Dear [Name],

CRIMINAL FINANCES BILL – UPDATE ON LEGISLATIVE CONSENT MOTION

You will recall from my letter to you of 20 January on the above that I indicated that an amendment, commonly referred to as the “Magnitsky amendment”, had been tabled for Commons Report Stage and undertook to write to you again if such an amendment was incorporated into the Criminal Finances Bill. The Committee’s report, published on 2 February, requested an update should this amendment be agreed.

I can now confirm to the Committee that the House of Commons voted on 21 February for a UK Government amendment (NC7) to be added to the Bill. The adopted amendment will explicitly insert an additional form of unlawful conduct into Part 5 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 amendment is attached at Annex A and can also be found here: https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0097/amend/criminal_daily_rep_0220.1-7.html

This new clause extends the meaning of "unlawful conduct" for the purposes of Part 5 of POCA, so that it includes conduct in other countries that constitutes a gross human rights abuse or violation of a person who has sought to expose illegal activity of a public official or person acting in an official capacity, or to promote human rights. Part 5 confers civil recovery powers in relation to property that has been obtained through unlawful conduct. The policy intention therefore 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 any such property obtained through unlawful conduct of that kind.

A consequential amendment to NC7, amendment 58, has also been adopted into the Bill. This amends section 19B of the Prescription and Limitation (Scotland) Act 1973 and provides for a limit of 20 years from the date of the abuse or violation referred to in NC7 for proceedings to be brought.

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The Magnitsky amendment is significant, as any such change to Part 5 of POCA broadens the scheme of civil recovery so as to extend Scottish Ministers’ functions under that Part and alter their executive competence. The amendments also make provision in relation to matters that fall within the legislative competence of the Scottish Parliament (the civil recovery of the proceeds of devolved crime and the limitation of civil actions). For both of these reasons, they would require the agreement of the Scottish Parliament via a Legislative Consent Motion.

Finally, I would like to take this opportunity to highlight two further sets of potential consequential amendments.

The Scottish and UK Governments are discussing the need to bring forward amendments in consequence of clause 26 (recovery orders relating to heritable property). If agreed, these would make such further provision as required to ensure that: (a) the new provisions being inserted by clause 26 are effective in enabling the trustee for civil recovery to secure vacant possession of any heritable property that is subject to a recovery order; (b) the procedure for removing any persons occupying such property is consistent with that for other types of action for removing and gives occupiers fair notice of the need to vacate the property, and (c) the Scottish Ministers notify the local authority of any application for a recovery order made in respect of a dwellinghouse in the local authority’s area, to complement existing safeguards against homelessness. Any such amendments would require the Scottish Parliament’s consent, as they would make provision in relation to matters falling within its legislative competence and would also confer functions on the Scottish Ministers so as to alter their executive competence.

Also under discussion is the possible need to amend the information-sharing provisions in Part 10 of POCA in consequence of clause 4 of the Bill (unexplained wealth orders: Scotland). The aim is to enable the Scottish Ministers to disclose information obtained by an unexplained wealth order for the same purposes (specified in section 441(2) of POCA) as they can disclose other information obtained in connection with their civil recovery functions. It would also allow the Lord Advocate, and certain Directors with functions under POCA, to disclose information to the Scottish Ministers which is relevant to them for the purpose of applying for an unexplained wealth order. Any such amendments would alter the Scottish Ministers’ executive competence and, therefore, require the Scottish Parliament’s consent.

I believe that the Legislative Consent Motion, which was included as part of the Memorandum considered by the Committee, is sufficiently broad in its scope to include these amendments.

I trust that this letter addresses the Committee’s request for an update on the Magnitsky amendment, and that it will be taken into account in the Parliament’s consideration of the Legislative Consent Motion on 2 March.