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Dear Margaret,

Criminal Finances Bill – update on Legislative Consent Motion

I understand that the Justice Committee are currently considering the Legislative Consent Memorandum and draft Legislative Consent Motion for the Criminal Finances Bill. With that in mind, I am writing to provide you with an update on recent developments relating to the Bill and the Legislative Consent Motion.

The Bill was introduced in the House of Commons on 13 October 2016. The Commons Committee stages are now complete with the Report Stage likely to be timetabled for early February before the Bill moves to the House of Lords.

It has come to my attention that an amendment, commonly referred to as the “Magnitsky amendment”, has been tabled for Commons Report Stage. This amendment has been tabled by backbench MPs and has attracted significant cross-party support. It proposes explicitly inserting an additional form of unlawful conduct into 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 intention 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 those assets (based on a rebuttable presumption that they were the proceeds of that person’s unlawful conduct).

The amendment derives its name and objectives from the case of Sergei Magnitsky, a Russian lawyer and auditor who was arrested in 2008 and died in custody in Moscow in 2009. He had alleged that there had been large scale theft from the Russian state sanctioned and carried out by Russian officials. His case led to the adoption of a “Magnitsky Act of Accountability” in the United States under which those Russian officials believed to be involved in his death were barred from entering the United States or using its banking system. That Act was recently extended so that it could be applied to those involved in human rights abuse globally.

The UK Government is considering the amendment at present and a Government amendment is a distinct possibility. The non-government amendment and any UK Government amendment would be considered and voted on as part of the Bill's House of Commons Report stage.

While the amendment does not mention Scotland, any such change to Part 5 of POCA would confer functions on the Scottish Ministers (in terms of their role with respect to civil recovery). Part 5 also falls (in part) within the legislative competence of the Scottish Parliament. For both of these reasons, it would require the agreement of the Scottish Parliament through the Legislative Consent Motion.

I propose to write to you again at the time of the Commons Report Stage with an update on whether an amendment of this sort has been incorporated into the Bill but wanted to make you aware at this stage of that possibility.

There is one other technical issue on which I also wanted to update the Committee. Following its consideration of the Legislative Consent Memorandum, the Delegated Powers and Law Reform Committee published a report (its "16th Report of 2016") which was largely supportive of the delegation of powers to Scottish Ministers contained in the Bill. However, the report did raise one issue around the parliamentary procedure for two of the commencement-related regulations in the Bill:

"43. However, the Committee recommends to the Justice Committee that, in relation to clauses 53(2) and (9), the powers conferred upon the Scottish Ministers to make commencement Regulations should be subject to the Parliamentary procedure which usually applies to commencement Regulations. The Regulations should be laid before the Parliament and not subject to further procedure (that is, affirmative or negative), in accordance with section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010."

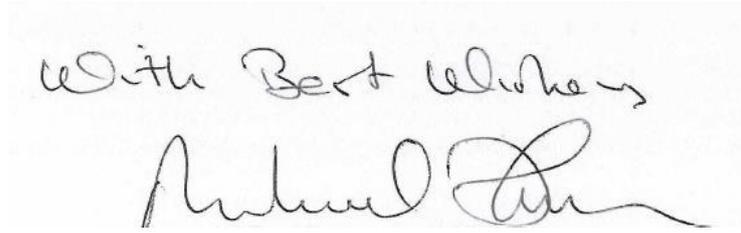
I thought it would be helpful to set out the Scottish Government's position on this issue. The Scottish Government considers that commencement regulations made by the Scottish Ministers under those powers are, by virtue of section 30(1) of the Interpretation and Legislative Reform (Scotland) Act 2010 ("the 2010 Act"), automatically subject to the parliamentary procedure which usually applies to commencement regulations – namely, the default laying requirement in section 30(2) of that Act. Regulations made using those powers will therefore be laid before the Scottish Parliament, but not subject to any further procedure, in accordance with section 30(2) of the 2010 Act.

The approach taken in clause 53(2) and (9) of the Criminal Finances Bill was followed in relation to similar commencement powers conferred by section 88(2) and (9) of the Serious Crime Act 2015. The Delegated Powers and Law Reform Committee's 70th Report of 2014, regarding the Legislative Consent Memorandum on the Bill for that Act, agreed that commencement regulations made under that Act would be subject to the default laying requirement in section 30(2) of the 2010 Act (paragraphs 35 and 36). The Serious Crime Act 2015 (Commencement No. 1 and Saving Provision) (Scotland) Regulations 2016 (SSI 2016/11) were duly laid in accordance with that requirement.

The Committee may wish to note that the same approach was also taken in the Energy Act 2011 (section 121(2) and (6)), the Defamation Act 2013 (section 17(5)), the Growth and Infrastructure Act 2013 (section 35(4) and (5)), the Marine Navigation Act 2013 (section 13(3) and (4)), and the Anti-social Behaviour, Crime and Policing Act 2014 (section 185(6) and (9)).

As I have said above, I propose to write to you again with a further update on the Magnitsky amendment once Commons Report Stage is complete and MPs have voted on whether to include an amendment of this sort in the Bill.

I trust that this update is helpful to Committee members.



With Best Wishes
Michael Matheson

MICHAEL MATHESON