SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM

CRIMINAL FINANCES BILL

Background – the original Legislative Consent Memorandum and consideration of the Bill to date

1. This supplementary Legislative Consent Memorandum (LCM) has been lodged by Michael Matheson, MSP, Cabinet Secretary for Justice. This supplementary LCM augments the original LCM on the Criminal Finances Bill which was lodged on 22 November 2016. That LCM identified a number of provisions contained within the Bill that alter the executive competence of the Scottish Ministers and/or which fall within the legislative competence of the Scottish Parliament. Those provisions related to the Proceeds of Crime Act 2002 (POCA) and the Anti-terrorism, Crime and Security Act 2001 and included provisions on:

- unexplained wealth orders;
- forfeiture of personal (or moveable) property;
- forfeiture of money held in bank/building society accounts;
- seized money; and
- recovery orders relating to heritable property.

2. In addition, the Cabinet Secretary for Justice wrote to the Convener of the Justice Committee on 20 January to notify the Committee of the potential “Magnitsky” amendment which would explicitly insert an additional form of unlawful conduct – gross human rights abuses or violations – into Part 5 of POCA. The Cabinet Secretary then wrote again on 24 February to confirm the inclusion of a UK Government-drafted “Magnitsky” amendment in the Bill (clause 12 in the current draft of the Bill) and a consequential amendment to section 19B of the Prescription and Limitation (Scotland) Act 1973.

3. The letter of 24 February also set out possible further amendments in consequence of what is currently clause 28 of the Bill (recovery orders relating to heritable property). These amendments would ensure that (a) the new provisions being inserted by clause 28 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.

4. In addition, the letter of 24 February also highlighted a possible need to amend the information-sharing provisions in Part 10 of POCA in order to enable the Scottish Ministers to disclose and receive particular information with respect to Unexplained Wealth Orders (UWOs).

5. Since that letter was sent to the Convener of the Justice Committee, further work has been done to instruct and draft the amendments referred to in paragraphs 3 and 4 above. The amendments referred to in paragraph 4 were agreed at the Committee Stage.
in the House of Lords on 28 March. The amendments referred to in paragraph 3 are due to be considered at Report Stage.

6. Subsequent to the correspondence referred to above and consideration by the Justice Committee of the original LCM, the Legislative Consent Motion for the Criminal Finances Bill was passed by the Parliament on 2 March.

Links to the Original LCM and the letters of 20 January and 24 February

7. The original LCM is available here: http://www.parliament.scot/SPLCM-S05-6.pdf

8. The letter from the Cabinet Secretary for Justice to the Convener of the Justice Committee dated 20 January 2017 is available here: http://www.parliament.scot/S5_JusticeCommittee/General%20Documents/20170120CSfJt oMM.pdf

9. The letter from the Cabinet Secretary to Convener of the Justice Committee dated 24 February 2017 is available here: http://www.parliament.scot/S5_JusticeCommittee/General%20Documents/20170224CSfJt oMM.pdf

The latest version of the Bill


Need for a supplementary LCM

11. The Scottish and UK Governments have been working together on refining certain provisions of the Bill to make them as effective as possible. The UK Government has tabled further amendments to the Bill for consideration at Lords Committee Stage (28 March and 3 April). Further amendments are due to be tabled for Lords Report Stage.

12. Where these amendments are not covered by the scope of the original LCM, and where they fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, then a supplementary LCM is required.

13. The amendments detailed below largely build on, and make further provision in consequence of, the provisions of the Bill covered by the original LCM. They are aimed at improving the recovery of criminal assets under POCA and ensuring that Scotland, and the UK as a whole, is a more hostile place for those seeking to move, hide, use or reinvest the proceeds of crime or corruption. Since POCA is a UK-wide regime which relates to both reserved and devolved matters, this Bill offers the most efficient and effective means of making the provisions on a UK basis. The Scottish Government therefore recommends that the Scottish Parliament gives consent for the UK Parliament to consider these provisions as they extend and apply to Scotland.
Summary of developments and changes to the Bill

UWOs

14. Three separate amendments to the provisions on UWOs were tabled and then agreed at the Lords Committee Stage on 28 March. These amendments are included in this supplementary LCM because they extend the application of, and add to, the UWO provisions as set out in the original LCM. In so far as the amendments relate to the recovery of the proceeds of devolved crime, they fall within the legislative competence of the Scottish Parliament. In addition, these amendments further alter the executive competence of the Scottish Ministers. Accordingly, the Scottish Parliament’s consent is being sought as the amendments aim to strengthen the UWO-related provisions whilst also ensuring that adequate safeguards are in place.

UWOs – reducing the threshold

15. The first of these amendments changes the minimum value of any property which may be subject to a UWO from “greater than £100,000” to “greater than £50,000”. This change brings more properties into the scope of the provisions, particularly in parts of the UK where property prices are lower. The original LCM referred to the figure of £100,000 which was in the Bill as introduced (paragraph 2 of page 6 of the original LCM).

UWOs – property held in trust

16. The second UWO-related amendment amends the provisions on UWOs to explicitly include property that is held in a trust arrangement. These amendments ensure that UWOs can apply in situations where property is held in trust and/or corporate structures.

UWOs – compensation

17. The third UWO-related amendment provides for compensation to be paid, in certain circumstances, where an interim freezing order made in connection with a UWO is recalled. Any such compensation would be payable by the Scottish Ministers. This will bring the provisions on UWOs into line with other orders made under POCA which contain explicit compensation provisions so that a person can seek a remedy in the event of their property being wrongly frozen.

Seizure and forfeiture of cash – betting slips

18. A further amendment was agreed to at the Lords Committee Stage to expand the definition of cash that can be seized and forfeited under POCA to include betting slips (“betting receipts”). The Scottish Government pressed for this amendment to be made, so as to make the cash forfeiture regime more effective in countering the increasingly sophisticated ways in which criminals try to prevent the recovery of their criminal gains. Consent is therefore being sought, as this amendment falls within the Scottish Parliament’s legislative competence to the extent that it relates to the civil recovery of cash which is the proceeds of devolved crime.

Reconsideration of discharged confiscation orders

19. A new clause introduced at the Lords Committee Stage amends section 109 of POCA to make it explicit that the discharge of a confiscation order under section 109
(inadequacy of available amount: discharge of order) is not a barrier to the revisiting of that order under section 106 or section 107. This is a relatively minor amendment to ensure that the confiscation regime is fully effective. Consent is being sought because this amendment makes provision in relation to a matter which falls, in part, within the legislative competence of the Scottish Parliament.

Amendments to the Civil Jurisdiction and Judgments Act 1982

20. In addition, further amendments to the Civil Jurisdiction and Judgments Act 1982 were agreed to at Lords Committee Stage, which will mean that UWOs issued in the civil courts of one UK jurisdiction can be recognised and enforced in any of the other jurisdictions. These are consequential on the UWO provisions in clause 4, and supplement similar consequential amendments in paragraph 3 of Schedule 5 to the Bill regarding Interim Freezing Orders (clause 5), Account Freezing Orders and Account Forfeiture Orders (both clause 15). They will allow Scottish UWOs to be recognised and enforced elsewhere in the UK, and vice versa, in line with other similar types of order made under POCA. Consent is therefore being sought as these amendments make provision for a purpose which falls, in part, within the Scottish Parliament’s legislative competence.

Possible amendment to clause 51: power to make consequential provision

21. The Scottish and UK Governments are discussing the need to amend clause 51 to extend the Scottish Ministers’ regulation-making power to include also the power to (a) make provision in consequence of clause 28 (recovery of heritable property), and (b) amend, repeal or revoke (as required) any provision relating to devolved matters contained in an Act of Parliament or an instrument made under such an Act (as well as any provision in an Act of the Scottish Parliament, or an instrument made under an Act of the Scottish Parliament, as currently provided). Given the tight timetable for this Bill, the Scottish Parliament’s consent to the UK Parliament considering an amendment of this sort is being sought on a contingency basis, as it would further alter the executive competence of the Scottish Ministers.

Draft legislative consent motion

22. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

“That the Parliament agrees that provisions of the Criminal Finances Bill, introduced in the House of Commons on 13 October 2016, relating to Unexplained Wealth Orders, the seizure and forfeiture of cash in the form of betting receipts, discharged confiscation orders, the Civil Jurisdiction and Judgments Act 1982 and powers to make consequential provision, 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.”

Scottish Government
March 2017