "are regulated under a separate and distinct set of requirements with [regulation] designed to meet international regulatory standards commensurate with their size and market scope."[106]

This has seen Bermuda's affluence steadily increase. Little known to those off island and not in the insurance industry, Bermuda is now the "largest supplier of catastrophe reinsurance to US insurers"[107]:

[103] (no97)
[104] Association of Bermuda Insurers & Reinsurers 'Bermuda FAQ' (Bermuda, Date N/A) <http://www.abir.bm/bermuda-faq/> last accessed 6/6/2017
[105] ibid
[106] ibid
[107] ibid

"Bermuda's insurers and reinsurers have contributed an estimated $35 billion in catastrophe claims payments to their US clients, including $2.5 billion in response to the World Trade Centre tragedy, $17 billion for Hurricane Katrina and $2 billion following tornado outbreaks from 2010 to 2012. This amount now also includes the estimated $3 billion in reported losses by Bermuda's reinsurers for Hurricane Sandy."[108]

As illustrated through statistics present above, the United States, a country that has been particularly unwilling to adopt public beneficial ownership registers, is Bermuda's largest trading partner: the island "remains closely linked to the [US] economically. Indeed, the Bermudian dollar is pegged (1:1) to the US dollar." [109] A World Economic Impact Report published by the Government of Bermuda found that "Bermuda in many ways is a more significant economic partner for the United States than Canada, UK, Japan and China."[110] The relavance of this trade dynamic in terms of Amendment 167 will be expanded upon in the next chapter.

Bermuda's success does not, however, solely benefit the US. The UK also benefits from Bermuda's financial centre. In a letter response[111] to Jeremy Corbyn's demands to impose direct rule over the island, Premier Michael Dunkley outlined these benefits. It was found that Bermuda's economy directly ccontributes "53,000 UK jobs are a result of … employment generated by Bermuda owned affiliates in the

[108] ibid
[109] (no94)
[110] Government of Bermuda 'Bermuda in the World Economy: Economic Relations with Asia, Canada, Europe and the United States' (Washington DC, June 2015) <https://www.gov.bm/sites/default/files/bermuda-in-the-world-economy_0.pdf >
[111] Royal Gazette 'Dunkley defends island in letter to Corbyn' The Royal Gazette (Bermuda, 29 April 2016) <http://www.royalgazette.com/article/apps/pbcs.dll/article&avis=RG&date=20160429&category=NEWS01&lopenr=160429683&Ref=AR&template=mobileart > last accessed 28/6/2017

United Kingdom selling…financial services to UK persons. [Further] some 15,200 UK jobs dedicated to producing and exporting services to Bermuda."[112] The island also provides 10 billion dollars of capital to the UK economy since 2008; Bermuda is the UK's third largest-non European investor. In addition to this, Bermuda is found to be one of the largest providers of reinsurance to cover UK terorism. In addition to the above, Bermuda is key to Lloyds of London, providing: "26% of Lloyd's 2013 capacity and wrote 23% of Lloyd's premium – almost $10.0 billion additional capacity"[113] Preliminary analysis of this data points to Bermuda as a key economic partner to both the UK and the US; not an adversary.

Bermuda is an economic power unto itself. It has its own world-class multinationals that make independent economic decisions and is a driving force for rebuilding post-catastrophe globally, as evidenced in the instances below:

- *Bermuda insurance carriers covered $.6 billion reported losses for French homeowners in 2009 from Windstorm Klaus. 30% of losses paid by Bermuda.*

- *Bermuda covered 37% of reported losses in Europe from Windstorm Xynthia.*

- *Bermuda insurers covered 55% of the 2009 Air France Crash liability - $222 million.*

- *Bermuda insurers covered 50% of insured losses for Cruise ship Costa Concordia - $500 million of $1.0 billion reported losses.*

[112] (no110)
[113] ibid

- *Bermuda insurance carriers paid 51% of reported liabilities from 2010 New Zealand earthquake.*

- *· Bermuda insurance carriers paid 29% of reported liabilities for the international share of Japan's 2011 earthquake.*[114]

As the Panama Papers, and more specifically the use of shell companies, was found to be the main driving force behind Amendment 167, it is imperative to assess Bermuda's standing in light of such revelations. Bermuda, simply, does not facilitate nor encourage the use of shell corporations to evade taxes owed to major nations such as the UK. Bermuda Governmental research indicates that:

"Bermuda constitutes only 2% of the corporate registrations in the jurisdictions that comprise the leading British Crown Dependencies and Overseas Territories. Bermuda's total is 15,600 compared with 100,000 in the Cayman Islands and nearly 500,000 in the British Virgin Islands. Note, this compares to 1,100,000 in Delaware."[115]

The specific reasoning for the distinct lack of shell companies comparatively in Bermuda will become apparent in section 3.2 of this piece. Bermuda continually updates beneficial ownership information, and is extremely cooperative in the intergovernmental sharing of such information. Preliminary analysis of the data

[114] (no110)
[115] Government of Bermuda 'Bermuda responds to serial errors in Oxfam report on offshore centres' (Bermuda, 12 December 2016) <https://www.gov.bm/articles/bermuda-responds-serial-errors-oxfam-report-offshore-centres > last accessed 14/5/2017

presented by the Government of Bermuda points towards the notion that Bermuda, in sharp contrast from Cayman and BVI, is not an appropriate jurisdiction to target via Amendment 167.

Of further relevance is Bermuda's intention to distance itself from the world of banking, unlike Cayman and BVI. Not a banking domicile for private banks, Bermuda has just four commercial banks:

"Bank of Bermuda is a subsidiary of the international HSBC bank. Butterfield Bank fulfills the functions of a super-regional bank, with subsidiary and affiliated operations in 15 countries around the world. Bermuda Commercial Bank handles only international business transactions. Capital G is a community bank and high-level financial advisor."[116]

In addition to this distinct lack of questionable banking practices, "Bermuda has never been a bank secrecy jurisdiction", implementing Basel III banking regulatory requirements in 2015.[117] There are no laws in Bermuda providing for bank secrecy.

As Bermuda is often accused by the UK of offered tax incentives to MNCs looking to stash profits, the taxation system in which their financial centre operates is also of relevance. Bermuda has no corporate or capital gains taxes, and income-based taxes are limited to a payroll tax of 14% on a tranche of income earned on the island".

[116] World Commerce Review 'Company Formation in Bermuda' (Date N/A) <http://www.worldcommercereview.com/publications/article_pdf/244> last accessed 13/6/2017
[117] (no115)

In addition to this, Bermuda imposes duties on imports whilst also legislating a variety consumption-based and real estate taxes.[118] While academics have accused Bermuda of attracting international business by “"compet[ing] aggressively in taxation"[119], this is harshly refuted by the Bermuda government:

“Bermuda collects tax revenues equal to nearly 17% of its GDP. Bermuda’s tax system is based on consumption taxes with an additional large contribution from a payroll tax paid by employers on incomes earned by employees. Bermuda has not adopted tax laws intended to attract corporation formation, rather its 100 years plus system of consumption tax has served it well in financing its government. Analogous to many business structures, Bermuda’s tax laws and treaty commitments avoid double taxation of corporations and facilitate taxation of income accruing to the beneficial owners outside of Bermuda. Its commitment is to be at the forefront of transparency and cooperation by helping other jurisdictions claim revenue they believe their taxpayers are obligated to pay.”[120]

The above indicates that although Bermuda does not tax in a conventional manner, it has its own historical system of taxation that works for the jurisdiction. While the tax environment created by this unique system is no doubt attractive to corporations, it is not the sole benefit Bermuda provides to potential companies: "Bermudians have long been aware of the substantial advantages that their geographic, cultural, and historical proximity to major north-Atlantic powers provide."[121] Companies are attracted by Bermuda’s economic and social stability,

[118] (no94)
[119] ibid
[120] (no115)
[121] (no94)

friendliness to e-commerce, daily flights to Europe and the US, investment flexibility, progressive legislation, and a sophisticated workforce, among others.[122]

Through analysis of Bermuda's international business industry and the taxation system it is bound by, it is clear that the island emerges as distinct to its Caribbean counterparts. Bermuda, a legitimate and legal financial centre, already appears to be misunderstood in public and political discourse. Lawmakers, as evidenced by Baroness Stern's proposal, also appear to have fallen ignorant of Bermuda's unique and robust industries, aversion to risky business, and unique taxation system. As this chapter continues, Bermuda further emerges as an exceptional case in Amendment 167 in terms of its constitution, collection of beneficial ownership information, and international commitments.

3.1.2 Constitutionally

In addition to Bermuda's exceptional international business centre, the island's constitution also differs from the rest of the OTs in one very critical way. While the provision for the Crown ability to impose Orders in Council (thereby legislating for the OTs) can be found in many other OTs, there is no such provision in Bermuda's constitution. For example, the Constitution of the Cayman Islands (Section 125)[123] provides "There is reserved to Her Majesty full power to make laws for the peace, order and good government of the Cayman Islands." This, when taken in the context of Amendment 167, provides legal explicit legal ability for the UK to

[122] (no116)

[123] The Cayman Islands Constitution Order 2009, SI 2009/1379

legislate for Cayman. "Similar reservations of power to legislate by Order in Council for the peace, order and good government of the territory are contained in the constitution Orders of all other territories [except Bermuda]…[including BVI and Gibraltar]."[124] Bermuda sharply differs in this regard, as there is "…no general power to legislate by Order in Council for Bermuda"[125] as the constitution Order of Bermuda[126] makes no provision for legislative power to Her Majesty.

It is possible to argue that the Bermuda Constitution Act 1967[127] does not explicitly deny legislative powers to her Majesty, as Section 1(1) contains:

"Her Majesty may by Order in Council make such provisions as appears to Her expedient for the government of Bermuda."

However, as Hardy et al note in their book *British Overseas Territories Law*, these are extremely general terms. However, the full title of the 1967 Act is "An Act to provide for the grant of a new constitution for Bermuda". This is best interpreted by concluding that the Act above does not indeed contain legislative powers to Her Majesty via Order in Council, as intended through Amendment 167 if Bermuda does not comply with the demand for a public register. "In practice, [this] interpretation has been consistently followed."[128] Unlike other OTs, most importantly Cayman and BVI, there is no power on behalf of the UK to legislate for the peace, order, and good government of Bermuda. While there are provisions in specific Acts of Bermuda

[124] (no43)
[125] ibid
[126] Bermuda Constitution Order 1963 (BDA) BX 182/1968
[127] Bermuda Constitution Act 1967
[128] (no43)

Parliament, these powers are specific to each act and defined for special purposes of the respective Acts.[129]

Though quite simple to comprehend, the above difference between Bermuda and other OTs is critical to the purposes of this research project. How will lawmakers in the UK impose such legislation upon Bermuda if such powers do not expressly exist? Does this important distinction in Bermuda's constitutional order not provide for exceptional treatment, as argued for Gibraltar in the House of Commons and Lords? It is clear to see from the above that the threat tabled by Baroness Stern towards Bermuda provides for the constitutional crisis of a self-governing territory. This critical flaw contained in the proposed amendment will be further discussed in the concluding chapter of this piece.

3.2 Beneficial Ownership Registry: Current State of Affairs

From the outset is important to note that Bermuda has collected beneficial ownership of corporate and legal entities for over 70 years (since 1939). Collection of this data "was driven by other statutory purposes, including for exchange control purposes and identification of owners of local companies".[130] No matter the purposes of such collection, the result is that Bermuda has procured a registry of beneficial ownership of companies formed on the island. This surpasses the international standard by far and places Bermuda ahead of most jurisdictions, many only having

[129] ibid
[130] Government of Bermuda 'Proposed Revision to Beneficial Ownership Disclosures' Ministry of Finance (Bermuda, 5 May 2017) <http://www.bma.bm/document-centre/consultation-papers/TRUST%20II/Consultation%20Paper%20on%20Proposed%20Revisions%20to%20Beneficial%20Ownership%20Disclosures.pdf > last accessed 13/6/2017

recently committed to retention of such information as conveyed in chapter 2. This also further sets Bermuda apart from Cayman and BVI, who instead of committing to a central registry (as Bermuda already does), have insisted on "implementing—or wishing to implement—a complex system of linked registers."[131]

As agents of the Ministry of Finance, the Bermuda Monetary Authority (BMA) has been designated as the Controller of Foreign Exchange by the Exchange Control Act 1972[132] and the Exchange Control Regulations 1973[133]. The BMA is therefore responsible for undertaking vetting and diligence oversight on beneficial owners of all entities seeking to register in Bermuda. This concerns all "persons wishing to hold shares, interests or voting rights in a Bermuda legal entity."[134] Entities included in this process consist of local companies, exempted companies, partnerships (exempted and limited), permit companies (overseas) and permit partnerships (overseas).[135]

The Registrar of Companies (ROC) provides the BMA with the legal and beneficial ownership of all Bermuda companies for approval prior to their registration. Identity information on all owners in this full ownership chain must be disclosed to the BMA under Form 1 of the Company (forms) Rules 1982[136]. This information is filed on behalf of the companies by Corporate Registry Service Providers (CSP's) who are registered with the BMA.

[131] HL Deb 3 April 2017, vol 782, col 888
[132] Exchange Control Act 1972 (BDA)
[133] Exchange Control Regulations 1973 (BDA) SR&O 21/1973
[134] (no130)
[135] ibid
[136] Companies (Forms) Rules 1982 (BDA) BR 46/1982

As part of this procedure, the identity information provided to the BMA gives details on direct, intermediate and ultimate owners, thereby looking through any 'corporate veil', and if a trust structure, will include information on beneficiaries, trustees, and settlers of the trust(s). The identity information provided includes the name, address, and nationality (for natural persons) or place of incorporation (for legal persons). A CSP on behalf of the company submits electronically this information. The Corporate Service Provider Business Act 2012[137] and its 2014 Amendment[138] heavily regulate these CSPs. CSPs are further regulated under the Proceeds of Crime Act 2008[139] Section 14.

Subsequent to the incorporation of all companies, all issuances or transfers of equity shares (to or from non-residents as defined under the Exchange Control Act 1972 and Regulations 1973) must be submitted to the BMA for prior approval/permission. In instances where a share of ownership reaches 10%, "the Authority vets the owners including the ultimate beneficial owners"[140] This ensures the BMA's ability to continually to track ownership data throughout the life of the company of any beneficial owners seeking 10% or more ownership in a Bermuda registered company. The application for permission may be made electronically or via post to the BMA. The Company may submit directly or by way of its agent who must be a CRP to access the Authority's electronic filing system.

[137] Corporate Service Providers Business Act 2012 (BDA)
[138] Corporate Service Provider Business Amendment Act 2014 (BDA)
[139] Proceeds of Crime Act 2008 (BDA)
[140] (no130)

Additionally, since the amendment to the Exchange Control Regulations 1973[141] in October 2012, Permit companies (foreign domiciled companies with permission to conduct business in or from within Bermuda) are required to the report to the Controller of Foreign Exchange the identity of persons who beneficially own 10% or more of the share capital.

Note that this threshold was previously 5%, but was re-established as 10% in 2013.[142] Even with the recent doubling of the threshold defining a beneficial owner, this is still a staggering 15% below the FATF and UK standard. This gives potential criminals less room to arrange their affairs in a way to avoid the threshold, previously explored as a flaw in the UK's brand new register. In addition to this, the requirement to reassess the chain of beneficial ownership with each transfer is a far higher standard than the UK's process of annual submission of information. Much can occur within company ownership in a year, and these sometimes complex transfers could be unaccounted for by the time of submission, while also rendering the UK register more inaccurate than Bermuda's retained information.

In terms of monitoring compliance, the Minister of Economic Development and the ROC as his agent have responsibility for overseeing compliance with the Companies Act 1981[143]. If concerns or complains regarding the register of shareholders arise, the Minister of Finance has the powers to inspect the state of the register under sections 110 and 132 of the Companies Act 1981.

[141]Exchange Control Regulations 1973 (BDA) SR&O 21/1973
[142] Bermuda Monetary Authority 'Bermuda Refines Disclosure Requirements for Company Formations' Press Release (Bermuda, 18 February 2013) <http://www.bma.bm/BMANEWS/Bermuda%20Refines%20Disclosure%20Requirements%20for%20Company%20Formations.pdf>
[143] Companies Act 1981 (BDA)

In terms of enforcement, the BMA oversees compliance with the requirements of filing of information related to ownership of companies and partnerships by regulating the businesses of licensed financial institutions and in relation to AML/CFT obligations. It is an offence under the previously mentioned Exchange Control Act and Regulations to fail to obtain permission of the BMA to issue or transfer shares under regulations 50 and 51. For partnerships it is an offence under the Exempted partnerships Act 1992 (Section 13A)[144] and the Limited Partnership Act 1883 (Section 8B)[145] for failure to obtain the consent of the Authority of any changes. Consequences may range from the dissolving of a partnership, court proceedings, and financial penalties.

It is plain to see from the above that the current regime of beneficial ownership collection in Bermuda far surpasses international current state of affairs. The UK government has acknowledged this by recognising

"that Bermuda has a long established central register of company beneficial ownership. The Bermuda Police Service has arrangements with law enforcement both internationally and the United Kingdom. Given Bermuda's existing central register, there are no legislative arrangements required in order to provide information [in a more timely fashion]."[146]

[144] Exempted Partnership Act 1992 (BDA)
[145] Limited Partnership Act 1881 (BDA)
[146] (no63)

While this acknowledgement is extremely telling and important, it appears that lawmakers in both Houses have either overlooked Bermuda's unique standing, or have chosen to ignore it.

3.3 International Standing

In addition to the island's robust legal framework for the collection of beneficial ownership information, research has found that Bermuda has also displayed an observable commitment to international transparency standards that further attest to the jurisdiction's legitimacy. A brief overview is as follows:

The US Departments of Justice, State and the Treasury have testified to Bermuda's standing as a cooperative partner, with two tax enforcement treaties with the US in existence. "Many federal and state agencies in the United States have hailed Bermuda's government as a cooperative partner in many areas, including … tax law enforcement."[147]

In addition to this, Bermuda has "40 bilateral Tax Information Exchange Agreements (TIEAs) with all nations whom comprise of major trading partners"[148]. A step further from this, Bermuda is a signatory to the Multilateral Convention on Mutual Administrative Assistance in Tax Information Matters. This multilateral TIEA furthers Bermuda's position in international ownership transparency by facilitating

[147] (no104)
[148] ibid

"tax exchange relationships with over 106 jurisdictions…including all member states of the G20 and EU."[149]

In addition to this, Bermuda has also signed onto the OECD Common Reporting Standards, which further facilitates the international sharing of financial information. Bermuda was also the first OT or Crown Dependency to agree to the OECD BEPS Country by Country Reporting for MNCs, leading the way for offshore financial centres in terms of transparency. [150] A commitment to cooperation with foreign law enforcement is further exemplified through the signing of an MOU with the National Crime Agency to further facilitate more expedient exchange of beneficial ownership (within 24 hours).[151]

Finally, Bermuda has not been shy to publicly commit to steps to increase its international transparency with regards to ownership data:

"On May 12 2016 at UK Prime Minister David Cameron's Anti-Corruption Summit Bermuda was recognized as one of 33 jurisdictions that has committed to develop an international standard for the automatic sharing of beneficial ownership information with government officials"

3.4 Chapter Conclusion

[149] (115)
[150] ibid
[151] ibid

The above exploration of Bermuda's unique positon in industry, consitution, beneficial ownership regime, and international standing enables the reader to fully assess Bermuda's case in the face of Amendment 167. Bermuda has been clearly established as an exceptional case in comparison to other OTs, and in many ways is observably leading the way for the offshore world in international transparency efforts. The discussion undertaken above lends legislative evidence to the Bermuda government's stance that the island is" commit[ed] to be[ing] at the forefront of transparency and cooperation by helping other jurisdictions claim revenue they believe their taxpayers are obligated to pay."[152]

Bermuda's comprehensive ownership data collection and plethora of international agreements has seen Bermuda ranked below both the US and UK in the Tax Justice Network's Financial Secrecy Index.[153] This serves to further dispell public, political, and lawmaker misconceptions that Bermuda is committed to secrecy and undermines international transparency efforts. These international agreements, in addition to the comprehensive collection of ownership data, further acts to decentivise Bermuda as a choice of destination for criminals intending to use shell companies to hide profits. It is found through the above, that Bermuda is in fact opposed and actively attempting to do its part in curing some of the ills of the modern international finance system.

Chapter IV: Discussion of Findings

4.1 Is Justification Possible?

[152] (no115)
[153] Tax Justice Network 'Financial Secrecy Index- 2015 Results' <http://www.financialsecrecyindex.com/introduction/fsi-2015-results>

This chapter serves to bring together detailed analysis undertaken in both chapters 2 and 3 to ascertain the exact possibility of justification for the imposition of a public register of beneficial ownership in Bermuda. Bermuda's standing in terms of beneficial ownership as analysed in Chapter 3 will be directly discussed in regards to the UK's beneficial ownership regime as analysed in Chapter 2. This will enable the reader to understand whether the UK has a position in mandating transparency standards regarding company ownership to Bermuda the same as it intends to do with Cayman and BVI (amongst other OTs). To this end, critical contrasts between the UK and Bermuda regimes will be consolidated and highlighted. This chapter will then move on to discussing the potential impacts of the introduction of a public register on Bermuda's financial centre, especially in light of the response of its major trading partner. This will enable to reader to ascertain whether or not a pubic register is necessary to Bermuda in light of its current legislative framework and unique features. Finally, and most importantly, the legal challenges surrounding such an imposition by Amendment 167 will be stressed as a vital argument against the proposal at the centre of this piece.

4.1.1 UK and Bermuda: Comparative Review

When the analysis of chapters 2 and 3 are taken alongside each other, it clearly emerges that Bermuda has collected ownership information for far longer than the UK. This is significant in the argument of this piece in that Bermuda's regime is tried and tested: with its long establishment, there is no doubt that the current state of affairs has been proven to work for Bermuda. Though not public like the UK's, this research points to the fact that Bermuda's regime is more comprehensive through the

various processes and safeguards provided for within Acts of Bermuda Parliament. The UK's register, however, has been widely criticised in its infancy (as displayed in chapter 2). While the UK's regime is undoubtedly less complex than Bermuda's, this does not directly imply increased effectiveness and transparency.

Inaccuracies analysed in chapter 2 in regards to the information contained in the UK register largely stem from reliance upon self-reporting. As previously conveyed, it is highly unlikely that criminals who are committed to evading taxes and funnelling profits will feel compelled to file accurate information. In contrast, Bermuda's heavily regulated central registry relies on the submission of information by CSPs registered with the BMA and regulated by various Acts. In addition to this, powers delegated to the Minister of Finance to inspect such register further bolsters the possibility of Bermuda receiving accurate ownership data. This is supported in writing: "Key options are regulating company service providers to verify who is behind the companies they set up, or mandating that company owners self report to a central register. Evidence to date suggests that regulating CSPs is more effective."[154]

In addition to this, academic research indicates that Bermuda facilitates the creation of shell companies than the UK itself. This is in direct contradiction to the UK's stance that Bermuda undermines Britain's transparency efforts: it would indeed appear that Britain has hindered its own efforts by failing to introduce a central

[154]Maya Foster 'Beneficial openness? Weighing the costs and benefits of transparency' CMI (March 2017) <https://www.jerseyfinance.je/media/PDF-Brochures/CMI%20Working%20Paper%20Beneficial%20Openness%20March%202017.pdf?utm_medium=email&utm_campaign=CEO%20Brief%20on%20Lords%20debate&utm_content=CEO%20Brief%20on%20Lords%20debate+CID_52ac372da1806aca03e016f54e469a7e&utm_source=JFL%20email%20communications&utm_term=Beneficial%20Openness%20weighing%20the%20costs%20and%20benefits%20of%20financial%20transparency>

registry sooner. In an academic study undertaken by J. Sharman[155], it was found-to much surprise- that it was indeed easier to set up a shell company in the UK than it was in Bermuda. This suggests that the UK "get its house in order", as David Cameron earlier suggested to the OTs, including Bermuda. This indicates hypocrisy of the highest concern.

This research also found that Bermuda, with beneficial ownership threshold criteria of just 10%, compares quite favourably to the UK's current threshold of 25%. This indicates that Bermuda is far stricter than the UK in terms of identifying beneficial ownership by giving criminals potentially looking to avoid such threshold less opportunity to do so. Bermuda's register, in this regard, further serves to convey a further degree of comprehensiveness as established by Bermudian legislators and regulators.

Also critical in the comparison of the UK and Bermuda's ownership regimes is the updating of such ownership information. As conveyed, the UK requires companies to file updated ownership information with each annual statement, receiving information on a yearly basis. Bermuda, however, requires permission of transfers to be sought by the BMA, therefore retaining the ability to track transfer of shares and ownership as they happen. This, as discussed, ensures Bermuda has access to comprehensive information regarding complex ownership changes. The UK misses out on this detailed tracking ability through the somewhat lax stipulation of annual declarations. This was found to be the final 'nail in the coffin' in the comparison of UK and Bermuda regimes, a further testament to the robustness of Bermuda's current

[155] (no52)

legislative framework.

Through stricter controls in the form of exchange permissions, lower threshold criteria, and a distinct lack of dependency upon self-reporting, this detailed research indicates the superiority of Bermuda's regime in relation to the UK, its potential legislative imposer.

4.1.2 Public Register in Bermuda: Is it worth it?

In addition to an uncovered degree of British hypocrisy surrounding the introduction of a public register in Bermuda, there is an explicit need to discuss the potential negative impacts upon Bermuda as a financial centre. This will enable the reader to further draw conclusions as to the exact necessity of such an extreme measure in Bermuda.

Amendment 167, if imposed, has the very real possibility to unduly disadvantage Bermuda's economy. As explored in chapter 2, public registers are simply not yet the global standard. Imposing such a standard upon Bermuda would mandate an unlevelled playing field in terms of international financial activities. This standard, which could be perceived to be 'over the top', may act as a disincentive to company formation in Bermuda, despite previously discussed advantages of the jurisdiction. This is especially true in relation to Gibraltar and the Crown Dependencies, who have explicitly been excluded from threat of imposition. Law-abiding citizens engaged in international business that value privacy could very well leave Bermuda due to the forced publicity of often-sensitive financial information.

More critically, the island risks the loss of US business due to the US' unwillingness to implement a public register. These businesses may very well perceive the measure to be 'over-regulation', finding the negative impacts of publicity-and therefore loss of valued privacy- too important to simply ignore. This is especially significant as the US is Bermuda's largest trading partner (as previously noted), with a large portion of the island's economy dependent upon a positive business relation with the world leader. The exodus of reputable US businesses directly threatens the livelihoods of thousands of Bermudians reliant upon the successes of Bermuda's financial centre. Morally, this poses an issue; how does the UK justify damaging the wellbeing of thousands of British Overseas Territories Citizens?

The activities undertaken in Bermuda in regard to insurance and reinsurance may also be perceived to have a moral dimension. As previously discussed, Bermuda provides an astounding amount of catastrophe capital globally, aiding the rebuilding of multiple countries after natural and manmade disaster. Much of the developed world also benefits from post-catastrophe capital emanating from Bermuda: how does the UK justify risking such service to the developing world? This may counteractively negatively impact the developing world in far more considerable ways than a public register may benefit it.

Also of importance is the loss of information an imposition of a public register has the potential to trigger. The previously discussed plethora of Bermuda's multilateral agreements, including TIEAs and transparency initiatives could be lost in

favour of a simpler, and less effective regime of beneficial ownership collection. This may result in the loss of comprehensive cooperation, by which relevant foreign authorities are lesser able to access accurate data imperative to their investigations.

With the above taken into account along with the fundamental flaws of public registers conveyed in chapter 2, it is clear that there is no convincing argument for forgoing Bermuda's current regime in favour of the UK's desires. It is clear to see that Bermuda has far too much at stake to implement an under-researched legal measure upon which very little concrete information is available. That is not to say, however, that a public register is not advisable in Bermuda. Rather, this research points toward the conclusion that Bermuda would be willing to consider such a measure if it becomes a global standard. This is evident in the analysis that Bermuda has much to lose if a public register is implemented at this time, with its major trading partner and other offshore centres not following suit. There is no indication that Bermuda is directly opposed to such a register, as the jurisdiction has very publicly committed to transparency measures in the past. Rather, it is not the right time to do so: and when that time comes, it is for the Parliament of Bermuda to legislate.

4.2 Legal Obstacle

The critical legal obstacle presented through the potential imposition of Amendment 167 renders the imposition of a public register in Bermuda not only flawed on a logical basis, but also a legal basis. The lack of explicit provision for Her Majesty to legislate via Order in Council as analysed in subsection 3.1.2 point to British lawmaker desire to bypass the consitution of a self-governing territory with an

extremely high degree of autonomy. This is clearly unacceptable in modern times, especially as Britain attempts to distance itself from its colonial past. Though lawmakers have previously expressed their hesitancy to legislate for Bermuda, it is explicit that there is a considerable portion who do not subscribe to such hesitancy.

Moral argument may further extend to this critical flaw in the UK position. It must be boldly acknowledged that the UK intends to legislate on behalf of over 70,000 British Overseas Territories Citizens. Critically, this legislative imposition has the potential to immensely damage thousands of citizen livelihoods, which as previously noted largely depend upon the island's success in international business. How does the UK Parliament justify imposing legislation with such immense potential impact upon citizens whom have no direct representation in Westminster? This raises serious legal philosophical questions surrounding self-governance of Bermuda and the wider OTs.

Detailed research of Amendment 167's legal standing within Bermuda's consitution by all accounts points toward a very real possibility of constitutional crisis. If British lawmakers are willing to overried Bermuda's consitution in this regard, where else may they find justification for doing so? How far does this have the potential to go? Does this render the entirety of Bermuda's consitution invalid in the eyes of Brtiain?

Chapter V: Conclusion

This dissertation has undertaken the first steps of ground-breaking research in regards to a recent British legislative development concerning Bermuda. Through analysis of Amendment 167 to the Criminal Finances Act 2017 as tabled by Baroness Stern, it was found that British lawmakers have taken a distinctively superior moral position to their potential legislative imposition upon Bermuda. Fuelled by highly emotive public and political discourse, the extreme proposal appeared to be tabled almost unquestioned. This work has attempted to lend legislative grounding to contemporary legal debate.

The discussion undertaken in chapter 2 appears to be the first detailed research aimed at fully comprehending Amendment 167. This was facilitated through discussion of political, legislative, and theoretical dimensions of such a measure. It was found that while the UK's position on public registers is admirable, there are serious flaws present with not only the UK's register in its infancy, but also in the notion of public registers themselves. These manifest in the form of fears over loss of privacy, incomplete and innacurate information, lack of detailed tracking, and room for criminals to rearrange affairs to maintain a position off the radar of relevant authorities.

Chapter 3 appears to be the first academic study to attempt to put forth the exceptional case of Bermuda. Analysis of the island's financial industry, taxation regime, and constitution clearly outlined Bermuda as sharply distinct from other OTs targeted by Amendment 167. Further to this, the chapter appears to be the first

attempt at in-depth independent research concerning Bermuda's regime of beneficial ownership collection. The findings of Bermuda's robust, comprehensive, and historical legal regime regarding ownership transparency served as solid evidence for the case of Bermuda's unique treatment in regards to Baroness Stern's proposal. This chapter also served to dispell misconception of Bermuda as a secrecy jurisdiction, a notion rife within public, political, and now legal discourse.

Chapter 4 consolidated research findings in chapters 2 and 3 to make well-informed statements towards the overall necessity of Amendment 167's proposed imposition upon Bermuda. It was found that Bermuda's register compared favourably to the UK's own, and avoided many of the fundamental flaws of public registers as explored in chapter 2. In addition to this, it was found that the future of Bermuda's success as an international financial centre hangs in the balance of UK desires. Through potential creation of an unlevelled playing field, loss of business and loss of existing interntional cooperation mechanisms, it became apparent that the costs of a public register far outweigh potential benefits. This is exacerbated by the fact that potential benefits of public registers have yet to be understood. In addition to this, it was found that the UK's potential imposition, justified on moral grounds, has overlooked important moral questions raised by the proposal. The Amendment calls into questions consitutional integrity, loss of catastrophe capital to the developing world, and legislating harmful mechanisms into a society by a Parliament in which they do not have representation. Of immense importance was the Consitution of Bermuda's explicit reservation of power for Her Majesty to impose Orders in Council, rendering Baroness Stern's proposal as not legally viable nor justified as it called for an essential consitutional crisis for the island.

Overall, this work has found that the case for Bermuda's exceptional treatment in regards to Amendment 167 is compelling. On the other hand, the necessity of a public register in Bermuda does not appear as compelling. Comparison of UK and Bermuda beneficial ownership regimes, by which Bermuda made out superior, made this explicit. Amendment 167 to the Criminal Finances Act 2017, through the research undertaken in this piece, is rendered as a misguided politically-motivated legislative imposition, with immense potential negative impacts and little proven benefits.

As a result of these findings, this work concludes that Amendment 167 in regards to Bermuda cannot be justified on any grounds.

5.1 Towards the Future

The research contained within this piece displays a fundamental misconception regarding Bermuda's financial centre, legislation, and overall international in cooperation in regards to transparency. The findings of the research identify a gap in lawmaker understanding, and highlight an explicit need for British lawmakers to asses each OT on a case-by-case basis, instead of grouping them for the sake of simplicity. A "one-size-fits-all" approach is not only inefficient, but harmful to Bermuda which strives to distance itself from more its more notorious counterparts, Cayman and BVI.

This research also identified a gap in understanding of the exact benefits of public registers of beneficial ownership. This serves as a call for academic research upon such an emerging standard while also conveying the importance of understanding such a mechanism before forcefully legislating it into self-governing territories of the UK.

Amendment 167 was eventually dropped during the research of this work, and did not succeed in providing for a new clause in the Criminal Finances Act 2017. This however, does not render such research obsolete. As conveyed, the push for transparency in the OTs has been a recurring legal theme for a number of years. With attacks upon Bermuda increasing in frequency and by individuals with increasingly high profiles, Bermuda can expect the notion behind Amendment 167 to resurface. The findings of this research may serve as useful to future desires of UK imposition regarding beneficial ownership transparency.

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