SEWEL MEMORANDUM

SERIOUS ORGANISED CRIME AND POLICE BILL

Motion

1. The motion to be put to Parliament is:

"That the Parliament recognises the importance of building safe and secure communities and agrees that the provisions of the Serious Organised Crime and Police Bill that relate to devolved matters and those that relate to the executive competence of the Scottish Ministers should be considered by the UK Parliament"

Background

2. The Serious Organised Crime and Police Bill was introduced at Westminster on 24 November 2004. The Bill aims to contribute to the building of safe and secure communities. A range of provisions in the Bill relate to reserved matters, such as those covering police power to seize uninsured vehicles, health and safety responsibilities of chief constables, giving police civilians direct access to motoring-related databases, a new offence of using an incorrectly registered vehicle, and provisions in relation to money-laundering. A number of other provisions do not extend to Scotland, including those which aim to improve the efficiency and effectiveness of the police service in England and Wales by ensuring they have appropriate powers to tackle crime and anti-social behaviour there. Such provisions, of course, are outwith the scope of this memorandum because they are outwith the legislative competence of the Scottish Parliament and do not relate to the executive competence of the Scottish Ministers.

3. The purpose of this memorandum is to outline the terms of those provisions in the Bill that do require the consent of the Scottish Parliament, by virtue of the Sewel Convention, because they apply to Scotland and are for devolved purposes, or alter the executive competence of the Scottish Ministers. The relevant provisions are as follows:

- The operation of the Serious Organised Crime Agency in relation to Scotland;
- Compulsory Investigative Powers;
- Financial Reporting Orders;
- Provisions in connection with Witness Protection;
- Implementation of the UN Conventions against Transnational Organised Crime and against Corruption;
- Implementation of the EU Framework Decision on Asset Freezing;
- Amendments to the Proceeds of Crime Act 2002;
- Hypothecated funding for Automatic Number Plate Recognition;
- Amendments to Part V of the Police Act 1997, mainly in response to the Bichard Inquiry; and
- Regulation of the Private Security Industry in Scotland.

Consultation

4. The UK Government first announced in February 2004 proposals for a Serious Organised Crime Agency (SOCA). In commenting publicly on the proposals at the time, Scottish Ministers made clear that the establishment of SOCA should not lead to a change in the existing partnership arrangements which provide for the Scottish Drug Enforcement Agency (SDEA) and the Scottish Police Service to work alongside the rest of UK law enforcement. They also said that the legislation to set up the new body should take full account of the separate Scottish legal system, the responsibilities of the Scottish Parliament in relation to crime, and the role of the Lord Advocate in prosecuting serious and organised crime (as for all crime), as well as of the other law enforcement bodies that work here.

5. The proposal to extend the remit of the Security Industry Authority to Scotland was the subject of a public consultation exercise conducted in 2001. This indicated widespread support for the proposals, and the Scottish Ministers announced their subsequent policy decision in March 2003. In addition, two further specific exercises have been conducted to engage small business and precognition officers. The Regulatory Impact Assessment for the extension of the SIA to Scotland gives further detail of these consultation exercises, and is attached as an annex.

6. Other relevant provisions have not been subject to the same level of public consultation in Scotland. However, each of the proposals has been discussed with the most directly affected public agencies, including the Association of Chief Police Officers in Scotland, the Scottish Drug Enforcement Agency, the Scottish Courts Service and the Crown Office and Procurator Fiscal Service.

Financial Implications

7. The extension of the Security Industry Authority to Scotland will carry a cost to individuals, government and to industry associated with the implementation of the regulation of the private security industry in Scotland. These cost implications are also discussed in the Regulatory Impact Assessment for the extension of the SIA to Scotland, annexed to this memorandum.

8. The other provisions will have limited financial implications in Scotland:

- There will be no statutory requirement for the Scottish Ministers to provide a financial contribution to the SOCA, and so any Scottish contribution would be the subject of separate discussion and agreement between the Home Office, SOCA and the Scottish Executive. The Executive currently provides a financial contribution to the National Criminal Intelligence Service (which will be subsumed within SOCA) which in 2004-05 is £5.4m.

- The introduction of compulsory investigative powers and financial reporting orders, and the changes to the Proceeds of Crime Act, will have cost implications for law enforcement agencies including prosecutors and courts. The level of these implications will depend on the take up, but they are expected to be limited and to a large extent outweighed by the efficiencies gained in dealing with the respective offences. The changes to civil recovery provisions should increase the level of assets seized and hence the amounts available to the Executive.

- Improvements to child and vulnerable adult safety through disclosure arrangements, as recommended by the Bichard Inquiry, will carry a cost which in the medium term will be borne by those applying for disclosure certificates. There will be an initial implementation cost to set up new administrative and IT systems, perhaps of around £200,000. This may need to be borne by the Executive.

- Subject to Treasury agreement, there should be a small recurrent financial gain to the Scottish Police Service from the hypothecation of funding for Automatic Number Plate Recognition.

- Other provisions are expected to have neutral or marginal cost implications in Scotland.

The Bill on Introduction

9. For the most part, the Bill as introduced includes all the clauses which it is intended will apply in Scotland. However, there are a number of largely technical amendments which still need to be made. This memorandum, however, provides information both on those clauses that are already in the Bill and those aspects which it is intended will be added.

Devolved provisions proposed for extension to Scotland

10. The following paragraphs describe the specific provisions, for which consent is sought in terms of the Sewel Convention, and provide background on their application in Scotland.

Part 1 – The operation of the Serious Organised Crime Agency in relation to Scotland

11. *Policy Intent* To extend to Scotland specific provisions on how the proposed new Serious Organised Crime Agency will operate in Scotland and to ensure an optimum working relationship with the Scottish Drug Enforcement Agency (SDEA).

12. *Background* The Bill will establish this new Agency which will have some UK functions and some functions limited to England and Wales only. Specifically, SOCA will replace and take on most functions of the UK-wide National Criminal Intelligence Service (NCIS) and the England and Wales National Crime Squad (NCS) and will also take on some functions previously exercised by HM Customs and Excise (on serious organised crime in relation to the importing of drugs and pornographic material) and by the UK Immigration Service (on serious organised crime). In general, these provisions will mean that SOCA agents working in the NCIS, customs and immigration aspects should continue to have a UK-wide remit. Those involved in activities which relate to the NCS element would operate south of the Border - with equivalent roles being carried out in Scotland by the SDEA. However, because organised crime knows no borders, it will also be necessary to provide some flexibility in the arrangements. The Bill will therefore:

- Require that Scottish Ministers are involved in the process of setting the strategic priorities for SOCA and in the issuing of any codes of practice and, in addition, require that the annual plan which SOCA must issue (to set out how it intends to

exercise its functions in Scotland) be agreed between SOCA and the Scottish Ministers;

- Require a high level agreement between SOCA and the Scottish Ministers, expressly setting out how the powers and privileges of a constable are to be exercised by SOCA agents in Scotland;

- Require that the Director of the SDEA agree with SOCA which agents so designated can exercise these powers and privileges in Scotland in respect of a particular operation(s) – this proposal has been endorsed by the Association of Chief Police Officers in Scotland; and

- Ensure that all SOCA agents operating in Scotland are subject to the direction of the Lord Advocate and Procurators Fiscal as regards the investigation and prosecution of crime.

13. *The provisions* Part One of the Serious Organised Crime and Police Bill deals with the establishment, activities and powers of SOCA in 53 clauses in 3 Chapters. These are as follows:

Clauses 1 to 37 – Chapter 1: SOCA: Establishment and Activities

- Clauses 1 to 5 of this Chapter, along with Schedule 1, establish the Agency, making provisions for its constitution, members and employees, and for those organisations which it will wholly subsume (the NCIS and NCS) to be abolished at a date determined by the Secretary of State. They set out the functions of the Agency in relation to the prevention and detection of serious organised crime; its contribution to the reduction of such crime; and the extent to which it will gather, store and share criminal intelligence. Although SOCA will be a UK organisation, provision has been made to ensure that it can operate alongside and in support of the Scottish Police Service and the SDEA, as well as preserving the unique role of the Lord Advocate in relation to the investigation and prosecution of crime in Scotland.

- Clauses 6 to 17 concentrate on performance and measuring performance, specifying timescales and consultation arrangements as regards setting annual strategic priorities and performance targets, producing an annual plan and an annual report. Clause 6 requires that the annual plan which SOCA must issue must set out how it intends to exercise its functions in Scotland and must be agreed between SOCA and the Scottish Ministers. Clause 8 states that the Secretary of State and the Scottish Ministers have a duty to ensure that they use the powers conferred on them in this section in such manner and to such extent as appear to them to promote the efficiency and effectiveness of SOCA. The central supervision and direction arrangements mean that the Secretary of State must consult the Scottish Ministers before determining strategic priorities, and once priorities are identified, the Secretary of State must also consult Scottish Ministers on any performance targets set. This will ensure that Scottish interests are taken into account. There are further details on codes of practice which the Secretary of State may issue relating to the exercise by SOCA of its functions, and arrangements for the Secretary of State to request ad hoc reports from SOCA on

its functions or activities, both of which must again be done in consultation with the Scottish Ministers as necessary. Clauses 15 to 17 deal with powers which the Secretary of State will have to direct SOCA to take remedial action in response to any inspection reports which indicate that SOCA is either inefficient or ineffective, or likely to become so if no remedial action is taken. Clause 17 states that any inspection into SOCA carried out wholly or partly in Scotland must be carried out jointly by HMIC and HMIC Scotland.

- Clauses 18 to 21 outline the financial provisions for the Agency, stating that it will be funded by way of grant from the Secretary of State, setting out how this will be determined, and how this will be paid. It also makes provisions for SOCA to charge for any goods or services it provides, and as regards accounting and audit arrangements. Certain reports must be laid before each House of Parliament and the Scottish Parliament. There is no statutory requirement for the Scottish Ministers to provide a financial contribution towards the grant paid to SOCA. Any such grant contribution would be the subject of separate discussion and agreement between the Home Office, SOCA and the Scottish Executive.

- Clauses 22 to 30 provide for a number of operational matters such as defining the responsibility of the Director General in controlling, prioritising and conducting SOCA operations. Clause 23 states that SOCA may only carry out activities in Scotland in relation to an offence which it suspects has been committed (or is being committed) with the agreement of the Lord Advocate and that SOCA must otherwise comply with such directions as may be issued by the Lord Advocate or a procurator fiscal. Other clauses put in place arrangements for the provision of voluntary and directed mutual assistance between SOCA and other law enforcement agencies, clarifying the circumstances in which this may be requested, whose direction and control officers will be under, and what financial agreements can be brokered. In circumstances where agreement for mutual assistance cannot be reached under the voluntary arrangements, the Secretary of State will have powers to direct chief officers, heads of law enforcement agencies and the Director General of SOCA to provide assistance as required. However amendments have been tabled to provide that, where these circumstances apply to Scottish police forces or the SDEA, only Scottish Ministers will have the power to so direct chief constables of Scottish police forces, the Director of the SDEA and, following agreement with the Secretary of State, the Director General of SOCA. An amendment has also been tabled to ensure that the Secretary of State will have no such powers of direction over the Scottish Administration. The final three clauses deal with issues surrounding liability and payment of damages in respect of any unlawful conduct by SOCA staff whilst carrying out their functions. They also extend these provisions to individuals who are not SOCA staff but who are part of a joint investigation team formed under the leadership of SOCA.

- Clauses 31 to 37 specify the *permitted purposes* for which information obtained by SOCA may be disclosed. These purposes include a number of categories, including the prevention, detection, investigation or prosecution of criminal offences, whether in the UK or elsewhere. These clauses also deal with disclosure of police and other information to SOCA, as well as a general duty on the police and other law enforcement to assist SOCA in the exercise of its serious organised crime functions.

Clauses 38 to 49 - Chapter 2: SOCA: Special powers of designated staff

- Although SOCA employees may be given the powers and privileges of a constable, SOCA will formally be a non police organisation which will have, as noted above, functions in relation to serious organised crime, including organised immigration crime and the importation of drugs and pornographic material. SOCA staff will have no powers unless they are conferred upon them and this Chapter deals with the designation of SOCA employees by the Director General as persons having powers of a constable, a customs officer or an immigration officer. Clauses 38 – 40 set out the processes for designating a person as having such powers.

- Clause 41 deals with persons having the powers and privileges of a constable in England and Wales and the extent to which those powers can be exercised, whilst clause 42 deals with persons having powers of a constable in Scotland (and Northern Ireland). Since policing is devolved, before such powers can be conferred upon a member of SOCA, two tests must be met. First, there will require to be compliance with the terms of an agreement (to be agreed by the Scottish Ministers and SOCA) specifying the general terms and conditions under which SOCA agents in Scotland might be approved to exercise the powers and privileges of a constable. Second, where compliance with this agreement is met, approval for individual agents to operate in relation to a particular operation would be given by the Director of the SDEA or a person nominated by him (in practice this is likely to be his deputy or an Assistant Chief Constable or above in a Scottish police force). These provisions allow for joint working arrangements, but also ensure that SOCA agents do not operate as constables in Scotland in an unfettered manner.

- In Scotland, immigration and customs functions are currently undertaken by officers within the corresponding UK agencies, often in partnership with the SDEA and the Scottish Police Service. The Bill has been drafted in such a way that these functions, as regards serious organised crime, will continue to be carried out at a UK level by SOCA employees (still with the support of the SDEA and the Scottish police). In order to perform these functions, SOCA employees will need to be designated powers (essentially making them either "Immigration Officers" or "Customs Officers" within SOCA) so that they may operate in much the same way as they do now – with all the powers which are specific to these functions. These arrangements are set out in Clauses 43 and 44, but the consent of the Scottish Ministers is not required because these relate to legislation which is reserved to the UK Parliament. However, under Part 1 of the Bill, all SOCA employees will, where appropriate, be subject to the role of the Lord Advocate and the procurator fiscal in the same way that the police in Scotland are.

- This Chapter also creates new offences in relation to obstructing, assaulting and deceiving a designated person acting in the exercise of their relevant powers.

Clauses 50 to 53 - Chapter 3: SOCA: Miscellaneous and Supplementary

- Clauses 50 to 53, along with Schedules 2, 3 and 4, make provisions for the transfer of staff to SOCA, including secondments from the Scottish Police Service; set out the practical arrangements for transferring the property, rights and liabilities of NCIS and NCS to SOCA; outline the functions of the Independent Police Complaints Commission (IPCC) in relation to SOCA in England and Wales (different arrangements will operate in Scotland - in particular, all complaints involving allegations of criminality will be investigated by the procurator fiscal); and lists a number of minor consequential amendments relating to SOCA, primarily substituting references to NCIS and NCS with SOCA in various pieces of legislation.

14. *Advantages of utilising this Bill* It is essential that provisions about how SOCA agents can operate in Scotland come into force at the same time as the SOCA is created. The Bill seeks to clarify the interfaces between SOCA and Scottish police forces, the SDEA and the Crown Office and Procurator Fiscal Service. The prevention and detection of crime in Scotland is a devolved matter, and the investigation and prosecution of crime in Scotland is carried out under the direction of the Lord Advocate. Moreover, in Scotland the SDEA carries out the functions currently exercised by the NCS in England and Wales. It would not make sense for the devolved aspects of these interfaces to remain undefined pending legislation in the Scottish Parliament. Further, the proposed provisions relating to devolved matters in Scotland must be part and parcel of the legislation required to set up the SOCA to ensure an effective counter to serious organised crime throughout the UK. It is therefore vital that these devolved provisions are put in place seamlessly with and at the same time as the establishment of the SOCA.

Clauses 54 –64 – Compulsory Investigative Powers

15. *Policy Intent* It is proposed to create new compulsory investigative powers to be conferred on the Lord Advocate which would enable the SDEA and other police officers acting under the direction of the Crown Office and Procurator Fiscal Service to require an individual to answer questions and provide information or documents in relation to an investigation of certain serious offences.

16. *Background* These new powers are directed primarily at those individuals who may have knowledge of or information about the activities of a serious organised crime group. Those individuals might include those on the fringes of that group as well as accountants, financial advisers, etc. It is intended that the powers should apply in circumstances where there are reasonable grounds for suspecting that one or more of certain serious offences has been committed and it appears that a person has information which is relevant and would add substantial value to the investigation. They are intended for use at the outset of an investigation with the aim of primarily obtaining documents and secondly getting answers to questions which the documents might raise. It is intended that the offences to which the power would apply should be those which would indicate that the person is living off the proceeds of crime such as those specified in Schedule 4 to the Proceeds of Crime Act 2002 (such as money laundering, drug trafficking, pimping and brothel keeping, etc) and certain terrorism offences.

17. The proposed new powers are similar to those which already exist in the Criminal Law (Consolidation) (Scotland) Act 1995 in relation to an investigation into serious and complex fraud. Under that Act, the Lord Advocate has the power to require a person to answer questions and provide information. Like the position under that Act, it is not proposed that the subject of the new compulsory investigative powers will have a right to have a lawyer present during questioning. There will, however, be suitable safeguards.

18. In order to comply with Article 6 of the European Convention on Human Rights and the privilege against self-incrimination, a statement by a person in response to a requirement under the new power may not, in general, be used in evidence in criminal proceedings against him. In addition, a person may not be required to answer any question, provide any information or produce any document which that person would be entitled to refuse to answer, provide or produce on the grounds of legal privilege. Any person who carries on a banking business would not be required to disclose any information in respect of which he owes an obligation of confidence.

19. *Advantages of utilising this Bill* Were these powers not to be introduced in Scotland at the same time as they are in England and Wales, their absence would hamper the pursuit of serious organised criminals in Scotland for the time being. Serious organised criminals moreover do not recognise boundaries between different legal jurisdictions and their absence could also have serious implications for cross border investigations. It would mean that action could not be taken against an individual in Scotland who was suspected of holding information about a serious criminal group in England. The lack of such powers could therefore seriously frustrate a Scottish investigation and delay or frustrate an English investigation with a Scottish dimension.

Clauses 70 – 73 – Financial Reporting Orders

20. *Policy Intent* To give courts the power to make Financial Reporting Orders (FROs) which would require persons convicted of certain financial offences to surrender details of their financial dealings (income, expenditure, assets) to the police, for a period after their sentence, with the purpose of facilitating the tracking of criminal assets.

21. *Background* This provision will give the courts a power to impose an order on those convicted of certain specified offences involving financial wrongdoing (fraud, and lifestyle offences under the Proceeds of Crime Act 2004) whom the court believe may commit further such offences. The order would require that person regularly to disclose details of his/her income, assets and expenditure to a designated authority for a period of up to a maximum of between 5 and 20 years, depending on the original conviction and at the discretion of the court. A person who fails reasonably to comply with any requirement of that order would be guilty, on conviction, of an offence. In England and Wales the disclosure will be made to a probation officer in the first instance who will, in turn, pass the details to the police, HM Customs and Excise and the Inland Revenue. In Scotland, the person will be required to make their disclosure returns to the police. The information provided would also be filed on existing databases against current or ongoing investigations and could be provided to other agencies as appropriate. The number of FROs in Scotland is not expected to be large, probably fewer than 100 made each year.

22. *Advantages of utilising this Bill* These provisions will be triggered by a mix of reserved and devolved offences. Legislating at Westminster, with a Sewel motion in respect of the devolved aspects, is therefore the most practical option.

Clauses 74 – 86 – Provisions in connection with Witness Protection

23. *Policy Intent* To extend to Scotland provisions for statutory witness protection arrangements.

24. *Background* There is currently no formal legal framework in the UK for the provision of witness protection. Instead, individual law enforcement agencies operate their own arrangements. In Scotland, the Scottish Drug Enforcement Agency (SDEA) provides a Scottish witness liaison function, mainly in relation to serious and organised crime cases. Individual police forces in Scotland also have responsibility for arranging low level witness protection. Earlier this year, the Home Office undertook a review to consider the case for a national witness protection scheme. They decided that the creation of a single national scheme was not necessary but that those delivering witness protection arrangements across the UK would benefit from the establishment of witness protection powers in statute. The Bill will:

- introduce powers to enable witness protection providers to make arrangements for witness protection;

- define those to whom protection may be provided (witnesses, jurors, judges and magistrates, prosecutors, law enforcement officers, prison officers, informants, members of staff of the SDEA and persons who are associated with any of the other categories of person who will be protected. Following amendments to be introduced in committee, this will also include those who work for, and are seconded to, the Crown Office and Procurator Fiscal Service, staff of the Scottish Civil Recovery Unit and Financial Crime Unit, and Interim Administrators);

- set out the factors to be considered in deciding to provide protection and that the protection providers must inform persons who are being protected, or those with and interest in that person's welfare, about the protection arrangements that have been made;

- exempt those giving false information about a protectee's new identity from civil and criminal liability; place a duty on public bodies (for example, health, education and housing authorities) to provide reasonable co-operation to protection providers; and

- create new offences of intentionally disclosing information about individuals protected or about the protection provided. Provision will be made for certain statutory defences to be invoked in relation to such offences.

25. In Scotland, the powers to make arrangements for witness protection would vest in Chief Constables and the Director of the SDEA.

26. *Advantages of utilising this Bill* Scottish witnesses at risk are generally relocated elsewhere in the UK, so effective witness protection relies heavily on joint working across

the UK. Not to extend the provisions to Scotland at this time would be problematic because Scottish law enforcement arrangements would be out of step with those in the rest of the UK. That would mean reduced scope for reciprocity and joint working and, overall, it would impact on the ability to deliver effective witness protection in Scotland. Scotland would also miss out on improved co-operation with public/ private sector bodies whose support is essential to make witness protection arrangements work. Extending the Westminster provisions to Scotland is the most effective way to ensure they take effect at the same time throughout the UK.

Clause 87 – Enforcement of overseas forfeiture orders

27. *Policy Intent* To enable the UK to ratify the UN Convention against Transnational Organised Crime (UNTOC) and the UN Convention against Corruption (UNCAC).

28. *Background* UNTOC was agreed in December 2000 to promote co-operation to prevent and combat transnational organised crime. The Convention lays down rules for international co-operation in the fight against organised criminal groups, and sets minimum standards for action at national level. It has three protocols: on people trafficking, migrant smuggling and firearms trafficking. The UK signed UNTOC and its three protocols in 2000; the Convention came into force in September 2003. UNCAC was agreed in 2003 to strengthen international co-operation against corruption and to facilitate recovery and repatriation of stolen state assets.

29. The UK has yet to ratify the 2 Conventions. The one remaining obstacle to ratification of UNTOC and UNCAC is the absence of a power to enforce foreign requests to confiscate instrumentalities (e.g. vehicles or boats) used to commit organised crime, and destroy them or dispose of them in some other way. This omission is an unintended consequence of the Proceeds of Crime Act 2002, which repealed the relevant legislation from 1995.

30. Under section 9 of the Criminal Justice (International Co-operation) Act 1990, an Order in Council could be made in respect of the enforcement of an order made by a court overseas which is for the forfeiture and destruction of anything which was used in connection with an offence to which section 9 applies. Section 9(6) sets out that section 9 applies to offences corresponding to, among other things, offences to which Part I of the Proceeds of Crime (Scotland) Act 1995 applies. Those were offences which had been prosecuted on indictment or certain summary offences. The difficulty is that Part I of the 1995 Act (and the English & Welsh equivalent legislation) was repealed by POCA in 2002.

31. Primary legislation is required to rectify this. The provision in this Bill takes the form of an amendment to section 9 of the 1990 Act so that the order-making power under that section would extend to indictable and summary offences.

32. *Advantages of utilising this Bill* Both conventions confer obligations on the UK. Doing nothing at this stage would mean that foreign orders for instrumentalities could not be enforced in Scotland until the amendment could be made in a Scottish Bill. Ratification of the Conventions would be delayed, Scotland would appear weak on transnational crime and corruption, and an exploitable loophole would be left open for longer than is necessary. There is no legislative opportunity currently in prospect in the Scottish Parliament and in any

case it appears sensible to make the necessary amendment for Scotland at the same time as in the rest of the UK.

Clause 88 – Mutual Assistance in freezing property or evidence

33. *Policy Intent* To give effect to an EU Framework Decision on the freezing of property and evidence.

34. *Background* In July 2003, the Council of the European Union agreed the Framework Decision on the execution in the European Union of orders freezing property or evidence. This has the effect of requiring all Member States to recognise and enforce freezing ("restraint") orders made in another Member State with the minimum of formality. The UK has already implemented the Decision as regards terrorist assets and evidence (the clear priorities). This was done for the whole of the UK in the Crime (International Co-operation) Act 2003 with a Sewel motion. However this leaves the freezing of non-terrorism-related proceeds of crime and instrumentalities (i.e. the property used to commit crime, for example the aircraft in which drugs were smuggled).

35. The Bill will create a new order-making power to allow the Scottish Ministers and the Home Secretary to give effect to the Framework Decision. This is similar to the wide-ranging power contained in sections 111 and 112 of the Anti-terrorism, Crime and Security Act 2001 (which was time limited and was not exercised), except that it will be limited to implementation of this Framework Decision. It is possible that an amendment to the Bill might extend the power to implementation of the Framework Decision on the confiscation of assets, but that will depend on that Decision being adopted by the EU in time. If this addition is made we will notify Parliament.

36. *Advantages of utilising this Bill* The Framework Decision confers obligations on the UK so doing nothing is not an option. The proposed provision will give Ministers order-making powers only: the detail will be contained in secondary legislation, which will be subject to the scrutiny of the Scottish Parliament. The UK is required to implement the Framework Decision by August 2005 (additionally, after the Madrid Council the UK along with others gave undertakings to try to implement by December 2004) and there is no legislative opportunity currently in prospect in the Scottish Parliament within that timescale. It also makes sense to ensure that there is consistency across the UK.

Clauses 90 – 93, clause 100 – Amendments to the Proceeds of Crime Act 2002

37. *Policy Intent* To make amendments to the Proceeds of Crime Act 2002 (POCA) relating mainly to civil recovery provisions in that Act.

38. *Background* These amendments cover a number of specific areas which are summarised below:

- *Create a free standing freezing order for use in civil recovery investigations (clause 90)* In order to avoid dissipation of assets which are the subject of a civil recovery investigation, POCA provides for a freezing mechanism in Scotland together with the remedies of arrestment and inhibition. Under POCA, these are only available as adjuncts to an interim administration order. The practical result of this is that in some cases, interim administration is sought simply because of

the need for arrestment and inhibition. Interim administration is expensive. A free standing freezing order would allow assets to be frozen without having to appoint an interim administrator. This will save money and mirror the provisions already available under the criminal confiscation regime.

- *Allow the cost of receivers and externally appointed trustees in civil recovery to be recovered from the receipts of a civil recovery case (clause 91).* There is currently no provision to recover the costs of the interim administrations from the recovered assets. The proposal will bring the position on civil recoveries into line with criminal confiscation where the administration costs are netted off. The provisions of POCA make it clear that an employee of Scottish Ministers cannot be appointed as Interim Administrator, and costs are therefore incurred in every case. There is no similar provision in respect of the appointment of the trustee for civil recovery, however, and we expect that in most cases the Court will appoint an employee to be the Trustee. There should therefore be no need for any payment to be made. In complex cases where specialist knowledge is required for the disposal of assets, it may be necessary for a specialist to be appointed; this provision would cover the payment of such an appointee.

- *Amend the cash forfeiture provisions to allow for more effective operation of the scheme (clause 92).* The cash scheme allows for the summary seizure of cash which is obtained through unlawful conduct or is intended for use in unlawful conduct. The scheme requires a court order within 48 hours of seizure to secure the detention of the cash. If the 48 hour period includes a weekend or public holiday, the court may be closed throughout and the hearing may have to be held in the sheriff's home. Since the respondent has the right to attend the hearing, there are unwelcome security implications for the sheriff and the sheriff's household. It is therefore proposed to exclude weekends and public holidays from the 48 hour period to make sure that the hearing can always be held at court. This simple proposal would be of benefit to the administration of justice in Scotland.

- *Provision to give Scottish Ministers a right of appeal in cash forfeiture case and allow for appeals by both pursuer and respondent to be made to the Sheriff Principal rather than to the Court of Session for rehearing (clause 93).* In Scotland, it is Scottish Ministers who apply for cash forfeiture, through the Civil Recovery Unit. There is currently no power of appeal against a dismissal by the sheriff of an application for the forfeiture of cash under section 298 of POCA. There is, conversely, a right of appeal against a decision to make a forfeiture order, and so effectively respondents have a right of appeal but Scottish Ministers do not. Theoretically, the lack of a right of appeal could lead to the odd situation that a sheriff could exclude evidence on a point of law and refuse to make an order for forfeiture, leaving Scottish Ministers unable to appeal that decision. There is no reason why the Scottish Ministers should not have a right of appeal: the general position in civil law is that all parties have an appeal against a decision. The number of appeals by Ministers is likely to be minimal, but successful appeals could, of course, lead to the recovery of more seized assets. At the same time, we wish to provide that appeals should be made to the Sheriff Principal, who proceeds on the basis of a detailed note by the Sheriff, and not to the court of session as at present. The current route is anomalous in terms of normal Scottish civil procedure, and arguably more costly.

- *Amend the international co-operation provisions allowing for more effective operation of this scheme (clause 100).* International co-operation is achieved by Orders in Council made by Her Majesty under Part 11 of POCA. Drafting the Orders has been proving difficult. It has become clear that the enabling legislation in Part 11 does not allow for the provisions in Part 9 relating to the domestic regime to be applied in a modified manner to international requests so that the system of international co-operation can operate in a manner equivalent to the processes available domestically. The provisions therefore seek to amend Part 11 to rectify this problem. Furthermore, the definition of an "external investigation" in Part 11 of POCA is narrower than the definition in Part 8 of the equivalent domestic "confiscation investigation". It does not include an investigation into the extent or whereabouts of that benefit. This appears to be a bar to effective co-operation as, in making a request for assistance, the international partner will probably already be satisfied that an individual has benefited from crime and will be particularly interested in investigating extent and whereabouts.

39. *Advantages of utilising this Bill* The Proceeds of Crime Act 2002 contains a complex mix of reserved and devolved matters. For this reason a Westminster Bill is the most practical means of legislating and indeed POCA was the subject of the first Sewel motion passed by the Scottish Parliament. The same considerations apply to the current proposals.

Clause 133 – Hypothecated funding for Automatic Number Plate Recognition

40. *Policy Intent* To extend to Scotland the proposed specific power to provide ring-fenced funding to police authorities for Automatic Number Plate Recognition (ANPR) equipment and operations; with a view to reinvesting the revenue generated from fixed penalty notices issued for road traffic offences detected with the aid of ANPR cameras.

41. *Background* ANPR technology is already in use by the police both in Scotland and south of the border. ANPR cameras read the number plates of passing vehicles and match these against existing databases. This will indicate whether the vehicle is unregistered, unlicensed, stolen or is otherwise being sought by the police. This is an important tool in the fight against crime generally, as well as serious crime.

42. When ANPR intercept teams stop vehicles flagged by the ANPR system, they may also issue fixed penalty notices for more minor offences such as driving without a current excise licence. It is this aspect which is the subject of the current proposal.

43. To help fund equipment and operations for ANPR, it has been proposed that the revenue generated by the fixed penalty notices for offences detected as a result of ANPR activity could be hypothecated and reinvested in ANPR, in much the same way as safety (speed) camera fines are reinvested in safety camera partnerships. Pilots in several forces in England and Wales have already been authorised by HM Treasury to hypothecate the fine revenue in this way, and they are proving successful. With HM Treasury agreement, Home Office now propose to take powers in the Bill to enable them to provide ring-fenced funding to police authorities for ANPR. These provisions will provide the basis for hypothecation of fine revenue to Scotland, by providing for the fixed penalty payments to be paid into the

Scottish Consolidated Fund, and by providing a specific power for the Scottish Ministers to make payments to police authorities for this purpose.

44. *Advantages of utilising this Bill* The provisions provide the earliest opportunity to put the necessary primary legislation in place, which is a pre-requisite for securing the additional funding stream. Further, the policy intention is to be part of a common hypothecation funding arrangement agreed with HM Treasury to apply across the whole UK.

Clauses 140 – 143 – Amendments to the Police Act 1997, mainly in response to the Bichard Inquiry

45. *Policy Intent* To give effect to two of the key recommendations of the Bichard Inquiry by amending Part V of the Police Act 1997 (access to criminal record and other relevant information in connection with employment-related vetting) and to tidy up various sections of that Part of the 1997 Act.

46. *Background* The two recommendations of the Bichard Inquiry in question are concerned with the better protection for children and vulnerable adults and relate to access to various lists and databases for purposes of checking (a) if the applicant for a standard or an enhanced disclosure under Part V of the Police Act 1997 is disqualified from working with children or vulnerable adults in any part of the UK, (b) if there is relevant non-conviction information about the applicant that should be disclosed on an enhanced disclosure and (c) for verifying the applicant's identity. Information from these lists and databases would also be used in connection with considering a person's suitability to countersign applications for disclosures and to receive information about the applicant.

47. These changes will be achieved by amending Part V of the Police Act 1997 through the Bill.

48. Additionally, this Bill "tidies up" various sections of Part V which have been subject to a succession of amendments made by different jurisdictions and which have made the Act as it stands difficult to understand and use. The consolidated provisions look quite different from the original Part V, but the only substantive new material (apart from the Bichard implementation outlined above) is (a) powers to substitute enhanced disclosures for standard disclosures and vice versa to enable the Scottish Ministers (in practice Disclosure Scotland) to decide whether a higher or lower level of disclosure is more appropriate than the level applied for in relation to the purpose for which the application is made; and (b) powers for the Scottish Ministers to prescribe the categories of position eligible for enhanced disclosure in regulations so that new categories can be added without the primary legislation having to be amended. The new version of Part V makes it clear that the Scottish Ministers will exercise functions relating to Scotland.

49. *Advantages of utilising this Bill* The provisions relating to the Bichard recommendations and the provisions to tidy up Part V contain a mixture of reserved and devolved items which make legislation at Westminster the most practical route. Additionally, the use of this Bill will ensure early passage of legislation and will secure earlier implementation of key recommendations of the Bichard Inquiry than would otherwise be the case, thus enhancing child safety and the safety of vulnerable adults in Scotland.

Clause 147 and Schedule 15 – Regulation of the Private Security Industry in Scotland

50. *Policy Intent* To regulate the private security industry in Scotland by extending to Scotland the remit of the Security Industry Authority.

51. *Background* The private security industry in Scotland is a significant and growing employer encompassing a wide range of activities from guarding persons and property to private investigators, security consultants and door supervisors. The provisions will extend the remit of the Security Industry Authority to include Scotland. This will cover the same sectors which are regulated in England and Wales with the exception of vehicle immobilisers who do not operate in Scotland because wheel clamping is a criminal offence here. Additionally specific to Scotland, precognition officers, apart from those employed by the Crown or who are solicitors or advocates in Scotland, will require to obtain a SIA licence. The Bill will also extend the remit of the Scottish Public Services Ombudsman to cover the devolved functions of the SIA.

52. As noted earlier, this proposal was the subject of a consultation exercise conducted in 2001. This indicated widespread support for the proposals, and the Scottish Ministers announced their subsequent policy decision in March 2003. In addition, two further specific exercises have been conducted to engage small business and precognition officers. The Regulatory Impact Assessment for the extension of the SIA to Scotland, annexed to this memorandum, gives further details.

53. *Advantages of utilising this Bill* The policy intention is to extend to Scotland the remit of an existing English & Welsh body established by Westminster statute and to do so at the earliest legislative opportunity. Using this Bill ensures that regulation will be introduced more quickly in Scotland.

Scottish Executive
December 2004