LEGISLATIVE CONSENT MEMORANDUM

CRIMINAL FINANCES BILL

Background

1. This memorandum has been lodged by Michael Matheson MSP, Cabinet Secretary for Justice, under Rule 9B.3.1(a) of the Parliament’s Standing Orders. The Criminal Finances Bill (“the Bill”) was introduced in the House of Commons on 13 October 2016. The latest version of the Bill can be found at:

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

Content of the Bill

2. 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. 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 various measures in the Bill also support the implementation of Scotland’s Serious Organised Crime Strategy.

3. The Bill is in four parts:

   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.

   Part 2 ensures that relevant money laundering and asset recovery powers under POCA will be extended to apply to investigations under the Terrorism Act 2000 (TACT), and amends the Anti-terrorism, Crime and Security Act 2001 to provide for forfeiture of specific types of terrorist property.

   Part 3 creates two new corporate offences of failure to prevent facilitation of tax evasion.

   Part 4 includes minor and consequential amendments to POCA and other enactments.

4. The Bill contains a number of provisions which do not extend or apply to Scotland. It also contains provisions that extend to Scotland, but which relate to matters that are reserved to the UK Parliament (by virtue of Schedule 5 of the Scotland Act 1998) and do not alter the executive competence of the Scottish Ministers or the legislative competence of the Scottish Parliament. These include provisions relating to money laundering, terrorist property and corporate offences of failure to prevent facilitation of tax evasion.

5. Although clauses 9, 11 and 31 contain provisions that confer functions on the Scottish Ministers in relation to certain reserved matters, the intention is to remove these by amendment to the Bill (as they are more appropriately exercisable by a procurator fiscal). Legislative consent is not, therefore, being sought in respect of those clauses.
Provisions which relate to Scotland and require legislative consent

6. 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. The relevant provisions are set out below.

Part 1 – Proceeds of Crime

Chapters 1 (investigations), 3 (civil recovery) and 5 (miscellaneous) make amendments to POCA

Relevant Clauses: 4 to 6, 12, 13, 23 to 25, 27 and 28

Policy intent

7. The over-arching policy intention of the Scottish Ministers is to strengthen 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. The relevant clauses in Part 1 of the Bill (specified above) introduce various measures that are designed to achieve this.

Background

8. Serious organised crime can take place across the different nations of the UK and, so, it is important that a consistent approach in law is adopted as much as possible when our different justice agencies are taking action to tackle such criminal activity. There is extensive existing legislation in this area, including POCA, which sets out the legislative framework for the recovery of criminal assets. There are four main routes for recovery of assets through POCA: criminal confiscation (post-conviction); civil recovery (used where no conviction has taken place); cash seizure and forfeiture; and taxation. POCA also provides for a number of investigative powers, such as search and seizure powers and powers to apply for production orders and disclosure orders, and allows for the “restraint” of assets to prevent dissipation of assets prior to a confiscation order or recovery order being made.

9. POCA is an extremely powerful and flexible tool which has resulted in more than £90 million being removed from criminals in Scotland since 2003-04, which otherwise could have been re-invested in criminal enterprises. However, crime evolves and the legislation must evolve with it to maximise opportunities to recover proceeds of crime. The relevant clauses in Part 1 of the Bill maximise those opportunities.

10. Clauses 23 and 24, in particular, make specific provision to maximise the recovery of criminal assets in Scotland, as requested by the Scottish Government. Clause 23 will further align Scottish proceeds of crime legislation with that in the rest of the UK, to ensure that there are consistent measures across the jurisdictions for enforcing confiscation orders. Clause 24 will improve the efficiency and effectiveness of the civil recovery regime as it operates in Scotland.
11. The Annex provides further detail on the relevant clauses in Part 1 that relate to Scotland and require the Scottish Parliament’s consent.

Reasons for seeking legislative consent

12. Part 1 of the Bill makes provision in relation to matters which fall, in part, within the Scottish Parliament’s legislative competence. Although the criminal and civil law are generally devolved, POCA provides for the confiscation and civil recovery of the proceeds of reserved crime (e.g. drug trafficking and money laundering the proceeds of drug trafficking) as well as devolved crime. As POCA concerns a complex mix of both reserved and devolved matters, it is appropriate for the proposed amendments to be made by the UK Parliament. However, to the extent that the proposed amendments make provision in relation to the confiscation or civil recovery of the proceeds of devolved crime, they are within the Scottish Parliament’s legislative competence and therefore consent is being sought for this to be considered by the UK Parliament.

13. 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). As these alter the Scottish Ministers’ executive competence, the Scottish Parliament’s consent is being sought.

14. The Scottish Government therefore recommends that the Scottish Parliament gives consent for the UK Parliament to consider the proposed amendments to POCA that extend and apply to Scotland. The proposed changes are aimed at improving the recovery of criminal assets and, since POCA is a UK-wide regime, they can be most efficiently and effectively made on a UK basis by this Bill.

Part 2 – Terrorist property

Relevant Provisions: Clauses 32 and 33 and Schedules 3 and 4

Policy intent

15. These provisions are aimed at combating the financing of terrorism and recovering terrorist property.

Background

16. 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, and also 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.
17. 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.

Reason for seeking legislative consent

18. 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

Relevant provisions: Clauses 45 to 47 and 50 and Schedule 5

Policy intent

19. Part 4 of the Bill makes general provision, including making minor and consequential amendments, conferring power to make consequential provision, making financial provision, and making provision in relation to extent, commencement and short title.

Background

20. 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.

21. Clauses 46 and 47 enable 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 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 provision in connection with commencement of those provisions.

Reasons for seeking legislative consent

22. 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.

23. 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.

Consultation

24. Scottish Government officials have considered the legal and policy implications of the Bill, and have sought the views of relevant stakeholders. 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.

25. Stakeholders were supportive of the principles and objectives of the Bill. They have suggested some possible improvements to the provisions on unexplained wealth orders and forfeiture of personal and moveable property. Scottish Government officials have raised these issues with Home Office officials with a view to making the new provisions as effective as possible.

Financial implications

26. No significant additional costs to the Scottish Government, nor any significant additional direct costs to the Scottish criminal justice sector, are envisaged as a result of the provisions within the Bill.

27. 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.

Conclusion

28. Extending and applying the relevant provisions of the Bill to Scotland will help meet the Scottish Government’s aim of maximising the tools available in Scotland to enable an efficient and effective law enforcement response to serious organised crime. The Scottish Government recognises that such crime has no respect for borders or boundaries and, so, must be tackled across multiple jurisdictions. The proposals in the Bill seek both to provide new measures, and reform existing measures, to disrupt and combat this kind of criminality by making it less profitable. They will go a long way to ensuring that Scotland, and the UK as a whole, is a more hostile place for those seeking to move, hide, use or re-invest the proceeds of crime or corruption.

29. It is the view of the Scottish Government, therefore, that the relevant provisions of the Bill, as outlined above, will help to achieve its objective of reducing the harm caused by serious organised crime and making Scotland a safer, fairer and more prosperous country.

Draft Legislative Consent Motion

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

“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.”

Scottish Government
November 2016
Annex

Legislative Consent Memorandum

Criminal Finances Bill

Relevant provisions in Part 1 of the Bill which relate to Scotland

1. The following paragraphs describe the relevant provisions which apply to Scotland and for which consent is sought in terms of the Legislative Consent Motion. Clause numbers refer to clauses in the Bill following its introduction into the House of Commons on 13 October 2016.

Part 1: Proceeds of Crime

Chapter 1: Investigations

Clause 4: Unexplained wealth orders: Scotland

2. Clause 4 amends Chapter 3 of Part 8 of POCA, which makes provision in relation to investigations in Scotland. It inserts new provisions which enable the Court of Session, on an application made by the Scottish Ministers, to make an unexplained wealth order (UWO) in respect of any property valued at over £100,000. In practice, the Civil Recovery Unit is likely to make such applications on behalf of Scottish Ministers.

3. A UWO is an order that requires persons who are suspected of involvement in, or being connected with, serious criminality to explain how they obtained certain property where the value of the property appears to exceed their known, lawfully obtained, income. A failure to provide a response would give rise to a rebuttable presumption that the property is recoverable for the purposes of any subsequent civil recovery action taken in respect of that property under Part 5 of POCA. A person could also be convicted of a criminal offence, if he or she makes false or misleading statements in response to a UWO. Law enforcement agencies often have reasonable grounds to suspect that identified property of such persons is the proceeds of serious crime. However, they are unable to freeze or recover the property under the current provisions in POCA due to an inability to obtain evidence (often because of a lack of full co-operation and assistance in obtaining relevant evidence from overseas authorities). UWOs will overcome this difficulty.

4. The Court of Session may also make a UWO in respect of foreign politicians or officials, or those associated with them, known as “Politically Exposed Persons” (PEPs). A UWO made in relation to an overseas PEP would not require suspicion of serious criminality. This measure is aimed at preventing those involved in corruption overseas from laundering the proceeds of crime in the UK; and addresses the fact that it may be difficult for law enforcement agencies to satisfy any evidential standard at the outset of such an investigation given that all relevant information may be outside of the jurisdiction.

5. The new provisions allow for a UWO to be varied or discharged on the application of the Scottish Ministers or any person affected by the order.
Clause 5: Interim freezing orders

6. Clause 5 also amends Chapter 3 of Part 8 of POCA by inserting new provisions to enable the freezing of property identified in a UWO, to prevent the property being dissipated while it is subject to the order.

7. The new provisions allow the Court of Session to make an interim freezing order in respect of any property to which a UWO applies. It may do so if it considers it necessary in order to avoid the risk of any future recovery order under Part 5 of POCA being frustrated. The effect of the order, therefore, is to prohibit any person from in any way dealing with the property to which it relates. This is subject to any exclusions which the Court of Session may make so as to enable a person, for example, to meet reasonable living expenses or to carry on any trade or business.

8. An application for an interim freezing order may only be made by the Scottish Ministers, and must be made in the same proceedings as those in which the UWO is made. Clause 5 also makes provision for the variation and recall of such orders, for the sisting of other legal proceedings concerning the same property, for the arrestment or inhibition of property affected by an interim freezing order and for the appointment of receivers in connection with such orders.

Clause 6: External assistance

9. Clause 6 further amends Chapter 3 of Part 8 of POCA to provide for requests for assistance in enforcing UWOs abroad.

10. Where the Scottish Ministers believe that property subject to a UWO is at risk of diminution (so as to risk frustrating any future recovery order that might be obtained), and that the property is in a country outside the United Kingdom, they can make a request for assistance (in relation to that property) to the Secretary of State who may forward the request to the government of the country concerned. This involves a request to the overseas government to prevent any person from dealing with the property, and for assistance with the management of the property (including with securing its detention, custody or preservation).

11. Furthermore, when an interim freezing order is in effect and a receiver has been appointed, the receiver may send a similar request for assistance to the Secretary of State with a view to it being forwarded to the relevant overseas authority. The Secretary of State must forward the request for assistance. The Secretary of State has no discretion in relation to such a request given that the receiver is an officer of the court.

Chapter 3: Civil Recovery

Clause 12: Forfeiture of certain personal (or moveable) property
Clause 13: Forfeiture of money held in bank and building society accounts

12. Clauses 12 and 13 amend Part 5 of POCA. Part 5 provides for the Scottish Ministers to recover, in civil proceedings, property which is (or represents) property obtained through unlawful conduct. The Civil Recovery Unit exercises these functions on behalf of the Scottish Ministers. Clauses 12 and 13 insert new Chapters 3A and 3B which make provision for the seizure and forfeiture of certain types of personal or moveable property (known as “listed assets”), as well as the freezing and forfeiture of money held in
bank and building society accounts, where the listed asset or money is obtained through unlawful conduct or is intended for use in such conduct.

13. The new Chapters largely mirror the existing cash forfeiture scheme in Chapter 3 of Part 5 of POCA. In particular, new Chapter 3A confers similar search, seizure and detention powers as are available to constables and other relevant officers under that scheme, subject to the same requirements for prior approval.

14. The new provisions enable the Scottish Ministers to apply to the sheriff for the forfeiture of monies stored in bank accounts, as well as items of personal property, like precious metals and jewels, artistic works, face-value vouchers and postage stamps. This takes account of evidence that these items are being used to move value, both domestically and across international borders. To counter any new methods of moving or concealing proceeds of crime, the Secretary of State may, by regulations, amend the list of specified assets (after consulting the Scottish Ministers).

Forfeiture of cash

15. In addition to the provisions above on forfeiture of personal or moveable property and money held in bank and building society accounts, the intention is to amend the Bill by introducing a new clause which will expand the existing definition of cash contained in Chapter 3 of Part 5 of POCA (section 289(6)). The new clause is intended to treat gaming vouchers (also referred to as ticket in ticket out vouchers) and casino tokens as cash for the purposes of the civil recovery powers conferred by that Chapter. The expanded definition will apply to the whole of the UK.

Chapter 5: Miscellaneous

16. The Scottish Government, following advice from stakeholders, has requested two bespoke amendments to POCA to reflect circumstances that are specific to Scottish cases. These are contained in clauses 23 and 24.

Clause 23: Seized money

17. Clause 23 inserts a new section into Part 3 of POCA, which relates to confiscation proceedings in Scotland. It essentially replicates for Scotland sections 67 and 215 of POCA (which apply in England and Wales and Northern Ireland respectively), although with certain modifications.

18. It 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. In contrast to sections 67 and 215, this power will only apply to accounts held in the name of the person against whom the confiscation order is made, not third-party accounts. This is to tackle the problem of accused persons not paying, or delaying payment of, their confiscation orders despite holding money in a bank or building society account.

19. Furthermore, it allows for the High Court of Justiciary or the sheriff to order money which has been seized from an accused person, and which is being detained by Police Scotland or HMRC for the purposes of a criminal investigation or prosecution, to be paid in satisfaction of that person’s confiscation order. This reflects the “best evidence rule” in Scottish criminal proceedings, which requires seized money to be lodged in court as a
cash production (whereas in the rest of the UK, the money is generally banked). Most confiscation cases involve seized money, so this will provide a more expedient way for law enforcement authorities to release any money seized from an accused person in full or part payment of that person’s confiscation order.

20. The intention, however, is to amend clause 23 so that it applies more broadly to money seized by all relevant law enforcement officers (not just constables and officers of Revenue and Customs), and which is being detained in connection with a criminal investigation or prosecution or with an investigation of a kind mentioned in section 341 of POCA. This aligns with similar amendments proposed for sections 67 and 215 of POCA.

21. 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 procedure.

Clause 24: Recovery orders relating to heritable property

22. Clause 24 amends sections 266 and 267 in Part 5 of POCA, which relate to the civil recovery of the proceeds of unlawful conduct. This is to remove existing jurisdictional and procedural barriers that can delay the recovery of possession of heritable property (e.g. a house, flat or commercial premises) to which a recovery order applies. The amendments provide for a more efficient and effective means to recover possession of heritable property in Scotland where the Court of Session makes a recovery order under section 266.

23. When a recovery order is granted, the property automatically vests in the trustee for civil recovery; and the previous owner loses his or her title. Since any owner-occupier of property subject to a recovery order has no right or title to occupy the property, the appropriate way to recover possession in these circumstances is by warrant for ejection. A decree of removing will also be required to remove any sitting tenant(s) from heritable property to which a recovery order applies.

24. At present, the trustee for civil recovery has to seek recovery of possession through a separate process in the Sheriff Court. This process can take as long as a year. During this time, there is a risk of the degeneration of the heritable property or the building up of mortgage arrears which ultimately compromise the amount recovered. Such delays also permit those involved in criminality to continue to occupy the property, despite the Court of Session having determined that it was obtained through unlawful conduct. Such a scenario does not maximise the disruption of serious organised crime.

25. The amendments allow for the recovery of possession to be dealt with as part of the civil recovery proceedings (which themselves can take up to two years to conclude). They require the Court of Session, on the application of the Scottish Ministers (as the enforcement authority), to grant decree of removing and warrant for ejection in relation to any persons occupying heritable property in respect of which it makes a recovery order. They also confer the function of enforcing such a decree and warrant on the trustee for civil recovery, in whom the property vests by virtue of the recovery order.
Clause 25: Money received by administrators

Clause 25 is a technical amendment to paragraph 6 of Schedule 3 to POCA, which makes provision in relation to money received by administrators appointed in connection with Scottish confiscation proceedings. It redefines “bank” for the purposes of that provision on account of the fact that the Banking Act 1987, referred to in the existing definition, has been superseded by the Financial Services and Markets Act 2000.

 Clause 27: Confiscation investigations: determination of the available amount

26. Section 341 of POCA defines the types of investigations in respect of which the powers set out in Part 8 may be variously exercised. Clause 27 amends this section to extend the definition of “confiscation investigation” to include an investigation into the amount available to an accused person for satisfying a confiscation order.

27. The “available amount” is the total value (at the time the confiscation order is made) of all of an accused person’s free property – minus certain prior obligations (e.g. earlier fines) – plus the total value of all tainted gifts made by the accused. In making a confiscation order, the High Court of Justiciary or the sheriff must set an amount equivalent to the accused’s benefit from his or her criminal conduct. That is, unless the available amount is shown to be less, in which case the accused is ordered to pay that amount. It is for the accused to show that the amount available to satisfy a confiscation order is less than his or her benefit from criminal conduct.

28. The amendment will enable the police or prosecutor to test the available amount claimed by the accused, or to reinvestigate an accused’s financial position where he or she is suspected of having subsequently obtained further property that could be realised to satisfy a confiscation order up to the value of the accused’s benefit from criminal conduct (as determined by the court at the time of making the order). It will therefore allow the Part 8 investigatory powers to be used to gather evidence to support a prosecutor’s application to the court to make a new calculation of the available amount under section 107 of POCA.

Clause 28: Confiscation orders and civil recovery: minor amendments

29. Clause 28(5) makes a minor amendment to section 306 of POCA, which clarifies the meaning of “mixed property” for the purposes of civil recovery proceedings under Part 5 of POCA. It extends the types of mixed property (i.e. property obtained through unlawful conduct which is mixed with legitimate property) that can be recovered. The list of examples provided now includes recoverable property that is used for the discharge (in whole or in part) of a mortgage, charge or other security.

30. In addition, the intention is to amend clause 28 to clarify the definition of “free property” for the purposes of confiscation proceedings in Scotland. This is to provide that cash which is detained pending forfeiture in civil proceedings under section 298(4) of POCA is not free property. It will mirror the amendment to the definition of “free property” in relation to confiscation proceedings in England and Wales, which is contained in clause 28(2) of the Bill as introduced.
This Legislative Consent Memorandum relates to the Criminal Finances Bill (UK legislation) and was lodged with the Scottish Parliament on 22 November 2016.