MEMORANDUM
PROCEEDS OF CRIME BILL

1. The Proceeds of Crime Bill contains a comprehensive package of provisions designed to strengthen and enhance the existing legislation on the confiscation of the proceeds of crime. The Bill is a UK measure covering both devolved and reserved matters. While the general principles of the Bill will apply across the UK, there are specific provisions throughout the Bill to take account of differences in Scots criminal and civil law and procedure. Provision is also made for different institutional arrangements in Scotland. The Bill had its First Reading on 18 October 2001.

Background

2. At present the Proceeds of Crime (Scotland) Act 1995 ("the 1995 Act") provides for the confiscation by the courts of the proceeds of crime following conviction. There are separate schemes for the confiscation of assets deriving from drug trafficking and from other offences, with the former being more severe. In addition, powers of civil forfeiture are available to the police and customs officers under the Drug Trafficking Act 1994 to seize cash exceeding £10,000 involved in drug trafficking discovered on import or export. There are also separate money laundering provisions in the Criminal Law (Consolidation)(Scotland) Act 1995, which distinguish between terrorism, drugs and other crimes: these are less well used in Scotland.

3. The purpose of the Proceeds of Crime Bill is to

- enhance the powers of criminal confiscation following conviction by aligning the existing separate schemes for drug trafficking and for other crimes onto an all crimes basis and by strengthening the investigation and enforcement powers;
- introduce new powers of civil recovery to claim for the state the proceeds of criminal activity in cases where it is not possible to prosecute or secure a criminal conviction;
- strengthen existing money laundering powers by removing the current distinction between terrorism, drugs and other crimes and imposing tougher disclosure requirements on third parties such as financial institutions; and
- introduce new taxation arrangements to enable assets for which there is no proof of income to be taxed.

4. The UK Government considers that the provisions of the Bill are compatible with the ECHR.

Content of the Bill

5. The Bill is in 12 parts

- *Part 1:* creates an Assets Recovery Agency (ARA) which will be responsible for criminal confiscation and civil recovery in England and Wales and the revenue functions in Part 6 of the Bill throughout the UK.

- *Part 2:* makes provision for confiscation following criminal conviction in England and Wales.

- *Part 3:* makes similar provision for confiscation following criminal conviction in Scotland. It replaces the separate drug trafficking and other offence provisions contained in the Proceeds of Crime (Scotland) Act 1995 with a consolidated and updated set of provisions. Responsibility for criminal confiscation in Scotland will continue to rest with the Lord Advocate.

- *Part 4:* makes provision for criminal confiscation for Northern Ireland.

- *Part 5:* sets out new provisions for the recovery in the United Kingdom in civil proceedings of property which has been obtained through unlawful conduct; and procedures for the seizure of cash which is reasonably suspected of having been obtained through unlawful conduct or of being intended for use in such conduct, and for the forfeiture of such cash in proceedings before a sheriff. Responsibility for civil recovery in Scotland will rest with the Scottish Ministers: the Court of Session will deal with all cases.

- *Part 6:* empowers the Director of ARA to exercise functions of the Inland Revenue in relation to income, gains and profits arising or accruing as a result of criminal conduct. The Director's remit in this respect will extend to Scotland.

- *Part 7:* consolidates and reforms the criminal law in the United Kingdom with regard to money laundering.

- *Part 8:* sets out powers for use in criminal and civil investigations.

- *Part 9:* deals with the relationship between criminal confiscation and insolvency proceedings.

- *Part 10:* provides for the disclosure of information between the Director ARA, the Lord Advocate, the Scottish Ministers, the law enforcement agencies and various other bodies in relation to the various functions under the Bill.

- *Part 11:* provides for the enforcement in the different parts of the UK of various orders in relation to the investigation of the proceeds of crime and the enforcement of confiscation orders and civil recovery orders. It also covers the handling of external investigation requests and orders.

- *Part 12:* deals with miscellaneous and general matters.

6. A set of Explanatory Notes setting out the provisions of the Bill in detail is attached to this Memorandum

Proposal

7. A number of areas covered by the Bill relate to reserved matters – drugs, money laundering, taxation, while 'other crime' confiscation and the criminal and civil law generally fall within the legislative competence of the Scottish Parliament.

8. A key aim of the Bill is to put the provisions on confiscation, civil recovery, taxation and money laundering on an 'all crimes' basis, in order to remove various loopholes which are currently being exploited by having different provisions for drug trafficking and for other crimes. Most serious criminals are engaged in a range of activities and this artificial split hinders the investigation and confiscation of the proceeds of crime. To attempt to legislate at Westminster for the reserved matters in the Bill and in the Scottish Parliament for those matters within the competence of the Scottish Parliament would simply continue the present unsatisfactory position. Moreover, given the nature of criminal activity, it is essential that broadly similar provisions apply throughout the UK. The Scottish Executive therefore believes that comprehensive UK legislation will be more workable and effective than complex, complementary legislation in both Parliaments.

9. The measures in the Bill which are within the legislative competence of the Scottish Parliament but which the Scottish Executive proposes should be extended to Scotland by this Bill are:

Part 3 Confiscation: Scotland

10. As indicated above, at present there are separate provisions in the Proceeds of Crime (Scotland) Act 1995 covering the confiscation of the proceeds of drug trafficking and those covering the confiscation of the proceeds of other crimes. The intention of Part 3 of the Proceeds of Crime Bill is to replace the existing provisions and align them on an all-crimes basis. Provisions relating to the confiscation of the proceeds of drug trafficking are reserved: those relating to the confiscation of the proceeds of other crimes are devolved. In aligning them onto an all-crimes basis, the Executive believes that comprehensive UK legislation will be more workable and effective than complex, complementary legislation in both Parliaments, and will avoid the potential continuation of loopholes that could create safe havens for criminals either side of the Border.

11. Responsibility for investigating and pursuing confiscation in criminal cases in Scotland will continue to rest with the Lord Advocate as part of his wider responsibility for the investigation and prosecution of crime. Many of the detailed procedural provisions replicate those contained in the 1995 Act. The existing arrangements whereby the sheriff clerk enforces confiscation orders in much the same way as fines will be retained.

12. Clause 142(1)(c) confers a power on Scottish Ministers to make regulations specifying offences that constitute a criminal lifestyle for the purposes of Part 3. Such regulations will be subject to negative resolution procedure in the Scottish Parliament.

Part 5 Civil Recovery

13. Part 5 is drafted on a UK basis and introduces a new scheme for the civil recovery of assets that can be shown on the balance of probabilities to derive from the proceeds of crime.

The aim of civil recovery is to recover the proceeds of crime from individuals who cannot be prosecuted or convicted, for example as a result of witness intimidation or because they remain remote from the criminal activity itself but benefit, often very considerably, from its profits. The provisions setting out the principles of civil recovery are drafted on a UK basis and are on an all-crimes basis covering both drug trafficking (reserved) and other crimes (devolved). The civil law is a devolved matter. For reasons similar to those adduced for Part 3, the Executive believes that it will be more effective and workable to have unified legislation covering the entire UK rather than attempt complex separate legislation covering the proceeds of crime other than in relation to drug offences or offences under other reserved enactments. However, Part 5 contains detailed procedural provisions designed to align civil recovery procedure as closely as possible with existing Scots civil law and normal petition procedure. Civil recovery actions will run in the name of the Scottish Ministers and be heard in the Court of Session.

14. The First Minister intends to allocate administratively the day to day responsibility for exercising the functions of the Scottish Ministers in relation to civil recovery to the Lord Advocate as a Scottish Minister.

15. Action for civil recovery will be possible against any person in possession of the proceeds of crime, whether or not they are suspected of criminal conduct. The Bill contains a number of safeguards to protect the rights and interests of innocent third parties and others and the Court of Session will have considerable discretion in this regard. Provision is also made for the payment of compensation in appropriate cases. Part 5 of the Bill also contains provision in relation to the cross border enforcement of interim administration orders. Clause 261 allows an interim administration order to require respondents in civil recovery proceedings to bring property to Scotland or to place property in the custody of the interim administrator. That property will then be subject to final recovery (providing the Scottish Ministers are successful in the case) and then realisation by the trustee for civil recovery.

16. There are a number of order-making provisions in Part 5 relating to civil recovery -

- Clauses 273, 274 and 275 – these provisions contain powers for the Secretary of State, subject to consultation with the Scottish Ministers, to make regulations about the calculation and verification of the value of pension rights in relation to civil recovery. They will be subject to negative resolution procedure at the Westminster Parliament.
- Clause 281 – confers a power on the Secretary of State, after consultation with the Scottish Ministers, to make an order exempting specified persons or property from civil recovery proceedings. Such an order will be subject to draft affirmative resolution procedure at the Westminster Parliament.
- Clause 286 – confers a power on the Secretary of State, after consultation with the Scottish Ministers, to set the financial threshold below which civil recovery proceedings cannot take place. The initial threshold is likely to be £10,000. Such an order will be subject to negative resolution procedure at the Westminster Parliament.

17. Given that each of these order making powers relates to the general principles of the civil recovery scheme and therefore need to be kept consistent across the UK, the Executive considers that placing responsibility for making the relevant orders on the Secretary of State but only following consultation with the Scottish Ministers is appropriate.

18. Chapter 3 of Part 5 deals with the seizure of cash suspected of being the proceeds of crime or intended for use in criminal activity. At present, Part II of the Drug Trafficking Act 1994 provides for the seizure, and subsequent forfeiture in the sheriff court, of cash which is being imported or exported and is suspected of being the proceeds of drug trafficking or intended for use in drug trafficking. Part 5 of the Bill extends these provisions to cover cash suspected of being the proceeds of any crime or intended for use in any criminal activity. It also covers cash found anywhere in the country and not just on import or export. Again, drug trafficking is a reserved matter, other crimes devolved. In extending the cash provision onto an all-crimes basis the Executive believes that the most effective way is to legislate on a UK basis. Again, however, specific provision is made for differences in Scottish procedure.

19. Under clause 288, if a constable or a customs and excise officer is lawfully on any premises and has reasonable grounds for suspecting that there is suspect cash on the premises, he may search for the cash there. Clause 289 provides that this power of search should normally only be exercised after approval has been obtained from the sheriff, unless it is not practicable to obtain such prior approval. Under clause 289(6) if the search powers are exercised without prior approval and where either no cash is seized or any cash seized is not detained for more than 48 hours (court approval is required for detention beyond 48 hours), then the constable or customs officer who exercised the power must submit a written report to a person appointed by the Scottish Ministers. Under clause 290 the appointed person must make an annual report to the Scottish Ministers on the exercise of the search powers without prior approval and in turn the Scottish Ministers must lay the report before the Scottish Parliament. Finally, clause 292 provides that the Scottish Ministers must make a code of practice in connection with the exercise by constables in Scotland of the search powers conferred by clause 288. A draft of the Code is to be laid before the Scottish Parliament and thereafter brought into operation by order made by the Scottish Ministers which will be subject to draft affirmative resolution procedure in the Scottish Parliament.

20. There are two other order-making powers relating to the cash seizure provisions in Part 5 –

- Clause 288 confers a power on the Treasury, subject to negative resolution procedure at the Westminster Parliament, to describe the kinds of monetary instruments that will be subject to the cash seizure provisions.

- Clause 301 confers a power on the Secretary of State, after consultation with the Scottish Ministers, to set the minimum amount of cash for the purpose of the cash seizure scheme. The initial amount is likely to be £10,000. Such an order will be subject to negative resolution procedure at the Westminster Parliament.

21. The Executive's view is that it is appropriate that these order making powers be conferred upon the Treasury and the Secretary of State respectively.

22. Clause 308 makes provision about the inter relationship between civil recovery proceedings and both corporate and personal insolvency. Essentially, where corporate insolvency or personal bankruptcy proceedings have already begun, then property cannot simultaneously be subject to proceedings for a civil recovery order. As is mentioned below in relation to the relationship between criminal confiscation and insolvency, whilst corporate insolvency is reserved, sequestration generally is devolved. Whilst the provision might be seen to have an effect in relation to the reserved matter of corporate insolvency, the Executive

thinks that it relates to devolved matters in so far as sequestration is concerned. In any event, the view of the Executive is that including the provision in a UK Bill will be more workable and effective than artificially separating aspects of it into what may be reserved or devolved.

Part 8 Investigations

23. In order to tackle the often sophisticated methods used by criminals to hide the proceeds of their crimes, Part 8 of the Bill seeks to strengthen the existing powers of financial investigation to track and recover such proceeds. Thus in addition to the existing provisions for production orders and search warrants, the Bill provides for 3 new investigation powers – compulsory disclosure orders, customer information orders and monitoring orders. These will be available for both criminal confiscation and civil recovery investigations. Chapter 3 of Part 8 contains specific provisions for the use of such powers in Scotland, aligning them with Scots law and procedure. Application for a disclosure order will be made to the High Court or the Court of Session; application for the other orders will be made to the appropriate sheriff court. These provisions cover matters within the legislative competence of the Scottish Parliament. Nevertheless, because they relate specifically to the confiscation and civil recovery powers set out in Parts 3 and 5 of the Bill which, for the reasons outlined above, the Executive considers should be contained in UK legislation, it follows that in order to achieve a comprehensive package which is readily accessible to practitioners, then these related investigation powers should also be contained in the same UK Bill.

24. Clause 385 enables the Scottish Ministers to specify by order the information that may be sought in a customer information order. Such an order would be subject to draft negative procedure in the Scottish Parliament.

Part 9 Insolvency

25. Part 9 makes provision for the inter-relationship between criminal confiscation on the one hand and sequestration under the Bankruptcy (Scotland) Act 1985 and the winding up of companies under the Insolvency Act 1986 on the other. As mentioned above, clause 308 deals with the relationship between civil recovery and insolvency. The basic rule is that once a restraint order has been made under the criminal confiscation provisions of Part 3 prior to the award of sequestration, or the proceeds of property are in the hands of a management or enforcement administrator under Part 3 of the Bill, then any property does not form part of the debtor's estate for the purposes of sequestration proceedings for so long as the orders remain in force. Similar provisions apply to corporate insolvency. Company insolvency is a reserved matter. Sequestration is devolved. Whilst regulation of the effect on corporate insolvency may relate to reserved matters, the regulation of the effect on sequestration is, in the Executive's view, a devolved matter. Nevertheless, the provisions in Part 9 on sequestration relate directly to the criminal confiscation provisions and the Executive therefore considers for the reasons already mentioned above that it is appropriate that they should be contained in the same Bill.

Part 10 Information

26. Part 10 makes provision for the interchange of information between the various agencies etc involved in criminal confiscation and civil recovery on both sides of the border. These include the Lord Advocate, the Scottish Ministers, the Director of the Assets Recovery Agency for England and Wales, the police, the Commissioners of Customs and Excise and of

Inland Revenue and others. Many criminals will have assets on both sides of the border and it is essential that there is the closest possible co-operation between the various agencies to ensure that proceeds of criminal conduct are effectively pursued and recovered. The provisions relate solely to the powers set out in the Bill relating to criminal confiscation, civil recovery and revenue functions and the Executive therefore considers that it is appropriate to legislate for them in the Bill on a UK basis.

27. Clause 425 sets out details of the persons and bodies which are permitted to disclose information to the Scottish Ministers and to the Lord Advocate in respect of their respective civil recovery and criminal confiscation functions. The clause enables the Scottish Ministers to designate by order, subject to draft affirmative procedure in the Scottish Parliament, other persons or bodies who could disclose information. Clause 427 sets out the purposes for which the Lord Advocate may disclose information obtained by him in connection with the exercise of his criminal confiscation functions under Part 3 of the Bill and the purposes for which the Scottish Ministers may disclose information obtained by them in connection with the exercise of their civil recovery functions under Part 5 of the Bill. The clause enables the Scottish Ministers to designate by order, subject to draft affirmative procedure in the Scottish Parliament, further purposes for which such information could be disclosed.

Part 11 Co-operation

28. Part 11 provides in general terms for the enforcement in the different parts of the UK of various orders in relation to the investigation of the proceeds of crime (which includes civil recovery investigation orders) and the enforcement of criminal confiscation orders. We have already mentioned above the provisions in Part 5 of the Bill, namely clause 261 which deals with the cross border enforcement of interim administration orders. Part 11 also covers the handling of external investigation requests and orders. Detailed provision of these enforcement mechanisms will be made by Order in Council. In terms of clause 441, where any Order in Council makes provision concerning clause 428 (enforcement in one part of the UK of orders, warrants etc issued in another part of the UK) in relation to enforcement in Scotland, then that Order in Council is subject to negative resolution procedure in the Scottish Parliament. Orders in Council relating to external requests and orders (clause 429) and external investigations (clause 430) will be laid before the Scottish Parliament and will be subject to negative resolution procedure at the Westminster Parliament.

Reserved matters

29. **Part 1** makes provision in relation to the Director of ARA and his functions. Those functions will be exercised in Scotland only in so far as they relate to the Director's revenue functions under Part 6. **Parts 2 and 4** concern criminal confiscation in England and Wales and in Northern Ireland respectively. **Part 6** concerns revenue functions and **Part 7** money laundering, both of which relate to wholly reserved matters.

Part 12 Miscellaneous and General

30. Part 12 covers miscellaneous and general matters relating to the Bill as a whole. Certain aspects of Part 12 relate to matters in the Bill which are within the legislative competence of the Scottish Parliament. Clause 440 provides that Part 3 of the Bill (Confiscation: Scotland), and Part 12 in so far as it relates to Part 3, shall be commenced by the Scottish Ministers, after consultation with the Secretary of State. Parts 5 (Civil Recovery),

8 (Investigations) and 10 (Information) will only be commenced by the Secretary of State following consultation with the Scottish Ministers. Clause 441 sets out the procedure for the making of the various orders and regulations under the Bill. These have been referred to above under the relevant part of the Bill. Clause 442 deals with finance.

Schedules

31.	Schedule 1	contains detailed provisions on the Assets Recovery Agency.
	Schedule 2	contains further provisions on administrators appointed by the court in Scotland to deal with restraint orders or confiscation orders made under Part 3 of the Bill (Confiscation: Scotland). Paragraph 6(2) confers a power on the Scottish Ministers to prescribe by regulations, subject to negative resolution procedure in the Scottish Parliament, the maximum sum an administrator can retain in his hands.
	Schedules 3 and 4	sets out the powers of interim administrators and trustees for civil recovery in relation to Part 5 of the Bill (Civil recovery).
	Schedule 5	sets out the declarations to be made by the Director and by Agency staff in relation to the revenue functions under Part 6.
	Schedules 6	relates to the money laundering provisions in Part 7.
	Schedule 7	relates to tax
	Schedule 8	contains amendments consequential on the Bill and Schedule 9 repeals and revocations.

Operation of powers under the Bill

32. Under Part 1 of the Bill, the Secretary of State may issue guidance to the Director of ARA. That guidance will make it clear that the reduction of crime is best secured by criminal investigation and prosecution wherever possible, that civil recovery should normally only be pursued when a criminal prosecution has not been, and is not likely to be, obtained, and that civil recovery is more likely to contribute to the reduction of crime than the taxation of such property.

33. It would not be appropriate for the Scottish Ministers to be under a statutory obligation to issue guidance to themselves. Nevertheless, the Scottish Ministers intend to make a policy statement during the debate, reflecting the draft guidance attached to this Memorandum, so as to make it clear that in Scotland priority will always be given to criminal investigation and prosecution of those suspected of committing a criminal offence. Whenever an accused has been convicted of an offence, confiscation under Part 3 of the Bill will be the route to the recovery of the proceeds of his criminal activity. Civil recovery will only be considered by the Scottish Ministers where a successful criminal prosecution has not proved possible, but where there is nonetheless sufficient evidence to pursue a civil action for the recovery of property which may represent the proceeds of crime.

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