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# **Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh**

## **Supplementary Legislative Consent Memorandum on the Criminal Finances Bill**



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# Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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# Committee Membership



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**Monica Lennon**  
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# Introduction

1. At its meeting on Tuesday 25 April 2017, the Committee considered amendments to the latest version of the Criminal Finances Bill (“the Bill”) that confer powers to make subordinate legislation on the Scottish Ministers.
2. This followed a Supplementary Legislative Consent Memorandum<sup>i</sup> (“the Supplementary LCM”) lodged by the Scottish Ministers on 30 March 2017. That Supplementary LCM identified various amendments to the Bill which fall within the legislative competence of the Scottish Parliament or which alter the executive competence of the Scottish Ministers.
3. The Bill is a UK Government Bill which was introduced in the House of Commons by the Home Secretary Amber Rudd on 13 October 2016.<sup>ii</sup> Its purpose is to give law enforcement agencies enhanced powers to recover the proceeds of crime, tackle money laundering and corruption and counter terrorist financing. Amendments to the Bill are currently being considered at Report Stage in the House of Lords on 25 April 2017, having previously been considered at Committee Stage in that House on 3 April 2017.
4. On 13 December 2016 the Committee previously considered<sup>iii</sup> and reported<sup>iv</sup> on the provisions in the Bill at that time that conferred powers to make subordinate legislation on the Scottish Ministers. This followed a Legislative Consent Memorandum (LCM)<sup>v</sup> lodged by the Scottish Ministers on 22 November 2016. A legislative consent motion was subsequently lodged<sup>vi</sup> on 8 February 2017 and agreed<sup>vii</sup> by the Scottish Parliament on 2 March 2017.
5. The lead Committee in respect of both the LCM and the Supplementary LCM is the Justice Committee. The draft motion, which will be lodged by the Cabinet Secretary for Justice, Michael Matheson MPS, is:

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i Available at: <http://www.parliament.scot/S5ChamberOffice/SPLCM-S5-6a.pdf>

ii The latest version of the Bill can be found at: <http://services.parliament.uk/bills/2016-17/criminalfinances/documents.html>

iii The Official Report for the Committee’s meeting is available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10690&mode=pdf>

iv The report is available at: [http://www.scottish.parliament.uk/S5\\_Delegated\\_Powers/Reports/DPLRS052016R16.pdf](http://www.scottish.parliament.uk/S5_Delegated_Powers/Reports/DPLRS052016R16.pdf)

v Available at: <http://www.parliament.scot/SPLCM-S05-6.pdf>

vi The motion is available at: <http://www.scottish.parliament.uk/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S5M-03924&ResultsPerPage=10>

vii The Official Report is available at: <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10818&mode=pdf>

” *“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.”*

6. Like the LCM, the Supplementary LCM was considered by the Committee under Rule 9B.3 of the Parliament’s Standing Orders. Paragraph 6 of Rule 9B.3 provides that where the Bill that is the subject of a legislative consent memorandum contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Delegated Powers and Law Reform Committee shall consider and may report to the lead committee on those provisions.

# Delegated powers

7. This report considers the latest version of the Bill (dated 3 April 2017) together with the amendments that have been tabled to the Bill since then insofar as they confer delegated powers upon the Scottish Ministers. It does not reconsider the delegated powers in the Bill that the Committee previously reported on except where those powers have changed to a material extent.
8. Amendments to the Bill were approved at Committee Stage of the House of Lords on 3 April 2017. The Committee notes that a small number of those amendments relate to the powers the Committee previously reported on. However, those amendments are minor in nature and do not necessitate further detailed consideration in this report<sup>viii</sup>.
9. The remainder of this report considers amendments to the delegated powers conferred on the Scottish Ministers tabled since the Bill was approved at Committee Stage of the House of Lords on 3 April 2017. The only relevant amendments are those tabled on 20 April 2017.

## Part 4: General

### Clauses 53 and 54: Power to make consequential provision and procedural requirements

- **Power conferred on: the Scottish Ministers**
  - **Power exercisable by: Regulations made by SSI**
  - **Parliamentary procedure: affirmative/negative (depending on content)**
10. Currently (i.e. prior to the proposed amendments tabled on 20 April 2017 being voted on), clause 53 allows the Scottish Ministers to make amendments to Acts of the Scottish Parliament and Scottish Statutory Instruments in consequence of any provision in Parts 1 or 2 of the Bill. This includes amending, repealing or revoking such provisions.
  11. As the Supplementary LCM indicates, amendments are to be made to clause 53 of the Bill (as updated) to alter the Scottish Ministers' Regulation-making powers. As amended, the relevant powers will also include powers to:
    - make provision in consequence of clause 28 (recovery of heritable property);
    - and

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<sup>viii</sup> Clause 57 (clause 53 at the time it was previously considered by the Committee) contains the same commencement power. However, an additional clause (new clause 31(4)) relating to the reconsideration of a discharged confiscation order may be commenced by the Scottish Ministers. There is also a minor amendment to the Regulation-making power conferred on the Scottish Ministers in clause 27 of the Bill (clause 25 at the time it was previously considered by the Committee) in relation to types of money that can be seized. The amendment clarifies the scope of the provision.



- amend, repeal and revoke (as required) any provision relating to devolved matters contained in an Act of Parliament or an instrument made under such an Act.
12. The Supplementary LCM states that, in light of the tight timetable for the Bill, the Scottish Parliament's consent to the UK Parliament considering an amendment in these terms is being sought on a contingency basis.
  13. In the first instance, the Committee considers that it is a matter of concern that the Parliament has not had a reasonable amount of time to fully scrutinise these changes. The relevant amendments were tabled in the House of Lords on Thursday 20 April 2017. Consent is being sought from the Scottish Parliament on Tuesday 25 April, which is the same day that the House of Lords votes on the amendments at Report Stage. The Committee's report will unavoidably be published very shortly before the Scottish Parliament votes on the Supplementary Legislative Consent Motion in the afternoon of the same day.
  14. The Bill was already at Committee Stage in the House of Lords when the Supplementary LCM was lodged on 30 March 2017. The Committee recognises that the announcement of a UK General Election to be held on 8 June 2017, and the consequential dissolution of the UK Parliament, may have impacted on the timing of the amendments further. However, from the perspective of Parliament scrutiny, it is a matter of concern that the Committee will not be able to avoid publishing its report on the same day that both the amendments are voted on at Report Stage in the House of Lords and the Scottish Parliament votes on the Supplementary Legislative Consent Motion.
  15. Having made that initial observation, the proposed amendments are considered below.

### ***Provisions***

#### Amendment to clause 53 in consequence of clause 28

16. The amendments as tabled on 20 April 2017 amend clause 53 in relation to clause 28 of the Bill (among other clauses).
17. Currently, clause 28 inserts a new subsection (8ZA) into section 266 of the Proceeds of Crime Act 2002. It provides that where any recovery order is made by the Court of Session which includes heritable property, the Court of Session must also grant decree of removing and warrant for ejection, enforceable by the trustee for civil recovery against any person occupying such property.
18. The amendments tabled to clause 28 provide for the Scottish Ministers to notify the local authority of any application for a recovery order in respect of a dwellinghouse in that local authority's area<sup>ix</sup>. The amendments also seek to ensure that the trustee for civil recovery can secure vacant possession of any heritable property that is subject to a recovery order. The amendments provide that any lease over the heritable property immediately terminates on the granting of decree of removing and warrant for ejection<sup>x</sup>.
19. Clause 53(2) as amended would provide that the Scottish Ministers may by Regulations make provision in consequence of section 28 or any provision made by

or under Parts 1 or 2 that extends only to Scotland. Although clause 28 is contained in Part 1 of the Bill, separate provision is made in relation to that clause because, by virtue of clause 56(4), it is not restricted to Scotland only.

#### Amendment to clauses 53 and 54 generally

20. The effect of the amendments as tabled on 20 April 2017 would be to extend the power of the Scottish Ministers under clause 53. The Scottish Ministers would be able to make consequential provision to UK Acts of Parliament and Statutory Instruments in addition to making such amendments to Acts of the Scottish Parliament and Scottish Statutory Instruments.
21. The amendments also clarify that any power of the Scottish Ministers to make consequential amendments can only be exercised to the extent that the provision would be within legislative competence. Such a provision made in Regulations is within legislative competence if it would fall within the legislative competence of the Scottish Parliament if included in an Act of the Scottish Parliament.
22. Clause 54 sets out procedural requirements in relation to clause 53. The effect of the amendments is that:
  - the affirmative procedure would apply to Regulations making consequential amendments to primary legislation (which now includes Acts of Parliament in addition to Acts of the Scottish Parliament); and
  - the negative procedure would apply to Regulations making consequential amendments to secondary legislation (which now includes UK Statutory Instruments in addition to Scottish Statutory Instruments).

#### **Comment**

#### Amendment to clause 53 in consequence of clause 28

23. The Committee is content with the amendments to the Regulation-making power in clause 53 so as to include the power to consequentially amend clause 28. This is on the basis that this power will be limited to consequential modifications necessary to implement clause 28 insofar as that is within the legislative competence of the Scottish Parliament.

#### Amendment to clauses 53 and 54 generally

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<sup>ix</sup> As a result, a minor amendment is tabled in schedule 5 of the Bill to extend the Regulation-making power conferred on the Scottish Ministers in section 11 of the Homelessness etc. (Scotland) Act 2003 to prescribe the form of such a notice and the manner in which it is to be given. This extension is a minor and consequential extension to an existing power and is therefore not considered in any further detail.

<sup>x</sup> These particular amendments also provide that a number of enactments do not apply in relation to the heritable property. Those enactments provide in a number of places that various notices and applications are to be made in a form prescribed by the Scottish Ministers. However, the amendments do not remove the Regulation-making powers of the Scottish Ministers to prescribe those forms and notices generally and are therefore not considered in any further detail.

24. The Committee previously reported that it was content with the power to make consequential amendments to Acts of the Scottish Parliament and Scottish Statutory Instruments.
25. It also previously reported that it was content that the affirmative procedure applies to consequential amendments to Acts of the Scottish Parliament and that the negative procedure applies to consequential amendments to Scottish Statutory Instruments.
26. The Committee is content with the amendments to the Regulation-making powers in clause 53 insofar as they extend to repealing, revoking or otherwise amending UK Acts of Parliament and Statutory Instruments in consequence of Parts 1 and 2 of the Bill. The power will still be limited to consequential modifications necessary to implement Parts 1 and 2 insofar as they extend to Scotland only (in addition to clause 28).
27. While the amendments extend the scope of these “Henry VIII powers”, the Committee is also content that the affirmative procedure would apply to Regulations making consequential amendments to UK Acts of Parliament. This would mirror the use of that procedure currently in the Bill in relation to Acts of the Scottish Parliament.
28. The use of the negative procedure is also considered proportionate in relation to Regulations making consequential amendments to UK Statutory Instruments. It would also mirror the current position that the negative procedure applies to consequential amendments to Scottish Statutory Instruments.

## Recommendation

**The Committee finds that the amendments tabled for Report Stage in the House of Lords on 25 April 2017 to the powers which the Bill delegates to the Scottish Ministers in clauses 53 and 54 are acceptable in principle. It is also content with the Parliamentary procedure to which those amended powers are subject.**

**However, the Committee considers that it is a matter of concern that the Parliament has not had a reasonable amount of time to fully scrutinise these changes. From the perspective of parliamentary scrutiny, it is regrettable that the Committee will not be able to avoid publishing its report on the same day that both the amendments are voted on at Report Stage in the House of Lords and the Scottish Parliament votes on the Supplementary Legislative Consent Motion.**

