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Justice Committee

Legislative Consent Memorandum on the Criminal Finances Bill



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Justice Committee

Remit: To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice.



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justicecommittee@parliament.scot



0131 348 5047



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Committee Membership



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Scottish Conservative
and Unionist Party



Deputy Convener
Rona Mackay
Scottish National Party



Mairi Evans
Scottish National Party



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Scottish Labour



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Scottish National Party



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Scottish Conservative
and Unionist Party



Douglas Ross
Scottish Conservative
and Unionist Party



Stewart Stevenson
Scottish National Party

Background

1. The Criminal Finances Bill¹ (“the Bill”) was introduced in the House of Commons on 13 October 2016.
2. The Bill makes provision applying to Scotland for certain purposes which are within the legislative competence of the Scottish Parliament. It also makes provision which alters the executive competence of the Scottish Ministers. This makes it a “relevant” Bill under Chapter 9B of the Standing Orders of the Scottish Parliament and consequently requires the consent of the Scottish Parliament.
3. Accordingly, the Cabinet Secretary for Justice, under Rule 9B.3.1(a) of the Parliament’s Standing Orders, lodged a Legislative Consent Memorandum² (LCM) on the Bill on 22 November 2016. The text of the draft legislative consent motion can be found in Annexe A.

Introduction of LCM

4. Under Standing Orders, a LCM should normally be lodged within 2 weeks of the relevant Bill being introduced in the UK Parliament.
5. On this occasion, just over five weeks passed between the Criminal Finances Bill being introduced in the House of Commons on 13 October 2016 and the LCM being lodged on 22 November 2016. The Committee notes that the Cabinet Secretary for Justice wrote to the Presiding Officer on 16 November 2016 to explain the factors that caused this delay. A copy of the letter can be found in Annexe B. The letter explains that the UK Government prepared the Bill quickly which had led to ‘last minute’ drafting and a lack of consultation on the draft clauses. The Cabinet Secretary explained that this meant it took longer to agree exactly which clauses in the Bill required to be included in the LCM.
6. It is important that LCMs are introduced as soon as possible, and preferably within the two-week limit mentioned in Standing Orders, in order that the Scottish Parliament has adequate time for scrutiny. If there are difficulties causing delay, this should be notified as soon as possible. It is the Justice Committee’s view that, on this occasion, the late lodging of the LCM has had no significant detriment in terms of carrying out sufficient scrutiny. The Committee notes and accepts the mitigating factors that led to the delay as set out in the Cabinet Secretary’s letter.

Outline of the UK Bill

7. The Explanatory Notes³ accompanying the Criminal Finances Bill state that the Bill aims to ensure that law enforcement agencies have effective legal powers to deal with the threat from serious organised crime. The Bill aims 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. The LCM states that the various measures in the Bill also support the implementation of Scotland's Serious Organised Crime Strategy.

The Bill is in four parts—

- Part 1: Proceeds of Crime
- Part 2: Terrorist Property
- Part 3: Corporate Offences of Failure to Prevent Facilitations of Tax Evasion
- Part 4: General

Provisions relating to Scotland

8. Of the four parts of the Bill, three contain provisions which require the legislative consent of the Scottish Parliament. An outline of these relevant provisions is set out below. This outline draws mainly on information taken from the LCM. Further detail on the relevant provisions in the Bill can be found in the LCM itself.

Part 1: Proceeds of Crime

9. Part 1 amends the Proceeds of Crime Act 2002 (POCA) to make provision in relation to investigations, money laundering, civil recovery, enforcement powers and related offences, confiscation, as well as other miscellaneous matters. According to the LCM, the proposed changes are aimed at improving the recovery of criminal assets and that, since POCA is a UK-wide regime, they can be most efficiently and effectively made on a UK basis by this Bill.
10. The LCM explains that the proposed amendments make provision in relation to the confiscation or civil recovery of the proceeds of devolved crime and that, as these matters are within the Scottish Parliament's legislative competence, consent is being sought for them to be considered by the UK Parliament.
11. Part 1 of the Bill also confers functions on the Scottish Ministers in relation to: unexplained wealth orders, interim freezing orders and related requests for external assistance (clauses 4 to 6); civil recovery and the forfeiture of certain personal (or moveable) property and money held in bank and building society accounts (clauses 12 and 13), and recovery orders relating to heritable property (clause 24). Additionally, it confers on the Scottish Ministers a regulation-making power to make provision in relation to seized money in confiscation proceedings (clause 23). The LCM explains that as these alter the Scottish Ministers' executive competence, the Scottish Parliament's consent is being sought.

Part 2: Terrorist Property

12. Part 2 of the Criminal Finances Bill provides that relevant money laundering and asset recovery powers under POCA will be extended to apply to investigations under the Terrorism Act 2000 (TACT), and it amends the Anti-terrorism, Crime and Security Act 2001 to provide for forfeiture of specific types of terrorist property.
13. The LCM explains that Clauses 32 and 33, which give effect to Schedules 3 and 4 respectively, make amendments to the Anti-terrorism, Crime and Security Act 2001 to build on the existing forfeiture scheme for “terrorist cash” under Schedule 1 to that Act. They provide for the seizure and forfeiture of certain listed personal (or moveable) property. It also provides for the freezing and forfeiture of money held in bank or building society accounts, where the property or money is intended to be used for the purposes of terrorism, or consists of resources of a proscribed organisation, or is (or represents) property obtained through terrorism.
14. Schedules 3 and 4 make provision to enable the Scottish Ministers to apply to the sheriff for a forfeiture order in respect of any listed asset seized by an authorised officer or any money that is subject to an account freezing order. They also confer on the Scottish Ministers a right of appeal against a decision of the sheriff not to make such a forfeiture order. These mirror the Scottish Ministers’ current functions in relation to the forfeiture of terrorist cash in civil proceedings in the Sheriff Court.
15. The Scottish Government believes, and has set out in the LCM, that although the subject matter of Part 2 of the Bill is considered to be reserved, Schedules 3 and 4 require the Scottish Parliament’s consent because they confer new functions on the Scottish Ministers so as to alter their executive competence.

Part 4: General

16. Part 4 of the Bill includes minor and consequential amendments to POCA and other enactments.
17. The LCM explains that clause 45 gives effect to Schedule 5, which makes minor and consequential amendments to POCA as well as other legislation. Certain POCA amendments relate to confiscation and civil recovery proceedings in Scotland.
18. Clauses 46 and 47 enable Scottish Ministers to make regulations to make provision in consequence of any provision made by or under Part 1 or 2 that extends to Scotland only, provided they consult with the Secretary of State beforehand. Clause 50 enables the Scottish Ministers to make regulations to commence confiscation-related provisions, after consulting the Secretary of State. It also provides for the Scottish Ministers to make transitional, transitory or saving provisions in connection with commencement of those provisions.

19. The minor and consequential amendments in Schedule 5 make provision in relation to matters which fall, in part, within the Scottish Parliament's legislative competence. Therefore, they will require its consent to be considered by the UK Parliament in so far as they concern the recovery of the proceeds of devolved crime. The LCM states the Scottish Government's position that clauses 46, 47 and 50 require the Scottish Parliament's consent because they confer functions on the Scottish Ministers so as to alter their executive competence.

Scottish Government Consultation

20. The LCM makes clear that Scottish Government officials have considered the legal and policy implications of the Bill, and have sought the views of relevant stakeholders. It states that consultation has been undertaken, in particular, with the Serious and Organised Crime Division and the Civil Recovery Unit of the Crown Office and Procurator Fiscal Service, as well as Police Scotland, Revenue Scotland and the Scottish Courts and Tribunals Service.
21. The LCM further states that stakeholders were supportive of the principles and objectives of the Bill. It says stakeholders have suggested some possible improvements to the provisions on unexplained wealth orders and forfeiture of personal and moveable property. The Scottish Government confirmed its officials have raised these issues with Home Office officials with a view to making the new provisions as effective as possible.

Financial Implications

22. In the LCM the Scottish Government states that in its view there are no significant additional costs to the Scottish Government, nor any significant additional direct costs to the Scottish criminal justice sector, envisaged as a result of the provisions within the Bill. It adds that in relation to the amendments to the confiscation and civil recovery regimes under POCA, there is potential that these could result in a net benefit of POCA receipts which return to the Scottish Consolidated Fund.

Delegated Powers and Law Reform Committee Scrutiny

23. As the Bill confers powers on the Scottish Ministers to make subordinate legislation, the Delegated Powers and Law Reform Committee (DPLR Committee) considered the LCM at its meeting on 13 December 2016 and subsequently published its report⁴. The DPLR Committee indicated that it was content with the provisions conferring these powers, other than in respect of one minor matter.

24. The DPLR Committee recommended 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.
25. The Scottish Government wrote to the Justice Committee on 20 January 2017 setting out its position on the points raised by the DPLR Committee (see Annexe C). The Committee notes that the discussion between the Scottish Government and the DPLR Committee on this point is of a technical nature.

Justice Committee Scrutiny

Call for evidence

26. On 14 December 2016 the Committee issued a call for evidence⁵ on the LCM. Four written responses were received: from Families Outside, the Law Society of Scotland, Police Scotland and the Scottish Legal Aid Board. The responses can be found in Annexe D.

Evidence received

27. The submission from the Law Society of Scotland (the Society) did not set out a general view on whether it agrees with the provisions outlined in the LCM but instead provides a largely neutral commentary on the relevant provisions in the Bill. In a small number of instances, it expressed a view on particular provisions. The Society stated that has also provided a briefing on the Bill for MPs.
28. The Society's submission stated that the creation of Unexplained Wealth Orders should make it easier for Scottish Ministers to obtain property via civil recovery proceedings. It observed that such orders may be made against property thought to be held by "politically exposed persons" (PEPs), but that enforcement agencies are not required to demonstrate reasonable grounds to suspect PEP involvement in serious crime.
29. The Society explained that clause 25 provides for the High Court of Justiciary or Sheriff to order any realisable property in the form of money held in a bank or building society be paid to satisfy a Confiscation Order. The Bill enables Scottish Ministers to amend this provision, by way of regulations, so that it applies to money held by other financial institutions or other realisable cash or cash like products. The submission described the power as a "Henry VIII power" (ie a power enabling Ministers to amend primary legislation by subordinate legislation) and noted that the clause does not require Scottish Ministers to consult on draft regulations prior to laying them in the Scottish Parliament. It states that a

requirement for pre-legislative scrutiny of draft regulations would provide an additional layer of scrutiny in this area. As mentioned above the DPLR Committee reported on provisions in the Bill conferring subordinate legislation making powers on the Scottish Ministers and expressed no concerns in relation to this power.

30. The Society's submission stated that it believes that an additional layer of scrutiny would be provided if there were a requirement for prior scrutiny of draft regulations made under clause 49 (power to make consequential provisions). It again describes this as a Henry VIII power. The DPLR Committee did not express any concerns in relation to this power.
31. Police Scotland's submission stated that it was involved in ongoing discussions with the Scottish Government, the Crown Office and Procurator Fiscal Service (COPFS) and the Home Office in relation to the Bill. It stated that—

” Overall, Police Scotland is supportive of the Criminal Finances Bill however there are some practicalities which require to be addressed. The Home Office is aware of these issues, and is engaging already with the Scottish Government and the COPFS.

32. The submission highlighted three main measures which were of interest to Police Scotland. In respect of Disclosure Orders, Police Scotland argued that they would represent an opportunity to achieve real savings both for Police Scotland itself and for the COPFS as they would dramatically reduce the work currently required for Production Orders.
33. Police Scotland stated that it supported the proposed reform of the Suspicious Activity Report (SAR) regime, which will provide an extension to the current 31 day moratorium in relation to SARs which includes a request for Consent to Transact (now known as a Defence Against Money Laundering (DAML)). However it believes there are practical issues which require to be addressed and notes that these have already been raised directly with the Scottish Government and the Home Office by the COPFS.
34. Police Scotland stated that the Bill will strengthen current legislation by allowing law enforcement agencies to take action against criminal cash by allowing an order to be granted to the holder of cash (such as a bank or insurance company) to release funds to satisfy a Confiscation Order.
35. The Scottish Legal Aid Board (SLAB)'s submission stated that it has considered the LCM with a view as to whether or not there may be any implications of the availability of legal aid or advice and assistance to an individual affected by the proposed legislation. SLAB concluded that—

” It is not anticipated that the proposed legislation will necessarily lead to a significant increase in litigation, and, therefore material increased costs to the [Scottish Legal Aid] Fund.

36. Families Outside is an organisation which works on behalf of children and families affected by imprisonment. Its written submission highlighted the potential impact of the Bill on family members who may not be aware that their income derives from the proceeds of crime. While Families Outside did not suggest specific amendments to the Bill, it argued that the legislation should take into account the impact on non-offending family members and what consideration might be given to them, for example in a situation where the recovery of the proceeds of crime renders a family homeless or in crisis. We ask the Scottish Government to note this concern.

Possible new relevant provision

37. In his letter of 20 January 2017 (see Annexe C) the Cabinet Secretary drew the Committee's attention to an amendment (commonly referred to as the "Magnitsky amendment") which has been tabled for Commons Report Stage. He indicated that this backbench amendment has attracted cross party support. Its intention is to allow for civil recovery proceedings to be raised in respect of individuals involved in human rights abuses overseas with property in the UK.
38. The Cabinet Secretary's letter makes clear that, although the amendment does not mention Scotland, its effect if passed would be to confer functions on the Scottish Ministers (in respect of their role with regard to civil recovery). As a result of that, the amendment would require the agreement of the Scottish Parliament through a Legislative Consent Motion.

Recommendations

39. The Committee is supportive of the UK Government legislating in the areas set out in the Legislative Consent Memorandum on the Criminal Finances Bill. This is on the basis of an absence of any evidence raising significant concerns about relevant provisions in the UK Bill.
40. The Committee therefore recommends that the Parliament approves the legislative consent motion on the Criminal Finances Bill, to be lodged by the Scottish Government. In doing so the Committee recommends the Scottish Government takes regard of the points raised in the written responses it has received, as set out in this report.
41. The Committee notes that an additional amendment has been tabled for Commons Report Stage and, assuming it is agreed to, would welcome further information from the Cabinet Secretary prior to its inclusion in this, or a future, Legislative Consent Motion

Annexe A

Draft motion



“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.”

Annexe B

Letter from Cabinet Secretary for Justice to the Presiding Officer

16 November 2016

I am writing to let you know that I intend shortly to lodge a Legislative Consent Motion (LCM) with the Scottish Parliament in respect of relevant aspects of the Criminal Finances Bill. I am also writing to explain why it has not been possible to lodge the LCM in accordance with Standing Orders.

The Criminal Finances Bill proposes amendments to the Proceeds of Crime Act 2002 and to the Anti-terrorism, Crime and Security Act 2001 that either fall within the legislative competence of the Scottish Parliament, or which confer additional executive powers on the Scottish Ministers and therefore require an LCM under Rule 9B.3.1(a) of the Parliament's Standing Orders. I will lodge the LCM once it has been approved by the Cabinet Sub-committee on Legislation (CSCL).

However, as you know, under Scottish Parliament Standing Orders an LCM should normally be lodged with the Scottish Parliament two working weeks after the introduction of the Bill in Westminster. In the case of the Criminal Finances Bill this would have been 7 November, however preparation and lodging of an LCM to those timescales was not a realistic option in this instance/

This was because the Bill was prepared at high speed leading to last minute drafting and a lack of consultation by the Home Office on the detailed provisions and draft clauses in advance of introduction. This resulted in drafting errors which has meant it has only been possible within the last week to agree exactly which clauses of the Bill required to be included in the LCM. In addition, the introduction of amendments to the Bill by the Home Office has meant that Scottish Government officials have had to make last minute changes to the LCM before it could be considered by the CSCL.

It is disappointing that these circumstances have led to the LCM being lodged late with the Parliament but I trust you will understand that it was important to ensure that the Parliament and the Justice Committee have the most relevant and up-to-date information when it comes to their consideration of the LCM.

I am copying this letter to Margaret Mitchell, Convener of the Justice Committee

Annexe C

Letter from Cabinet Secretary for Justice to the Convener

Criminal Finances Bill – update on Legislative Consent Motion

I understand that the Justice Committee are currently considering the Legislative Consent Memorandum and draft Legislative Consent Motion for the Criminal Finances Bill. With that in mind, I am writing to provide you with an update on recent developments relating to the Bill and the Legislative Consent Motion.

The Bill was introduced in the House of Commons on 13 October 2016. The Commons Committee stages are now complete with the Report Stage likely to be timetabled for early February before the Bill moves to the House of Lords.

It has come to my attention that an amendment, commonly referred to as the “Magnitsky amendment”, has been tabled for Commons Report Stage. This amendment has been tabled by backbench MPs and has attracted significant cross-party support. It proposes explicitly inserting an additional form of unlawful conduct into the Proceeds of Crime Act 2002 (POCA) – human rights abuses – which could then be used as the basis for civil recovery in the UK. The intention is that where an individual involved in gross human rights abuse overseas has property in the UK, it would be possible to raise civil recovery proceedings to recover those assets (based on a rebuttable presumption that they were the proceeds of that person’s unlawful conduct).

The amendment derives its name and objectives from the case of Sergei Magnitsky, a Russian lawyer and auditor who was arrested in 2008 and died in custody in Moscow in 2009. He had alleged that there had been large scale theft from the Russian state sanctioned and carried out by Russian officials. His case led to the adoption of a “Magnitsky Act of Accountability” in the United States under which those Russian officials believed to be involved in his death were barred from entering the United States or using its banking system. That Act was recently extended so that it could be applied to those involved in human rights abuse globally.

The UK Government is considering the amendment at present and a Government amendment is a distinct possibility. The non-government amendment and any UK Government amendment would be considered and voted on as part of the Bill’s House of Commons Report stage.

While the amendment does not mention Scotland, any such change to Part 5 of POCA would confer functions on the Scottish Ministers (in terms of their role with respect to civil recovery). Part 5 also falls (in part) within the legislative competence of the Scottish Parliament. For both of these reasons, it would require the agreement of the Scottish Parliament through the Legislative Consent Motion.

I propose to write to you again at the time of the Commons Report Stage with an update on whether an amendment of this sort has been incorporated into the Bill but wanted to make you aware at this stage of that possibility.

There is one other technical issue on which I also wanted to update the Committee. Following its consideration of the Legislative Consent Memorandum, the Delegated Powers and Law Reform Committee published a report (its “16th Report of 2016”) which was largely supportive of the delegation of powers to Scottish Ministers contained in the Bill. However, the report did raise one issue around the parliamentary procedure for two of the commencement-related regulations in the Bill:

“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.”

I thought it would be helpful to set out the Scottish Government’s position on this issue. The Scottish Government considers that commencement regulations made by the Scottish Ministers under those powers are, by virtue of section 30(1) of the Interpretation and Legislative Reform (Scotland) Act 2010 (“the 2010 Act”), automatically subject to the parliamentary procedure which usually applies to commencement regulations – namely, the default laying requirement in section 30(2) of that Act. Regulations made using those powers will therefore be laid before the Scottish Parliament, but not subject to any further procedure, in accordance with section 30(2) of the 2010 Act.

The approach taken in clause 53(2) and (9) of the Criminal Finances Bill was followed in relation to similar commencement powers conferred by section 88(2) and (9) of the Serious Crime Act 2015. The Delegated Powers and Law Reform Committee’s 70th Report of 2014, regarding the Legislative Consent Memorandum on the Bill for that Act, agreed that commencement regulations made under that Act would be subject to the default laying requirement in section 30(2) of the 2010 Act (paragraphs 35 and 36). The Serious Crime Act 2015 (Commencement No. 1 and Saving Provision) (Scotland) Regulations 2016 (SSI 2016/11) were duly laid in accordance with that requirement.

The Committee may wish to note that the same approach was also taken in the Energy Act 2011 (section 121(2) and (6)), the Defamation Act 2013 (section 17(5)), the Growth and Infrastructure Act 2013 (section 35(4) and (5)), the Marine Navigation Act 2013 (section 13(3) and (4)), and the Anti-social Behaviour, Crime and Policing Act 2014 (section 185(6) and (9)).

As I have said above, I propose to write to you again with a further update on the Magnitsky amendment once Commons Report Stage is complete and MPs have voted on whether to include an amendment of this sort in the Bill.

I trust that this update is helpful to Committee members.

Michael Matheson
20 January 2017

Annexe D

Written submission from Families Outside

Families Outside is a national Scottish charity that works solely on behalf of children and families affected by imprisonment. As such, we are keen to highlight the potential impact of legislation such as the Criminal Finances Bill on family members who may not be aware that their income derives from the proceeds of crime. We do not have specific amendments to suggest but request that the legislation takes into account the impact on non-offending family members and what consideration might be made for them (e.g. if recovery of the proceeds of crime renders a family homeless or otherwise in crisis).

At present, consideration of the remaining children and families seems to be completely absent from the legislation. This is a significant oversight with potential long-term implications. Families Outside would be grateful for this to be taken into account, and I would be happy to discuss this further.

Written submission from the Law Society of Scotland

This paper is in response to the Justice Committee's call for written evidence ¹ on the Legislative Consent Memorandum (LCM) for the Criminal Finances Bill.

By way of background, in June 2016 the Society responded to the consultation issued by Home Office/HM Treasury on the "Action Plan for anti-money laundering and counter-terrorist finance"². At that time the Society liaised with the Law Society of England and Wales (LSEW), and the Law Society of Northern Ireland regarding the commissioning of the Counsel Opinion which underpinned the consultation response produced by the LSEW³. The Society endorsed the LSEW response and provided some additional comments contained in a supplemental paper. We have also responded to the recent government consultation on the 4th Money Laundering Directive.

In July 2016, the Society responded to the HMRC consultation on "Tackling Tax Evasion: Legislation and Guidance for a Corporate Offence of Failure to Prevent the Criminal Facilitation of Tax Evasion"⁴.

As the Criminal Finances Bill is proceeding through the Parliamentary process in Westminster, the Society has provided a briefing document for MPs⁵. We will be

¹ [Justice Committee Call for Written Evidence - Criminal Finances Bill Legislative Consent Memorandum](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517993/6-2118-Action_Plan_for_Anti-Money_Laundering_print_.pdf)
² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517993/6-2118-Action_Plan_for_Anti-Money_Laundering_print_.pdf

³ <http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/home-office-and-hm-treasury-consultation-on-the-action-plan-for-aml-and-cft-legislative-proposals/>

⁴ <http://www.lawscot.org.uk/media/876339/crim-tackling-tax-evasion-consultation-response.pdf>

⁵ <http://www.lawscot.org.uk/media/964957/crim-criminal-finances-bill-report-stage-briefing-law-society-of-scotland-submitted.pdf>

updating this document in advance of the Report Stage of the Bill in the House of Commons (no date for Report Stage has yet been set).

Areas requiring Consent of the Scottish Parliament

The areas of the Bill which require the consent of the Scottish Parliament are set out below: -

1. Part 1 – Proceeds of Crime
2. Part 2 – Terrorist Property
3. Part 4 – General Provisions making and conferring power to make minor and consequential amendments, making financial provision, and provision in relation to extent and commencement.

The Society notes that Legislative consent is not sought in respect of Clauses 9, 11, 31⁶ (now Clause 33 following amendment at Public Bill Stage) which conferred power upon the Scottish Ministers in respect of certain reserved matters on the basis that those functions are exercised by a procurator fiscal rather than the Scottish Ministers and an amendment to the Bill would be sought. We note that following the Public Bill Stage in the Commons the references to “the Scottish Ministers” have been deleted from those clauses within the Bill⁷.

Society’s comments

Part 1 – Proceeds of Crime

Clauses 4 to 6: Unexplained Wealth Orders (UWO)

The Bill introduces UWO which will require individuals to explain the origin of assets where there are reasonable grounds to suspect that the persons know lawful income would have been insufficient to obtain that property. The Bill enables the Scottish Ministers to apply to the Court of Session for an UWO (and/or an interim freezing order, if required) in respect of property of value greater than £100,000 and thought to be held by: -

- A person where there are reasonable grounds to suspect they have been involved (or are connected with someone) involved in serious crime; or
- A Politically Exposed Person (PEP) (or a family member or close associate). There is no requirement for enforcement agencies to demonstrate reasonable grounds to suspect PEP involvement in serious crime.

This is a civil law process with an application made to the Court of Session. UWO are likely to make it easier for the Scottish Ministers to obtain property via civil recovery proceedings. An UWO requires the individual to explain the nature and extent of their interest in the property and how they funded the property. Failure to provide an adequate explanation of the origins of the property in question, or failure to comply with

⁶ [Memorandum from the Scottish Government on the Legislative Consent Memorandum lodged in respect of the Criminal Finances Bill on 22 November 2016 at paragraph 5 on page 1.](#)

⁷ [Criminal Finances Bill - as amended following Public Bill Stage on 23 November 2016](#)

an UWO, without a reasonable excuse, will give rise to a rebuttable presumption that the property is recoverable in civil recovery proceedings.

In addition, failure to comply with an UWO could leave the individual open to Contempt of Court proceedings. It is an offence if, in purported compliance with the UWO an individual knowingly or recklessly makes a material statement that is false or misleading.

The Scottish Ministers (in practice the Civil Recovery Unit, on behalf of the Scottish Ministers) can make an application to the Court of Session for an interim freezing order⁸ at the same time as a UWO to preserve assets.

Clause 13: Civil Recovery of Listed Assets in Summary proceedings

Clause 13 extends the types of moveable property or personal assets that can be seized or forfeited that are part of the proceeds of unlawful conduct or intended for use in unlawful conduct. There already exist powers to seize, detain and forfeit cash sums⁹.

Code of Practice: Scotland (inserting new section 303H of the Proceeds of Crime Act 2002)

We note that the current draft Clause 13 requires the the Scottish Ministers to produce code of practice in connection with the exercise by constables in Scotland of the powers of search in the civil recovery of the proceeds of unlawful conduct. Where the Scottish Ministers propose to issue a code of practice, they must publish a draft; consider any representations made about the draft, and if they think it appropriate, modify the draft in the light of any such representations. The Scottish Ministers must lay a draft of the code before the Scottish Parliament. We note that the equivalent provisions are made for the Secretary of State as regards police constables in England and Wales, HMRC and SFO officers and the Department of Justice in Northern Ireland. These provisions mirror those already in existence for cash amounts¹⁰. The Scottish Ministers have produced a Code of Practice¹¹ for seizure of cash sums under section 293 of the Proceeds of Crime Act 2002.

Clause 25: Seized Money

Clause 25 provides for the High Court of Justiciary or the sheriff (as the case may be) to order any realisable property in the form of money held in a bank or building society account to be paid in satisfaction of a confiscation order. The Scottish Ministers may, by regulations, amend this provision so that it applies to money held by other financial institutions or other realisable cash or cash-like instruments or products, and may make provision for any such financial instrument or product to be realised into cash. Any such regulations will be subject to the affirmative procedure¹².

⁸ Clause 5 Criminal Finances Bill

⁹ See Sections 289-303A of the Proceeds of Crime Act 2002

¹⁰ Sections 292-294 of the Proceeds of Crime Act 2002

¹¹ [Code of Practice section 293 of the Proceeds of Crime Act 2002](#)

¹² [Memorandum from the Scottish Government on the Legislative Consent Memorandum lodged in respect of the Criminal Finances Bill on 22 November 2016, at Annex, paragraph 17-21 at page 9](#)

The UK Government Delegated Powers memorandum for the Criminal Finances Bill stated: *“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, it is considered that these are matters more appropriately left to secondary legislation.”*¹³ Clause 25 provides the Scottish Ministers with Henry VIII powers to amend primary legislation with subordinate legislation.

As currently drafted the clause does not require the Scottish Ministers to consult on the draft regulations prior to introduction in the Scottish Parliament. A legislative requirement providing for pre-legislative scrutiny of draft regulations made under clause 25 (e.g. a requirement to publish draft regulations, consider any representations and, if appropriate, modify the draft regulations in light of any representations) would provide an additional layer of scrutiny in an area where the power to realise property in the form of money could be expanded to money held by other financial institutions or other realisable cash or cash-like instruments or products, and may make provision for any such financial instrument or product to be realised into cash.

Part 3 – Corporate Offences of Failure to Prevent Facilitation of Tax Evasion

In July 2016, the Society responded to the HMRC consultation on “Tackling Tax Evasion: Legislation and Guidance for a Corporate Offence of Failure to Prevent the Criminal Facilitation of Tax Evasion”¹⁴.

We noted that the proposed offence has three stages: firstly, an individual taxpayer is shown to have evaded tax, capable of being prosecuted under the existing criminal law; secondly, this evasion is shown to be criminally facilitated by a person acting on behalf of the company; thirdly, the company fails to show that it has taken reasonable preventative steps.

The draft legislation envisages the first two stages being proved by the Crown; the third stage is a defence which can be pled by the company. The defence is that the company (at the time the principal offence was committed) ‘had in place such prevention procedures as it was reasonable in all the circumstances to expect [it] to have in place, or that in all the circumstances, it was not reasonable to expect [it] to have any prevention procedures in place’. It is likely that there will be uncertainty over what procedures are ‘reasonable’. Parallels can be drawn with the provisions of the Bribery Act, with its similarly ill-defined requirement for ‘adequate’ procedures.

Part 4 – General Provisions making and conferring power to make minor and consequential amendments, making financial provision, and provision in relation to extent and commencement

Clause 49: Power to make Consequential provision

Clause 49 enables the Scottish Ministers to make regulations to make provision in consequence of any provision made by or under Part 1 or 2 that extends to Scotland

¹³ [UK Government Delegated Powers Memorandum for the Criminal Finances Bill dated 12 October 2016 - paragraph 44 at page 15](#)

¹⁴ <http://www.lawscot.org.uk/media/876339/crim-tackling-tax-evasion-consultation-response.pdf>

only; this includes Henry VIII powers to amend primary legislation with subordinate legislation. Clause 50 enables the Scottish Ministers to make regulations to commence confiscation-related provisions, after consulting the Secretary of State. However as currently drafted, there is no requirement to consult any wider prior to introduction in the Scottish Parliament.

A legislative requirement providing for pre-legislative scrutiny on draft regulations made under clause 49 (e.g. a requirement to publish draft regulations, consider any representations and if appropriate, modify the draft regulations in light of any representations) would provide an additional layer of scrutiny.

Written submission from Police Scotland

Thank you for your e-mail correspondence of 14 December 2016 and the opportunity to comment upon proposed Criminal Finances Bill. Please find my responses attached as Appendix A.

Steve Johnson
Assistant Chief Constable
Crime

Appendix A

The Justice Committee has requested views of stakeholders on the Legislative Consent Memorandum (LCM) in relation to the Criminal Finances Bill. The Committee has stated it does not expect stakeholders to necessarily have comments on all parts of the LCM. Police Scotland Economic Crime and Financial Investigation Unit have been involved in ongoing discussions with Scottish Government, COPFS and the Home Office in relation to the Bill.

There are a range of measures contained within the Bill which is intended to strengthen the powers available to law enforcement in relation to the recovery of the proceeds of crime, tackling money laundering and corruption and countering terrorist financing.

Overall, Police Scotland is supportive of the Criminal Finances Bill, however there are some practicalities which require to be addressed. The Home Office is aware of these issues, and has been engaging already with the Scottish Government and COPFS.

The main measures contained in the Bill, which are of interest to Police Scotland, are:

Disclosure Orders. At present, officers conducting a Confiscation Enquiry under the Proceeds of Crime Act 2002 are required to apply to COPFS for a Production Order for each financial institution which may hold relevant information. This can often require numerous applications, all of which require to go before a Sheriff to be granted. A Disclosure Order, which is currently used by the Civil Recovery Unit to good effect, is a 'catch-all' order which covers all relevant institutions which previously would have been specified on individual Production Orders. A Disclosure Order, again granted by a Sheriff, can be used any number of times, and served repeatedly on an organisation as more information is sought within a specific enquiry. This would represent the

opportunity to achieve real savings for both Police Scotland and COPFS, dramatically reducing the work involved in the current Production Order process.

Reform of the Suspicious Activity Report (SAR) regime. Police Scotland plays an integral role in dealing with SARs which refer to subjects and/or entities which are linked to Scotland. The Bill proposes to extend the current 31 day moratorium in relation to SARs which include a request for Consent to Transact (now referred to as a Defence against Money Laundering, or DAML). Whilst Police Scotland supports this extension to the moratorium in principle, there are real practical issues which require to be addressed. These issues have been raised by COPFS directly with Scottish Government and the Home Office.

Improved seizure and forfeiture powers. The Bill proposes to strengthen current legislation which allows law enforcement agencies to take action against criminal cash. This would allow an order to be granted to the holder of cash (such as a bank or insurance company) to release funds to satisfy a Confiscation Order. Police Scotland supports this measure, which will assist in improving the payment of Confiscation Orders, depriving criminals of their criminal proceeds. The Bill also proposes measures which would assist in seizing cash in bank accounts, where the current legislation requires the cash to be in the possession of the suspect.

Written submission from the Scottish Legal Aid Board

The Board

1. The Scottish Legal Aid Board (the “Board”) is a non-departmental public body established by the Legal Aid (Scotland) Act 1986 (the “1986 Act”). The Board is responsible for the administration of legal aid in Scotland in terms of the 1986 Act and has the general functions of:
 - securing that legal aid and advice and assistance are available in accordance with the Act;
 - administering the Scottish Legal Aid Fund (“the Fund”); and
 - monitoring the availability and accessibility of legal services in Scotland.

Legal Assistance

2. There are several different types of legal assistance and several different contexts in which one or other form of publicly-funded legal assistance may be available. The nature of the legal assistance and the eligibility criteria can vary depending on whether a person simply requires advice or some assistance in dealing with a legal matter, or requires representation and the nature of such proceedings.

3. The legal assistance types are:

Advice and Assistance

Advice and assistance comes in the general form and in a particular form known as ABWOR where representation can be provided

(a) General advice and assistance

This covers legal advice to a client, and assistance on a matter of Scots law and includes general work other than representation in a court, such as meetings, correspondence, advice, etc.

(b) Assistance by Way of Representation (“ABWOR”)

This type of A&A allows for representation for certain specified hearings or types of case, set out in the ABWOR regulations from time to time, before a court or tribunal for which legal aid is not available. It is useful for proceedings of limited scope and can be subject to financial eligibility, or not.

Legal Aid

This is the main form of legal aid for representation before courts in the Scottish legal system, and some tribunals. Legal aid exists in several forms, but the two most common are criminal legal aid, which is available for criminal proceedings in the sheriff court, Sheriff Appeal Court and High Court, and civil legal aid which is available for civil cases in courts and tribunals listed in Schedule 2 to the 1986 Act which includes the sheriff court, the Sheriff Appeal Court, the Court of Session, and UK Supreme Court.

RESPONSE TO THE CALL FOR EVIDENCE

4. The Board has been invited to comment on the Legislative Consent Memorandum before the Committee and does so to the extent that there may or may not be any implications for the availability of legal aid or advice and assistance (including ABWOR) to any individual affected by the proposed legislation. The Board has no locus to comment on the wider policy intent of the Bill or the aspects of the legislation relating to legislative competence of the Scottish Government etc.

Part 1

5. Part 1 of the Bill confers functions on the Scottish Ministers in relation to:

(i) Unexplained wealth orders, interim freezing orders and related requests for external assistance (clauses 4 to 6)

An unexplained wealth order would appear to be contemplated as involving civil proceedings in the Court of Session and as such advice and assistance and civil legal aid would be available. It is noted that such orders may affect persons outwith the UK. Subject to the usual application of the statutory merits and means tests, however, a person does not require to be resident in Scotland to be eligible for legal aid in respect of proceedings in a Scottish court.

By further provision, a person commits an offence if, in purported compliance with a requirement imposed by an unexplained wealth order, the person—

(a) makes a statement that the person knows to be false or misleading in a material particular, or

(b) recklessly makes a statement that is false or misleading in a material particular.

(2) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both, or

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years, or to a fine, or to both.

The prosecution of such an offence would proceed in the usual way by summary Complaint or by way of solemn procedure on Petition and Indictment, and criminal legal aid would be available subject to the application of an interests of justice test and a financial eligibility test (summary) and a financial eligibility test only (solemn).

An Interim freezing order, following the making of an unexplained wealth order, under the changes envisaged by clause 5 reflect current procedures under the Proceeds of Crime Act 2002 and civil legal aid would be available, subject to eligibility.

In connection with clause 6, requests for external assistance appear to relate to the enforcement of orders of Scottish courts abroad and do not involve Scottish legal aid.

(ii) Civil recovery and the forfeiture of certain personal (or moveable) property and money held in bank and building society accounts (clauses 12 and 13)

The provisions for civil recovery, including the forfeiture of personal (or moveable) property, do not appear to raise any issues relating to the availability of legal assistance to the person in respect of proceedings before the sheriff or on appeal, or in respect of a victim or other owner with a putative claim on the property.

(iii) Recovery orders relating to heritable property (clause 26).

This clause makes further provision for the orders that may be made in the Court of Session in respect of a recovery order relating to heritable property and has no legal aid implications. As indicated previously, civil legal aid is generally available for all civil proceedings in the Court of Session.

Part 2

6. The provisions in Part 2 of the Bill are aimed at combating the financing of terrorism and recovering terrorist property. Schedules 3 and 4 make provision to enable the Scottish Ministers to apply to the sheriff for a forfeiture order in respect of any listed asset seized by an authorised officer or any money that is subject to an account freezing order. They also confer on the Scottish Ministers a right of appeal against a decision of the sheriff not to make such a forfeiture order. It is stated in the Memorandum that these mirror the Scottish Ministers' current functions in relation to the forfeiture of terrorist cash in civil proceedings in the Sheriff Court, and so should not raise any legal aid issues.
7. On a general note, it should be borne in mind that civil legal aid is available in the sheriff court where the sheriff is exercising his or her civil jurisdiction and also in the Court of Session by dint of the fact that these courts are listed in Schedule 2 of the 1986 Act regardless of the procedure. This makes consideration of whether civil legal aid is available fairly straightforward – if there are civil proceedings in a listed court, civil legal aid is available.

This position is to be contrasted with criminal legal aid where it is the nature of the proceedings which determines whether criminal legal aid is available. Criminal legal aid is available in criminal proceedings where the proceedings proceed by way of a summary complaint or solemn proceedings by way of a petition and subsequent indictment. There are however a range of procedures that can proceed before the sheriff exercising his or her criminal jurisdiction that do not involve a summary complaint or petition/indictment and for which criminal legal aid is therefore not available.

This does not create any insurmountable problems in terms of publicly funded legal assistance in that ABWOR can be made available notwithstanding the non-availability of criminal legal aid. Making ABWOR available for any new procedures that emerge in the criminal jurisdiction can be done by regulation prior to the new procedure coming into force. As and when any new procedures are identified and defined, often under regard to the procedural rules which are developed and introduced by Act of Adjournal, specific ABWOR provision can be established by regulations where appropriate.

Advice and assistance is always available on a matter of Scots law to permit a client to be given advice by a solicitor, or counsel, as appropriate.

Part 3

8. Part 3 creates two new corporate offences of failure to prevent facilitation of tax evasion. These apply to corporate bodies and partnerships. Neither corporate bodies nor partnerships are eligible for criminal legal aid.

Part 4

9. There would not appear to be any legal aid ramifications in relation to part 4.

Cost

10. As stated in the Memorandum, the principal objective of the Bill is to ensure that law enforcement agencies have effective legal powers to deal with the threat from serious organised crime, and 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. The emphasis is on strengthening the existing provisions within POCA to ensure that law enforcement agencies have effective legal powers to deal with the threat posed by serious organised crime; to ensure that its application in Scotland is consistent with its application in the rest of the UK to avoid any potential loopholes in the regime; and to ensure that the powers available to both prosecutors and the Civil Recovery Unit at the Crown Office are reinforced so as to counter the increasingly sophisticated ways in which criminals try to prevent the recovery of their criminal profits and assets.

This being the case, it is not anticipated that the proposed legislation will necessarily lead to a significant increase in litigation and, therefore, material increased costs to the Fund. Indeed, if effective, the legislation would lead to greater recovery of criminal assets.

¹ <http://services.parliament.uk/bills/2016-17/criminalfinances.html>

² <http://www.scottish.parliament.uk/SPLCM-S05-6.pdf>

³ <https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0075/en/17075en.pdf>

⁴ http://external.parliament.scot/S5_Delegated_Powers/Reports/DPLRS052016R16.pdf

⁵ Call for evidence <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/102703.aspx>

