Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Minister for Justice, is:

   “S2M-XXXX Cathy Jamieson: Serious Crime Bill Legislative Consent Motion – UK Legislation - That the Parliament endorses the principle that the offence of breaching a Serious Crime Prevention Order should be extended to Scotland and that amendments to the Proceeds of Crime Act 2002 relating to the use of force in executing search warrants in Scotland under section 387 of that Act and the extension of production orders and search warrants to include cash seizures as set out in the Serious Crime Bill should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by Cathy Jamieson, Minister for Justice, under rule 9B.3.1(a) of the Parliament’s standing orders. The Serious Crime Bill was introduced in the House of Lords on 16 January 2007. The Bill can be found at:

   http://www.publications.parliament.uk/pa/pabills/200607/serious_crime.htm

3. The Serious Crime Bill will:
   - introduce Serious Crime Prevention Orders (SCPOs), a new type of civil order capable of being imposed against individuals or organisations, covering a wide range of potential prohibitions or requirements;
   - provide for the merger of the Assets Recovery Agency with the Serious Organised Crime Agency;
   - put in place a statutory mechanism to enable public sector bodies to share information between themselves and with the private sector on suspected frauds;
   - place the Audit Commission’s National Fraud Initiative, which matches data across a range of public sector bodies to identify fraud, on a statutory footing and expand its scope;
   - create new offences of encouraging or assisting crime to plug perceived gaps in criminal law; and

Merger of Assets Recovery Agency with Serious Organised Crime Agency

4. The merger of the Assets Recovery Agency with the Serious Organised Crime Agency is one of the key features of the Serious Crime Bill. The Bill will transfer certain functions and staff of the Director of the Assets Recovery Agency to the Serious Organised Crime Agency. The Assets Recovery Agency operates for England and Wales and has no operational powers for Scotland except for Revenue purposes, which is a reserved matter. The transfer of functions to the Serious Organised Crime Agency therefore does not have any effect for
operational issues relating to policing and criminal justice. In Scotland civil recovery and criminal confiscation will continue to be pursued through the Civil Recovery Unit and the Crown Office and Procurator Fiscal Service.

Scottish Provisions

5. Many of the provisions of the Bill are only relevant to England and Wales or Northern Ireland, or if they extend to Scotland, relate to reserved matters. The parts of the Bill which would require the Scottish Parliament’s consent to a Legislative Consent Motion are:

- the application of the offence of breaching a Serious Crime Prevention Order issued in England, Wales or Northern Ireland to Scotland;
- allowing the extension of production orders and search warrants under POCA for detained cash investigations; and
- the use of force in executing search warrants in Scotland under POCA provisions.

In detail the effect is as follows:-

Serious Crime Prevention Orders

6. Part 1 of the Bill establishes a new system of SCPOs which courts in England and Wales and Northern Ireland will be able to impose. These civil orders will be used to disrupt and prevent the unlawful activities of an individual or an organisation known by law enforcement to be acting unlawfully but who cannot be prosecuted because it is not possible to gather sufficient evidence or because of the costs involved. For example an order might be used to prohibit, restrict or place certain requirements on financial, property or business dealings, an individual's working arrangements, use of or access to premises or the provision of goods or services by that individual or organisation.

7. An order can contain such terms as the court thinks appropriate for the purpose of preventing serious crime – provided that they are preventative and not punitive in nature. The Bill will impose certain general limits on the types of conditions that can be imposed in order to ensure that the provisions are not too wide-ranging. Breach of an SCPO without reasonable excuse will be a criminal offence. The penalty for failing to comply with a SCPO is, on summary conviction imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both, or if convicted on indictment, imprisonment for a term not exceeding 5 years or a fine or both.

8. It is not proposed to extend these provisions to Scotland in the Bill. However, in order to ensure that Scotland does not offer a bolt hole for those subject to an English, Welsh or Northern Irish SCPO it would be sensible and beneficial to ensure that it is also an offence in Scotland to breach such an SCPO. As the creation of offences in this area is devolved, consent is being sought for the creation of this new offence to extend to Scotland. Linked to the offence the court is also provided with powers to order the forfeiture of any item in the possession of the subject of an order at the time of the offence, which the court considers to have been involved in the offence.
Amendments to the Proceeds of Crime Act 2002

9. The Bill proposes a number of amendments to the Proceeds of Crime Act 2002, a UK Act which contains a mix of reserved and devolved issues. These are:
   • merger of the Assets Recovery Agency with the Serious Organised Crime Agency;
   • to enable financial investigators who are police staff to exercise more of the powers under POCA;
   • extending the use of production orders to a new category of investigation known as a detained cash investigation;
   • to make explicit the power to use reasonable force in executing search warrants under POCA.

10. The merger of the Assets Recovery Agency with the Serious Organised Crime Agency (discussed at paragraph 4) and the allowing of financial investigators who are civilian police staff to exercise more power under POCA either do not apply or are not necessary for Scotland. Although the financial investigator provisions as drafted do not exclude Scotland, in reality they will not have effect here as the Scottish authorities do not use civilian financial investigators.

11. The POCA provisions in the Serious Crime Bill that affect Scotland are the extension of production orders and search warrants for detained cash investigations and the use of force in executing search warrants. Legislative consent is required for these provisions to take effect in Scotland via the Westminster Bill.

Production Orders and Search Warrants for Detained Cash Investigations

12. The Civil Recovery Unit, who act on behalf of the Scottish Ministers (and the Crown Office and Procurator Fiscal Service for criminal confiscation matters) make frequent use of production orders when granted in connection with civil recovery and other investigations requiring the production of material beneficial to an investigation. These investigations do not presently extend to cash seized when the police or revenue officers seize cash over £1000 if they have reasonable grounds for suspecting that it is profit of crime or intended for use in unlawful conduct. This is in terms of their powers under section 294 of POCA. Such money can be detained initially for a period of 48 hours. Thereafter, detention needs to be authorised by an order of a sheriff.

13. A production order can be used to obtain a copy of bank statements from financial institutions, which is useful when analysing a person’s finances and determining what income they have received in addition to any legitimate income. A production order is granted by a sheriff following the application of the Civil Recovery Unit or the Crown Office and Procurator Fiscal Service. Where the cash has been seized because of suspicion surrounding the circumstances in which it is being held rather than as part of a continuing criminal investigation, law enforcement agencies are often limited in the further investigations they can conduct and at present production orders cannot be used when investigating cash seizures. The Scottish Executive would like to see the availability of production orders extended (with the associated ability to apply for search warrants under section 387 of POCA) to cash seizures so that information can be obtained from financial institutions and illegitimate income can be determined.
The Serious Crime Bill will make amendments to POCA to achieve this. This will extend powers of investigation in this area and allow for more effective and expedient investigations.

14. Similar provisions are being provided for England and Wales and Northern Ireland. Specific Scottish provisions have been included in the Bill for this purpose. These mirror the provisions being introduced for England and Wales whilst taking account of particular institutional and procedural differences in Scotland from the rest of the United Kingdom. While the Scottish Parliament could legislate in this area there is no suitable legislative opportunity in this Parliament. Legislating for this in the Serious Crime Bill will allow Scottish authorities to have the same powers as their colleagues in England and Wales and Northern Ireland at the same time and ensure that there is no gap in provision in Scotland.

Use of Force in Executing search warrants in Scotland under POCA

15. Under section 387 of POCA a search warrant can be issued in connection with confiscation, civil recovery and money laundering investigations, but there is no explicit power to use force to execute that warrant. This provision puts the use of reasonable force when executing a search warrant beyond doubt.

16. Whilst the Scottish Parliament could pass legislation in this regard in relation to warrants granted in respect of certain civil recovery investigations and some criminal confiscation investigations, the Parliament would not be able to make comprehensive provision here. This is because money laundering and confiscation in relation to drug offences are reserved areas. As these are the most frequent types of investigations for which production orders and hence search warrants are required in criminal investigations it would be unsatisfactory to legislate in Scotland, if these investigations could not be covered. The Bill puts beyond any doubt that the designated proper person (defined in section 412 of POCA as either a constable in a confiscation investigation or a money laundering investigation or the Scottish Ministers or a person named by them, in relation to a civil recovery investigation) can use reasonable force in the execution of a search warrant under POCA.

17. It is the view of the Scottish Ministers that those provisions relating to devolved matters in Scotland will be beneficial in targeting serious crime and will maintain a consistent approach in Scots Law. On SCPOs the extension of the offence to Scotland will ensure that Scotland is not seen as offering a safe haven from prosecution to those persons subject to a SCPO issued elsewhere in the United Kingdom.

Consultation

18. The main provisions of the Bill as they relate to England and Wales were set out in the Home Office consultation paper ‘New Powers Against Organised and Financial Crime’. The consultation period ended on 17 October 2006 and extended to England and Wales. Both the Association of Police Chief Officers (ACPOS) and the Law Society for Scotland responded to that consultation. On SCPOs the Law Society of Scotland raised concerns about the use of such orders mainly from an ECHR perspective and the potential to attach an
association with serious crime to an individual on the basis of action they have yet to take and without evidence which meets the current criminal standard. ACPOS are keen to have at their disposal another tool with which to combat serious organised crime but they also highlight the need for consideration to be given to the implications for law enforcement agencies of enforcing such orders.

**Financial Implications**

19. Production orders for detained cash production order applications will be dealt with by the Civil Recovery Unit. It is difficult to forecast how many applications will be sought each year, but this increased workload will be absorbed by the Civil Recovery Unit. All applications will be lodged with Edinburgh Sheriff Court, with consequent resource implications for Scottish Court Service. The police/HM Revenue and Customs will be instructed by the Civil Recovery Unit to follow up lines of enquiry which are established through the use of production orders.

Scottish Executive

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