Delegated Powers and Law Reform Committee

Legislative Consent Memorandum on the Criminal Finances Bill
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Delegated Powers</td>
<td>2</td>
</tr>
<tr>
<td>Recommendation</td>
<td>8</td>
</tr>
<tr>
<td>Annexe</td>
<td>9</td>
</tr>
</tbody>
</table>
The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

a. any—
   i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   ii. [deleted]
   iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

c. general questions relating to powers to make subordinate legislation;

d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

g. any Scottish Law Commission Bill as defined in Rule 9.17A.1;

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

i. any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.
## Committee Membership

<table>
<thead>
<tr>
<th>Convener</th>
<th>Deputy Convener</th>
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<tr>
<td><strong>John Scott</strong></td>
<td><strong>Stuart McMillan</strong></td>
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<td>Scottish Conservative and Unionist Party</td>
<td>Scottish National Party</td>
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<th>Alison Harris</th>
<th>Monica Lennon</th>
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<td>Scottish Conservative and Unionist Party</td>
<td>Scottish Labour</td>
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<th>David Torrance</th>
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<td>Scottish National Party</td>
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Introduction

1. At its meeting on 13 December 2016, the Committee considered the provisions in the Criminal Finances Bill ("the Bill") that confer powers to make subordinate legislation on the Scottish Ministers.

2. The Bill was introduced in the House of Commons on 13 October 2016. It is a UK Government Bill and was introduced by the Home Secretary Amber Rudd. The Bill has recently completed Committee stage in the House of Commons, with amendments having been considered on 15th, 17th, and 22nd November 2016. The Bill covers a range of matters wider than those before the Committee for delegated powers consideration. An outline of the Bill and specifically those provisions which extend to Scotland is therefore provided in the Annexe.


4. The lead Committee in respect of this LCM is the Justice Committee. The draft motion, which will be lodged by the Cabinet Secretary for Justice, Michael Matheson MSP is:

   “That the Parliament agrees that the relevant provisions of the Criminal Finances Bill, introduced in the House of Commons on 13 October 2016, relating to amendments to the Proceeds of Crime Act 2002 and the Anti-terrorism, Crime and Security Act 2001, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”

5. The LCM was considered by the Committee under Rule 9B.3 of the Parliament’s Standing Orders. Paragraph 6 of Rule 9B.3 provides that where the Bill that is the subject of a legislative consent memorandum contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Delegated Powers and Law Reform Committee shall consider and may report to the lead committee on those provisions.
Delegated Powers

6. There are a number of clauses in the Bill which confer delegated powers upon the Scottish Ministers. These are discussed below. There are also powers to make regulations conferred on the Secretary of State which require the Scottish Ministers’ consent prior to being exercised; however these do not engage this Committee’s remit.

Part 1: Proceeds of Crime

Clause 13 (inserting new section 303H(4) into the Proceeds of Crime Act 2002): Forfeiture of certain personal (or moveable) property – Code of practice: Scotland

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<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
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<tr>
<td>Power exercisable by:</td>
<td>Order made by SSI</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>affirmative</td>
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Provisions

7. Clause 13 amends Part 5 of the Proceeds of Crime Act 2002 (“POCA”). Part 5 provides for the Scottish Ministers to recover, in civil proceedings, property which is (or represents) property obtained through unlawful conduct. Equivalent provision is made for the rest of the UK. In Scotland, the Civil Recovery Unit exercises these functions on behalf of the Scottish Ministers.

8. Clause 13 inserts new Chapter 3A (in particular, sections 303B-Z) into Part 5 of POCA. It makes provision for the seizure and forfeiture of certain types of personal or moveable property (known as “listed assets”) where the listed asset or money is obtained through unlawful conduct or is intended for use in such conduct. New Chapter 3A largely mirrors the existing cash forfeiture scheme in Chapter 3 of Part 5 of POCA. It confers similar search, seizure and detention powers as are available to constables and other relevant officers under that scheme, subject to the same requirements for prior approval.

Delegated power

9. New section 303H creates an obligation on the Scottish Ministers to make a code of practice in connection with the exercise by constables in relation to Scotland of the powers to search for a listed asset conferred by section 303C. This obligation mirrors the existing obligation placed on the Scottish Ministers in section 293 of POCA to make a code of practice in connection with the exercise by constables of the search powers in relation to cash under existing section 289. Both existing section 293 and new section 303H require the Scottish Ministers to publish a draft code of practice, consider any representations on it, modify it if and as they consider appropriate in light of such representations, and lay a draft of the code before the Scottish Parliament.
10. Like the order under existing section 293, any order bringing the code under section 303H into operation must be made under the affirmative procedure (per the consequential amendments in Schedule 5 of the Bill). Both sections 293 and 303H also require that any revisions to the respective codes must also follow the steps set out above. Equivalent provisions are made for the rest of the UK.

Comment

11. The UK Government’s delegated powers memorandum for clause 13 states that the search powers are invasive. It raises the need for further detailed guidance to ensure that it is used proportionately and effectively. It is appropriate to set this out in a code of practice due to the level of detail required.

12. The delegated powers memorandum also explains that the UK Government considers that the draft affirmative procedure (or the affirmative procedure in Scotland) is appropriate for the use of the new powers in Chapter 13A. This is in light of the sensitive nature of these powers and that the code will clarify the use of the powers against the public.

13. The Committee considers that it is appropriate for the Scottish Ministers to have powers, by order, to make and publish the code of practice in relation to the exercise of the new powers of constables to search for listed assets.

14. The Committee is also content with the choice of the affirmative procedure. The affirmative procedure appears to afford an appropriate level of scrutiny to the Scottish Parliament. It also mirrors the existing scrutiny for the code of practice as regards the exercise by constables of the search powers in relation to cash under existing section 293.

Clause 25: Seized money

Power conferred on: the Scottish Ministers  
Power exercisable by: Regulations made by SSI  
Parliamentary procedure: affirmative

Provisions

15. Clause 25 makes specific provision to maximise the recovery of criminal assets in Scotland, as requested by the Scottish Government. The Scottish Government’s LCM states that clause 25 will further align Scottish proceeds of crime legislation with that in the rest of the UK, to ensure that there are consistent measures across the jurisdictions for enforcing confiscation orders.

16. Clause 25 inserts a new section 131ZA into Part 3 of POCA, which relates to confiscation proceedings in Scotland. It essentially replicates for Scotland sections 67 and 215 of POCA, which apply in England and Wales and Northern Ireland respectively, although with certain modifications.

17. New section 131ZA allows for the High Court of Justiciary or the sheriff to order money in a bank or building society account seized from an accused person, and
which is being detained by Police Scotland or HMRC for the purposes of a criminal investigation or prosecution, to be paid in satisfaction of that person’s confiscation order.

18. Paragraph 20 of the Annex to the Scottish Government’s LCM explains that the intention is to amend clause 25 so that it applies more broadly to money seized by all relevant law enforcement officers (not just constables and officers of Revenue and Customs), and which is being detained in connection with a criminal investigation or prosecution, or with an investigation of a kind mentioned in section 341 (i.e. an investigation into confiscation, civil recovery, detained cash, money laundering, exploitation proceeds, detained property or frozen funds). This aligns with similar amendments proposed for sections 67 and 215 of POCA. However, at the time of writing it does not appear that these amendments have been made.

19. The UK Government’s delegated powers memorandum explains that accounts containing easily realisable cash or cash-like financial instruments, and not just money held in an account with a bank or building society, should be capable of being the subject of orders by the courts under new section 131ZA of POCA.

**Delegated power**

20. Accordingly, new section 131ZA(7) confers on the Scottish Ministers a regulation-making power to amend section 131ZA, so that it applies to money held by other financial institutions or other realisable cash or cash-like instruments or products.

21. Subsection (8) states that the regulations under subsection (7) may make provision about realising a financial instrument or product or otherwise obtaining money from it.

22. New section 131ZA(7) is a “Henry VIII power”, as it allows the Scottish Government to amend primary legislation – in this case section 131ZA of POCA – by subordinate legislation. Special justification is usually required for the use of Henry VIII powers. Their use may not be acceptable where it would have the effect of authorising a fundamental change to the basis of the legislation, to address issues of policy and principle. However, it can be acceptable to use Henry VIII powers to address points of a minor, administrative or technical nature.

23. The UK Government’s delegated powers memorandum explains that the power to amend would be used “as operationally required”. It states that given the wide range of potential financial institutions and, more particularly, of products provided by the financial services industry, together with the constantly evolving nature of such products, these are matters more appropriately left to secondary legislation. It also explains that as new section 131ZA only applies to money, any extension of the power in this section to cover a financial instrument or product may need to modify the section to provide for the instrument or product to be realised in cash.

24. Broadly equivalent powers are contained in sections 67 and 215 of POCA in relation to England and Wales and Northern Ireland respectively, which are both currently in force. The regulation-making power in section 131ZA(7) is subject to...
the affirmative procedure (per the consequential amendments in Schedule 5 of the Bill).

Comment

25. The Committee considers that it is appropriate for the Scottish Ministers to have a power to amend by regulations the types of account or financial instrument or product from which money can be paid to the appropriate clerk of court. This is particularly in light of the technical nature of the power and the fact that equivalent powers apply to England and Wales and Northern Ireland.

26. The Committee is also content with the choice of the affirmative procedure. The affirmative procedure affords an appropriate level of scrutiny for the use of a “Henry VIII power” of this nature.

Part 4: General

Clause 49: Power to make consequential provision

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<th>Power conferred on:</th>
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<tr>
<td>Power exercisable by:</td>
<td>Regulations made by SSI</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>affirmative/negative (depending on content)</td>
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Provisions

27. Clause 49(2) of the Bill enables the Scottish Ministers to make regulations to make provision in consequence of any provision made by or under Parts 1 or 2 of the Bill that extends to Scotland only, provided they consult with the Secretary of State beforehand (clause 50(2)).

28. Regulations made under clause 49(2) may include transitional, transitory or saving provision. By virtue of sub-clause (6) of clause 49, such Regulations may also repeal, revoke or otherwise amend any provision of any Act of the Scottish Parliament or an instrument made under an Act of the Scottish Parliament.

29. Clause 50(6) of the Bill provides that regulations made by the Scottish Ministers under clause 49 that repeal or otherwise amend any provision of an Act of the Scottish Parliament are subject to the affirmative procedure, as may be appropriate for a “Henry VIII power”. By virtue of clause 50(7), any other regulations made under clause 49 are subject to the negative procedure.

30. Schedule 5 of the Bill already includes significant changes to various enactments as a consequence of the provisions of the Bill. The opportunity could have been taken to amend any provision of an Act of the Scottish Parliament necessary as a consequence of the provisions in Parts 1 or 2 of the Bill that extend to Scotland only within Schedule 5 of the Bill itself. Instead, a “Henry VIII power” is proposed to achieve this result through regulations made by the Scottish Ministers.

31. However, the UK Government’s delegated powers memorandum explains that it is possible that not all of the necessary consequential amendments have been
identified in the Bill’s preparation. The UK Government therefore considers that it would be prudent for the Bill to contain a power to deal with these in secondary legislation.

32. The UK Government’s delegated powers memorandum states that although the powers conferred by clause 49 are wide, they are limited by the fact that any amendments made under the regulation-making power must be genuinely consequential on the Bill. It refers to other precedents for such provisions, including section 85 of the Serious Crime Act 2015 and section 61 of the Psychoactive Substances Act 2016.

Comment

33. The Committee is content with the power conferred on the Scottish Ministers by clause 49(6)(a) to make regulations that repeal, revoke or otherwise amend any provision of an Act of the Scottish Parliament. This is on the basis that this power will be limited to consequential modifications necessary to implement any provision made under Parts 1 or 2 of the Bill that extend to Scotland only.

34. The Committee considers that it is appropriate that, by virtue of clause 50(6), any regulations made by the Scottish Ministers under clause 49(6)(a) that repeal or otherwise amend any provision of an Act of the Scottish Parliament are subject to the affirmative procedure. This affords an appropriate level of scrutiny for the use of a “Henry VIII power” of this nature.

35. The Committee is also content with the power conferred on the Scottish Ministers by clause 49(6)(b) to make regulations that repeal, revoke or otherwise amend any provision in an instrument made under an Act of the Scottish Parliament. This is also on the basis that this power will be limited to consequential modifications necessary to implement any provision made under Parts 1 or 2 of the Bill that extend to Scotland only.

36. The Committee also considers that it is appropriate that, by virtue of clause 50(7), any regulations made by the Scottish Ministers under clause 49(6)(b) that repeal or otherwise amend any provision of an instrument made under an Act of the Scottish Parliament are subject to the negative procedure. The use of the negative procedure is considered to be proportionate in relation to amendments to subordinate legislation and afford an appropriate level of scrutiny for the use of a power of this nature.

Clause 53(2) and (9):

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<th>Power exercisable by:</th>
<th>Parliamentary procedure:</th>
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<tr>
<td>the Scottish Ministers</td>
<td>Regulations made by SSI</td>
<td>currently none</td>
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Provisions

37. Clause 53(2) of the Bill enables the Scottish Ministers to make regulations to commence clauses 25, 27 and 30(3) of the Bill, after consulting the Secretary of State. Clause 53(9) also gives the Scottish Ministers power to make transitional,
transitory or saving provision in connection with commencement of those provisions.

38. Clauses 25, 27 and 30(3) of the Bill are confiscation-related provisions. They relate respectively to seized money (on which see above), minor amendments to definitions in the existing provisions on money received by administrators, and minor amendments relating to confiscation orders and civil recovery. These powers all relate to Scotland.

**Comment**

39. The Committee considers that, in principle, it is appropriate for the Scottish Ministers to have the power, by order, to commence clauses 25, 27 and 30(3) and to make transitional, transitory or saving provision in connection with commencement of those provisions. Such commencement powers are usual, to enable the changes made by the Bill to be implemented in an orderly manner.

40. There is an issue, however, so far as no Parliamentary procedure is applied to these commencement Regulations to be made by the Scottish Ministers. Clause 53 makes no provision for procedure in the Scottish Parliament. This is not consistent with the procedure which normally applies to commencement Regulations made by the Scottish Ministers by Scottish statutory instrument.

41. Commencement Regulations (previously Orders) are usually laid before the Scottish Parliament (but not subject to further procedure), in accordance with section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”). As a result the procedural provisions and requirements of sections 30 to 34 of ILRA usually apply to commencement Regulations. Also as a result of the application of section 30(2), the Regulations are scrutinised by this Committee after they are laid before the Parliament. These arrangements do not apply if no Scottish Parliament procedure is applied at all to the Regulations.
Recommendation

42. The Committee finds the powers which the Bill delegates to the Scottish Ministers in clauses 13, 25 and 49 of the Bill to be acceptable in principle, and is content with the Parliamentary procedure to which those powers are subject.

43. However, the Committee recommends to the Justice Committee that, in relation to clauses 53(2) and (9), the powers conferred upon the Scottish Ministers to make commencement Regulations should be subject to the Parliamentary procedure which usually applies to commencement Regulations. The Regulations should be laid before the Parliament and not subject to further procedure (that is, affirmative or negative), in accordance with section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.
Annexe

Outline of the Criminal Finances Bill

1. The purpose of the Criminal Finances Bill as stated by the UK Government is to make the legislative changes necessary to give law enforcement agencies and partners the capabilities and powers to recover the proceeds of crime, tackle money laundering and corruption and counter terrorist financing.

2. In particular, the measures in the Bill aim to:
   - improve cooperation between public and private sectors;
   - enhance the UK law enforcement response;
   - improve the UK’s capability to recover the proceeds of crime, including international corruption; and
   - combat the financing of terrorism.

3. The Bill is in four Parts, as follows:
   - Part 1 deals with the proceeds of crime, money laundering, civil recovery, enforcement powers and related offences and creates a range of new powers for law enforcement agencies to request information and seize, monies stored in bank accounts and mobile stores of value.
   - Part 2 will ensure that relevant money laundering and asset recovery powers will be extended to apply to investigations under the Terrorism Act 2000 (TACT), as well as the Proceeds of Crime Act 2002 (POCA).
   - Part 3 will create two new corporate offences of failure to prevent facilitation of tax evasion.
   - Part 4 includes minor and consequential amendments to POCA and other enactments.

4. A fuller overview can be found on pages 4 to 11 of the Explanatory Notes to the Bill here.

Application and extent

5. A number of the provisions of the Bill apply throughout the UK. However, some provisions apply to England and Wales only, while others apply to England and Wales and Northern Ireland only. Other provisions apply to Scotland only and to Northern Ireland only.

6. Some of the provisions of the Bill extend to Scotland, but relate to matters that are reserved to the UK Parliament under Schedule 5 to the Scotland Act 1998 and do not alter the executive competence of the Scottish Ministers or the legislative competence of the Scottish Parliament. These include provisions relating to money laundering, terrorist property and corporate offences of failure to prevent facilitation of tax evasion.
7. The provisions within the Bill which apply to Scotland and require the legislative consent of the Scottish Parliament relate to:

**Part 1**
- Unexplained wealth orders in Scotland, including interim freezing orders and related requests for external assistance (clauses 4 – 6);
- Civil recovery and forfeiture of certain personal (or moveable) property and forfeiture of money held in bank and building society accounts (clauses 13 and 14)
- Miscellaneous provisions relating to Scotland regarding seized money (including a regulation-making power in confiscation proceedings), recovery orders relating to heritable property and money received by administrators (clauses 25 – 27).
- Determination of the available amount in confiscation investigations and minor amendments to confiscation orders and civil recovery (clauses 29 and 30).

Although the criminal and civil law are generally devolved, POCA provides for the confiscation and civil recovery of the proceeds of reserved crime (e.g., drug trafficking and money laundering the proceeds of drug trafficking) as well as devolved crime. As POCA concerns a complex mix of both reserved and devolved matters, the Scottish Government considers that it is appropriate for the proposed amendments to be made by the UK Parliament.

**Part 2**
- Forfeiture of certain personal (or moveable) property and forfeiture of money held in bank and building society accounts (clauses 35 and 36 and schedules 3 and 4).

These provisions are aimed at combatting the financing of terrorism and recovering terrorist property. Although the subject matter of Part 2 of the Bill is reserved, Schedules 3 and 4 (which are given effect to by clauses 35 and 36) require the Scottish Parliament’s consent because they confer new functions on the Scottish Ministers and so alter their executive competence.

**Part 4**
- Minor and consequential amendments, the power to make consequential provision and procedural requirements and commencement (clauses 48 – 50 and 53 and Schedule 5).

The minor and consequential amendments in Schedule 5 (made under clause 48) make provision in relation to matters which fall, in part, within the Scottish Parliament’s legislative competence. Clauses 49, 50 and 53 confer functions on the Scottish Ministers and so alter their executive competence.

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1 The latest version of the Bill is available at: [http://services.parliament.uk/bills/2016-17/criminalfinances.html](http://services.parliament.uk/bills/2016-17/criminalfinances.html)
2 Legislative Consent Memorandum on the Criminal Finances Bill is available at: [http://www.parliament.scot/parliamentarybusiness/Bills/102324.aspx](http://www.parliament.scot/parliamentarybusiness/Bills/102324.aspx)