



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

12th Meeting, 2016 (Session 5)

Tuesday 13 December 2016

The Committee will meet at 10.15 am in the Mary Fairfax Somerville Room (CR2).

1. **Draft Budget Scrutiny 2017-18:** The Committee will take evidence in preparation for its scrutiny of the Scottish Government's Draft Budget 2017-18 from—

Caroline Gardner, Auditor General for Scotland, Angela Cullen, Assistant Director, and Mark Roberts, Senior Manager, Audit Scotland.

2. **Inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service:** The Committee will take evidence from—

Gordon Dalyell, Scotland's representative on the National Executive Committee, Association of Personal Injury Lawyers;

Patrick McGuire, Partner, Thompsons Solicitors.

3. **Criminal Finances Bill (UK Parliament legislation):** The Committee will consider its approach to the legislative consent memorandum lodged by Michael Matheson, Cabinet Secretary for Justice (LCM-S5-6).
4. **Justice Sub-Committee on Policing:** The Committee will consider a report back from the Sub-Committee meeting on 8 December 2016 from the Convener of the Sub-Committee.

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The papers for this meeting are as follows—

Agenda item 1

Paper by the clerk - Draft Budget Scrutiny 2017-18

J/S5/16/12/1

SPICe Briefing - Draft Budget Scrutiny 2017-18

J/S5/16/12/2

[Written submission from Audit Scotland](#)

Agenda item 2

Paper by the clerk - Inquiry into COPFS

J/S5/16/12/3

[Written submission from the Association of Personal Injury Lawyers](#)

[Written submission from Thompsons Solicitors](#)

Agenda item 3

Paper by the clerk - Criminal Finances Bill LCM

J/S5/16/12/4

Justice Committee

12th Meeting, 2016 (Session 5), Tuesday 13 December 2016

Draft Budget Scrutiny 2017-18

Note by the clerk

Introduction

1. The Committee agreed that it would focus its budget scrutiny on the Crown Office and Procurator Fiscal Service (COPFS). In advance of the 2017-18 draft Scottish Government budget being published on Thursday 15 December 2016, the Committee agreed to invite the Auditor General for Scotland to provide evidence on Tuesday 13 December.

2. Audit Scotland carries out annual audits of the COPFS, the most recent is [the Crown Office and Procurator Fiscal Service annual audit 2014/15](#), and has recently carried out a performance audit (published in September 2015) on the [Efficiency of prosecuting criminal cases through the sheriff court system](#).

Committee consideration

3. A written submission has been received from the Auditor General for Scotland and is attached at Annexe A.

4. The Lord Advocate will give evidence on the 2017-18 draft budget at the Committee's 20 December meeting, and this evidence session with the Auditor General is intended to help inform the 20 December session.

Justice Committee

Scrutiny of the Scottish Government's Draft Budget 2017-18

Written submission from Audit Scotland

Introduction

1. The Auditor General for Scotland appoints the auditor of the Crown Office and Procurator Fiscal Services (COPFS). Audit Scotland is the auditor of the COPFS. This submission summarises the most important findings of our recent audit work in COPFS, both our annual audits of its annual report and accounts and our performance audit (published in September 2015) on the *Efficiency of prosecuting criminal cases through the sheriff court system*.¹ The latter report focused on the sheriff court system as a whole, not solely on COPFS.

Financial context

2. In the five years to 2015/16, COPFS' total expenditure increased in cash terms from £108.3 million in 2011/12 to £113.3 million in 2015/16. COPFS' budget for 2016/17 is £113.5 million. In real terms (2015/16 prices), COPFS' total expenditure decreased from £114.6 million in 2011/12 to £113.3 million in 2015/16 (Figure 1).

Figure 1. COPFS' expenditure, 2010/11 – 2015/16 (£million)

	Cash			Real		
	Revenue	Capital	Total	Revenue	Capital	Total
2011/12	105.6	2.7	108.3	111.7	2.9	114.6
2012/13	104.5	4.6	109.1	108.3	4.8	113.0
2013/14	106.1	3.6	109.7	108.2	3.7	111.8
2014/15	108.9	3.6	112.4	109.4	3.6	113.0
2015/16	109.6	3.7	113.3	109.6	3.7	113.3

Note: Cash values have been converted into real terms (2015/16 prices) using November 2016 HM Treasury deflators. Expenditure includes additional funding provided within years by the Scottish Government (see paragraph 5).

3. In 2015/16, almost two-thirds (62 per cent) of COPFS' expenditure was on staff costs and a further 15 per cent on legal and witness costs. The remaining expenditure went on other staff costs, supplies and services, capital charges, accommodation and office costs, travel and training. Our report on the 2015/16 audit noted that COPFS was continuing to develop its workforce planning arrangements following its organisational restructure in April 2016.

¹ [Efficiency of prosecuting criminal cases through the sheriff court system](#). Audit Scotland, September 2015.

4. In our annual audit report for 2015/16, we recommended that COPFS develop a long-term financial strategy to inform its development over the next 10 years. Irrespective of the fact that public bodies' budgets are set annually, understanding long term financial pressures and constraints and potential future financial scenarios is a key component of strategic financial management for all public bodies. COPFS is in the process of developing such a strategy.

5. In both 2014/15 and 2015/16, the Scottish Government provided additional funding during the course of the year to the COPFS. In 2014/15, the Scottish Government provided a supplementary £2.6 million for additional specific court and casework. In 2015/16, the Scottish Government made additional funding (£0.95 million) available to the COPFS to reduce the overall time that cases involving domestic abuse took to reach the courts.

6. As part of our ongoing follow-up work on the *Efficiency of prosecuting criminal cases through the sheriff court system* report, we have looked at the performance data relating to cases involving domestic abuse. Cases involving domestic abuse are a national priority and the Scottish Government has provided additional funding for these. There is a commitment to ensure that cases involving domestic abuse to reach trial within 10 weeks. COPFS and the Scottish Courts and Tribunals Service play a role in ensuring that this commitment is met. Performance has improved significantly from August 2015, when the average time was 11 weeks, to October 2016, when the average time was eight weeks.

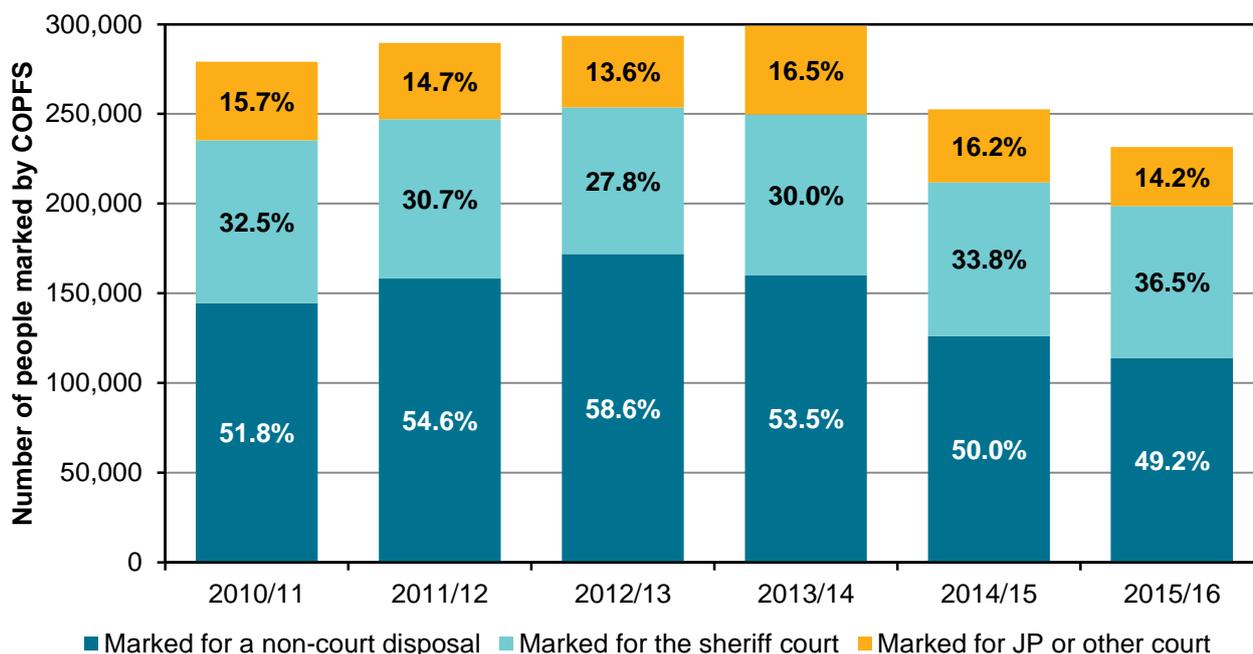
COPFS within the wider justice system

7. A key theme within our *Efficiency of prosecuting criminal cases through the sheriff court system* report was the challenges and tensions created by having a number of interconnected organisations, including COPFS, who are part of an integrated system but who are constitutionally and operationally independent.

8. When we published that report, we recognised that there had been progress at joining up the various public bodies involved in the justice system at a national level through the Scottish Government's Justice Board. We noted that joint working was weaker at a local level. Since publication, the remits and structures of the local criminal justice boards have changed. They are now aligned with the six sheriffdoms, as is COPFS' organisational structure since April 2016. Feedback suggests that this is enhancing local joint working across the justice sector organisations. At an operational level, the justice system planning group provides a focus for planning, performance management and reporting across the justice sector.

9. A large proportion of the COPFS' overall workload is driven by the number of prosecution reports that it receives and therefore the number of cases that it is has to mark and the proportion that are marked for the sheriff court (Figure 2). The number of people who had cases marked by COPFS peaked in 2013/14 at 299,082 after a steady increase since 2010/11, before falling back in 2014/15 and 2015/16. In addition the volume of cases, the nature of the cases is also critical in the overall demand pressure on COPFS. The increase in reporting of more complex cases involving sexual crimes (including historical offences) and cases involving domestic abuse has meant that there are a greater proportion of cases being marked for the sheriff court.

Figure 2. Number of people with cases dealt with outside of court and those prosecuted in court, 2010/11 – 2015/16.



Note: This is an updated version (with 2015/16 data) of Exhibit 4 from our report Efficiency of prosecuting criminal cases through the sheriff court system.

10. COPFS has a key role in the Scottish Government’s *Digital Strategy for Justice in Scotland* which should contribute to greater efficiency and effectiveness of the justice system as a whole. We have noted in our annual audit reports for both 2014/15 and 2015/16 that COPFS does not itself have an agreed digital strategy, although we understand this in development. This puts COPFS at risk of being unable to contribute fully to the delivery of an integrated approach across the justice system.

Audit Scotland
7 December 2016



Justice Committee

12th Meeting, 2016 (Session 5), Tuesday 13 December 2016

Scottish Government Draft Budget 2017-18

This paper provides background information to help inform the Justice Committee's consideration of the Crown Office & Procurator Fiscal Service (COPFS) budget. It is split into two parts:

- COPFS Budget – analysis of changes to the COPFS budget since 2007 (a period covering two parliamentary sessions)
- Criminal Case Statistics – consideration of statistics on criminal cases disposed of during the five years 2011-12 to 2015-16

COPFS BUDGET

2007-2011

Table 1 presents the COPFS budget over the period 2007-11 in cash and real terms.

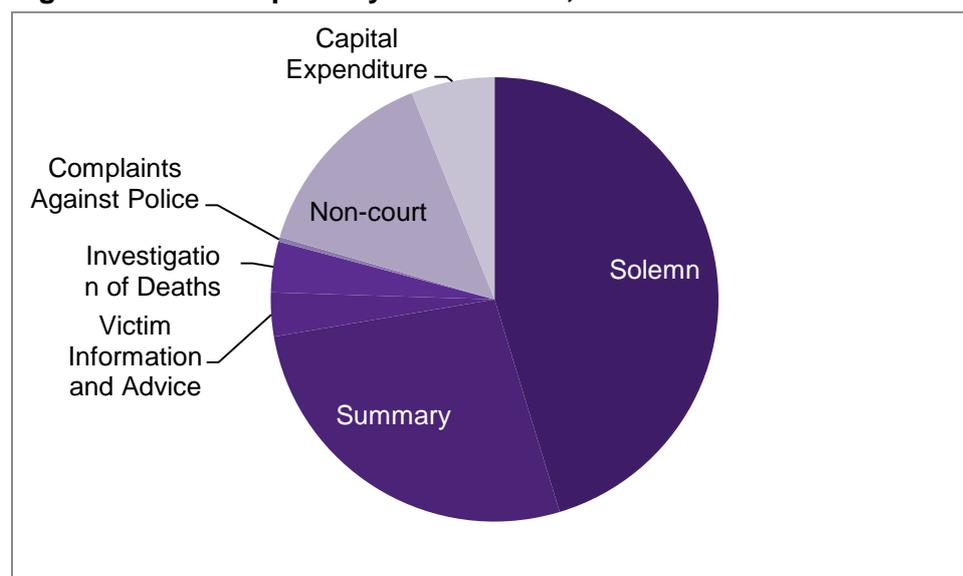
Over the period 2007-11, the COPFS budget increased in cash terms by just over 18%. This is above the growth in the total Scottish Departmental Expenditure Limit (DEL) over this period of time, which grew by just over 12%.

Adjusted for inflation, COPFS spending between 2007-11 equates to a real terms increase of just under 12%. The profile of this spending was for larger increases in the early years of the session (a real terms increase of 5.5% in 2008-09 and 8.7% in 2009-10; followed by a real terms decrease of 2.3% in 2010-11).

The draft budget plans for COPFS were also presented by area of COPFS work. The split in the final year of the session is presented in figure 1. It shows that solemn (45%) and summary (27%) work took up most of COPFS resources.

Table 1: COPFS Budget 2007-11 (cash and real terms)

	2007/08			2008/09			2009/10			2010/11		
	Approved budget £m	Updated budget £m	Outturn £m									
Running Costs	94.8	95.2	94.2	104.3	104.2	102.9	112.0	112.8	113.0	112.0	112.1	112.2
Capital	6.0	5.9	5.5	5.9	5.9	5.1	6.7	6.7	6.0	7.2	6.4	6.2
Total	100.8	101.1	99.7	110.2	110.1	108.0	118.7	119.5	119.0	119.2	118.5	118.4
Solemn	38.7			46.1			52.7	0.4		54.0		
Summary	35.8			34.3			34.2			32.2		
Victim Information and Advice	1.8			2.7			3.1			3.8		
Investigation of Deaths	4.0			5.0			4.3			4.4		
Complaints Against Police	0.4			0.4			0.4			0.4		
Non-court	14.3			15.8			17.3			17.2		
Capital Expenditure	6.0			5.9			6.7			7.2		
Total	100.8			110.2			118.7			119.2		
Real terms (2016-17 prices)												
Running Costs	109.3	109.8	108.6	117.1	117.0	115.5	124.0	124.9	125.1	121.8	121.9	122.0
Capital	6.9	6.8	6.4	6.6	6.6	5.7	7.4	7.4	6.6	7.8	7.0	6.7
Total	116.3	116.6	114.9	123.7	123.6	121.2	131.4	132.3	131.7	129.6	128.9	128.7
Solemn	44.6			51.8			58.4	0.4		58.7		
Summary	41.3			38.5			37.9			35.0		
Victim Information and Advice	2.0			3.0			3.4			4.1		
Investigation of Deaths	4.6			5.6			4.8			4.8		
Complaints Against Police	0.4			0.4			0.4			0.4		
Non-court	16.4			17.7			19.2			18.7		
Capital Expenditure	6.9			6.6			7.4			7.8		
Total	116.3			123.7			131.4			129.6		

Figure 1: COPFS spend by area of work, 2010-11

Over the period 2007-11, solemn activities increased their share of expenditure from 38.3% in 2007-08 to 45.3% in 2010-11. Summary had a fall in its share of expenditure from 35.5% in 2007-08 to 27% in 2010-11.

Table 2: COPFS areas of work as a share of expenditure, 2007-11, %

Area of work	2007-08 % of COPFS spend	2008-09 % of COPFS spend	2009-10 % of COPFS spend	2010-11 % of COPFS spend
Solemn	38.3	41.8	44.4	45.3
Summary	35.5	31.1	28.8	27.0
Victim Information and Advice	1.7	2.5	2.6	3.2
Investigation of Deaths	3.9	4.5	3.6	3.7
Complaints Against Police	0.4	0.4	0.3	0.3
Non-court	14.1	14.3	14.6	14.4
Capital Expenditure	6.0	5.4	5.6	6.0
Total	100.0	100.0	100.0	100.0

2011-2017

Table 3 presents the COPFS budget over the period 2011-17 in cash and real terms. As can be seen there is a difference in the presentation of the level 3 data in the periods 2007-11 and 2011-17. The breakdown presentation changed in 2011-12 from type of work (solemn, summary, etc) to type of expenditure (staff costs, etc).

Table 3: COPFS Budget 2011-17, cash and real terms, £m

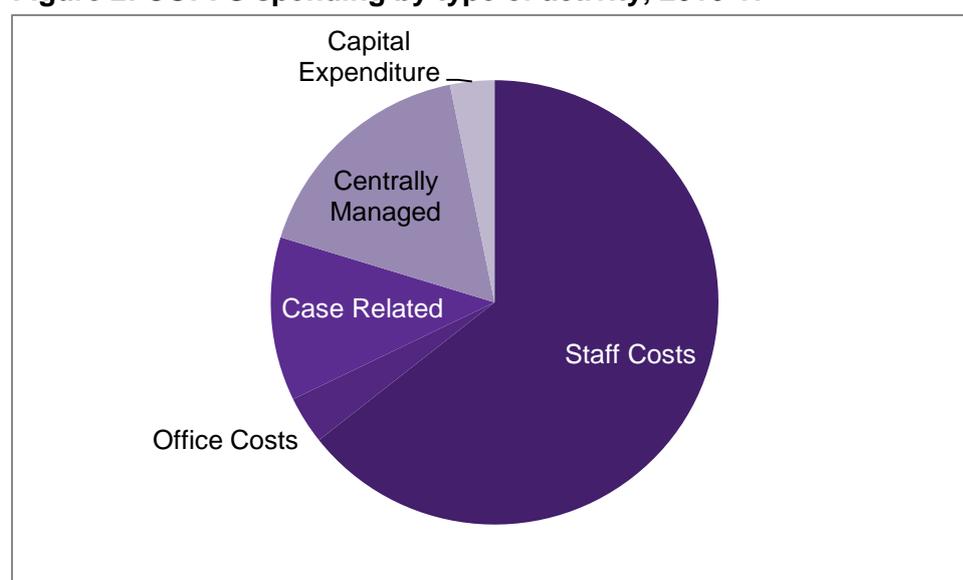
	2011/12			2012/13			2013/14			2014/15			2015/16			2016/17		
	Approved budget £m	Updated budget £m	Outturn £m															
Running Costs	105.5	106.6	105.6	104.5	105.4	104.5	104.5	106.3	106.1	105.1	108.9	108.9	108.5	110.3	109.6	108.9	109.9	-
Capital	2.7	2.7	2.7	3.6	3.1	4.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.7	3.6	3.6	-
Total	108.2	109.3	108.3	108.1	108.5	109.0	108.1	109.9	109.7	108.7	112.5	112.4	112.1	113.9	113.2	112.5	113.5	-
Staff Costs	69.0			67.2			67.1			69.1			69.1			72.4		
Office Costs	4.4			4.4			4.4			4.3			4.3			3.9		
Case Related	12.1			12.5			12.8			13.0			15.7			13.4		
Centrally Managed	20.0			20.4			20.2			18.7			19.4			19.2		
Capital Expenditure	2.7			3.6			3.6			3.6			3.6			3.6		
Total Level 3	108.2			108.1			108.1			108.7			112.1			112.5		
of which:																		
DEL Resource	105.5			104.5			104.5			105.1			108.5			108.9		
DEL Capital	2.7			3.6			3.6			3.6			3.6			3.6		
AME																		
Real terms (2016-17 prices)																		
Running Costs	113.2	114.4	113.3	109.8	110.7	109.7	108.0	109.9	109.6	107.0	110.9	110.8	110.0	111.8	111.1	108.9	109.9	
Capital	2.9	2.9	2.9	3.8	3.3	4.8	3.7	3.7	3.7	3.7	3.7	3.7	3.6	3.6	3.7	3.6	3.6	
Total	116.1	117.3	116.1	113.6	114.0	114.5	111.7	113.6	113.4	110.7	114.5	114.5	113.7	115.4	114.8	112.5	113.5	
Staff Costs	74.0			70.6			69.3			70.4			70.1			72.4		
Office Costs	4.7			4.6			4.5			4.4			4.4			3.9		
Case Related	13.0			13.1			13.2			13.2			15.9			13.4		
Centrally Managed	21.5			21.4			20.9			19.0			19.7			19.2		
Capital Expenditure	2.9			3.8			3.7			3.7			3.6			3.6		
Total Level 3	116.1			113.6			111.7			110.7			113.7			112.5		
of which:																		
DEL Resource	113.2			109.8			108.0			107.0			110.0			108.9		
DEL Capital	2.9			3.8			3.7			3.7			3.6			3.6		
AME	0.0			0.0			0.0			0.0			0.0			0		

Over the period 2011-17, the COPFS budget, like the Scottish Budget as a whole, has grown more slowly than in the 2007-11 period. The total approved budget from 2011-17 has grown by 4% which is slightly less than the growth in total Scottish DEL of 5.5%. COPFS spending from 2011 to 2017, when adjusted for inflation falls by just over 3%.

Outturn budget information is not available for the current financial year, but looking at the period 2011-16 shows a cash terms increase of over 4.5% (slightly less than the growth in the total Scottish DEL Budget), which adjusted for inflation is equivalent to a reduction of just over 1%.

The following figure presents the current year's budget allocations by type of activity.

Figure 2: COPFS spending by type of activity, 2016-17



Activities as a proportion of the COPFS budget have remained broadly similar during the period, but there have been some small fluctuations in staff costs as a share of spend and in other areas. Table 4 presents the breakdown of spending by type in each year between 2011-17.

Table 4: COPFS types of activity as a share of expenditure, 2011-17, %

Activity	2011-12 % of COPFS spend	2012-13 % of COPFS spend	2013-14 % of COPFS spend	2014-15 % of COPFS spend	2015-16 % of COPFS spend	2016-17 % of COPFS spend
Staff Costs	63.8	62.2	62.1	63.6	61.6	64.4
Office Costs	4.1	4.1	4.1	4.0	3.8	3.5
Case Related	11.2	11.6	11.8	12.0	14.0	11.9
Centrally Managed	18.5	18.9	18.7	17.2	17.3	17.1
Capital Expenditure	2.5	3.3	3.3	3.3	3.2	3.2
Total	100.0	100.0	100.0	100.0	100.0	100.0

2007-2017

Looking at changes over the full ten year period 2007-17, there has been an increase in the COPFS approved budget of 11.6%, which is less than the growth in the total Scottish DEL budget of 15%. Adjusted for inflation COPFS spending over the last ten years has fallen by 3.2% in real terms.

CRIMINAL CASE STATISTICS

The following tables use figures published by the COPFS on criminal cases disposed of during the five years 2011-12 to 2015-16. More detailed figures are set out on the COPFS website, in particular:

- [Statistics on Case Processing Last 5 Years \(2011-16\)](#)
- [No Action Cases Reported to COPFS \(2011-16\)](#)

Table 5: Disposals

	2011-12	2012-13	2013-14	2014-15	2015-16
Non-Court Disposals ¹	118,001	129,199	121,494	101,093	97,241
No Further Action ²	32,652	42,032	35,480	32,495	27,333
Court Disposals ³	101,606	92,721	96,852	98,742	90,157
Total	252,259	263,952	253,826	232,331	214,731
Non-Court Disposals	47%	49%	48%	44%	45%
No Further Action	13%	16%	14%	14%	13%
Court Disposals	40%	35%	38%	43%	42%
Total	100%	100%	100%	100%	100%

Table 5 sets out figures (and percentages) for all cases disposed of during the five years:

- the total number of disposals fluctuated between a high of 263,952 in 2012-13 and a low of 214,731 in 2015-16 (a difference of 49,221 or 19%)
- the total number of court disposals fluctuated between a high of 101,606 in 2011-12 and a low of 90,157 in 2015-16 (a difference of 11,449 or 11%)
- although the number of court disposals in 2015-16 is lower than in other years, as a proportion of all disposals in that year it was the second highest (at 42%)

¹ Non-Court disposals include the taking of no action, fiscal fines and warning letters.

² The category of 'no further action' covers cases closed after proceedings have been commenced (eg because a key witness is unavailable).

³ Court disposals consist of cases disposed of by a plea (no evidence led) or trial (evidence led).

Table 6: Court Disposals

	2011-12	2012-13	2013-14	2014-15	2015-16
Justice of the Peace Courts	36,056	32,929	36,095	36,881	31,454
Sheriff Summary Courts	60,418	54,325	55,395	55,674	52,673
Sheriff Solemn Courts	4,508	4,871	4,758	5,638	5,513
High Court	624	596	604	549	517
Total	101,606	92,721	96,852	98,742	90,157

Justice of the Peace Courts	35%	36%	37%	37%	35%
Sheriff Summary Courts	59%	59%	57%	56%	58%
Sheriff Solemn Courts	4%	5%	5%	6%	6%
High Court	1%	1%	1%	1%	1%
Total	100%	100%	100%	100%	100%

Table 6 sets out figures for court disposals (both pleas and trials):

- most court disposals take place under summary procedure (in justice of the peace and summary sheriff courts)
- the proportion of court disposals under solemn procedure (in solemn sheriff courts and the High Court) rose during the five year period, from 5% in 2011-12 to 7% in 2015-16

Table 7: Trials

	2011-12	2012-13	2013-14	2014-15	2015-16
Justice of the Peace Courts	1,823	1,362	1,560	2,044	1,789
Sheriff Summary Courts	4,951	4,777	5,168	6,248	5,616
Sheriff Solemn Courts	993	1,125	1,215	1,328	1,115
High Court	303	310	362	334	283
Total	8,070	7,574	8,305	9,954	8,803

Justice of the Peace Courts	23%	18%	19%	21%	20%
Sheriff Summary Courts	61%	63%	62%	63%	64%
Sheriff Solemn Courts	12%	15%	15%	13%	13%
High Court	4%	4%	4%	3%	3%
Total	100%	100%	100%	100%	100%

Table 7 sets out figures for court cases disposed of by trial:

- the total number of trials fluctuated between a high of 9,954 in 2014-15 and a low of 7,574 in 2012-13 (a difference of 2,380 or 24%)
- although most trials take place under summary procedure, the likelihood of a solemn procedure case resulting in a trial is higher (and thus the proportion of solemn trials is higher than the proportion of all solemn court disposals)

Ross Burnside & Frazer McCallum
SPICe Research
8 December 2016

Justice Committee

12th Meeting, 2016 (Session 5), Tuesday 13 December 2016

Inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service

Note by the clerk

Introduction

1. The Committee agreed to hold an inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service (COPFS) at its Business Planning Event in August. At its 6 September meeting, it agreed to this remit—

“The COPFS is Scotland’s independent prosecution service, acting in the public interest to help bring offenders to justice. The core role of the COPFS is to consider reports about crime from the police and other agencies, to decide whether it is in the public interest to prosecute them, and, if so, to deploy the resources that are necessary to help ensure that justice is done.

“The Committee’s inquiry will focus on this core role, examining in particular—

- The effectiveness and efficiency of the COPFS, and how well it works with other stakeholders in the criminal justice system;
- Whether the COPFS has the resources and skillsets it needs to carry out its core role;
- The COPFS’s responsiveness to new challenges and opportunities including the evolving nature of crime in 21st century Scotland, advances in technology, and changes in the delivery of court services that may affect access to justice;
- How the COPFS protects and supports witnesses and victims of crime.

“The Committee will also take evidence on the role and function of the Inspectorate of Prosecution in Scotland. (The IPS is the independent inspectorate for the COPFS.)

“The inquiry will not consider the COPFS’s two other roles of establishing the cause of sudden, unexplained or suspicious deaths or investigating allegations of criminal conduct against police officers, except in relation to the general issue of whether the COPFS has the resources it needs to carry out its purpose.”

2. The Committee issued a [call for evidence](#), with a closing date of 19 October 2016. All [written responses](#) accepted as evidence can be found on the Committee’s [inquiry page](#).

Committee consideration

3. As part of its inquiry the Committee visited the Lord Advocate in Chambers Street on 20 September 2016 and met with the Lord Advocate, the Solicitor General, the Crown Agent and various staff from the COPFS.

4. On 4 October 2016 the Committee met with individuals who had experience of the criminal justice system as victims and witnesses and heard of the difficulties they faced during the process. Notes of the meetings are available [here](#).

5. The Committee's first formal evidence session was on [25 October 2016](#), when it heard first from SACRO, Scottish Women's Aid, Rape Crisis Scotland and Victim Support Scotland. It then heard from a panel of legal representatives, comprising the Law Society of Scotland, and members of the Glasgow, Edinburgh and Aberdeen Bar Associations.

6. At its meeting on [1 November 2016](#) the Committee heard from a single panel consisting of representatives from the Community union, representing G4S staff, Circle Families Outside and Social Work Scotland.

7. At its meeting on [15 November 2016](#), the Committee heard from two panels of witnesses. The first was made up from unions representing COPFS workers and police representative bodies. The second panel consisted of two representatives of the Faculty of Advocates (both former Advocates Depute at the COPFS).

8. On [22 November 2016](#) the Committee heard from two panels of witnesses. The first panel was made up from is made up of Justices of the Peace and the second from representatives from Police Scotland and the Scottish Courts and Tribunal Service.

9. At its meeting on [29 November 2016](#) the Committee heard from Ian Thomson from the Royal Society of Protection of Birds who was representing Scottish Environment Link. The Committee also heard informally and privately from two former employees of the COPFS and an agreed [note](#) of that meeting has been published.

10. At its meeting on 13 December the Committee will take evidence from—

Gordon Dalyell, Scotland's representative on the National Executive Committee, Association of Personal Injury Lawyers; and

Patrick McGuire, Partner, Thompsons Solicitors.

11. The main focus of this session is expected to be on the COPFS's prosecution of health and safety offences.

Justice Committee

12th Meeting, 2016 (Session 5), Tuesday 13 December 2016

Approach to consideration of the Criminal Finances Bill legislative consent memorandum

Note by the Clerk

Introduction

1. This paper seeks to inform Members' consideration of the legislative consent memorandum¹ (LCM) lodged by the Scottish Government in relation to the Criminal Finances Bill. The LCM is attached at **Annexe A (page 5)**.

Legislative consent memorandum process

2. The LCM process is the mechanism for the Scottish Parliament to give its consent to the UK Government to legislate on devolved matters in the UK Parliament. Chapter 9B of Standing Orders² sets out the procedure governing the process. To give consent, the Parliament must agree to a legislative consent motion. This cannot be lodged until the lead committee has reported on the Bill.

3. A LCM in respect of the Criminal Finances Bill was lodged by the Scottish Government on 22 November 2016. Under Standing Orders, an LCM must summarise what the Bill does and what its policy objectives are, and specify the extent to which the Bill makes provision for any purpose within the legislative competence of the Scottish Parliament, or which alter the competences of the Scottish Ministers. If (as here) the intention of the lodger of the LCM is to lodge a draft legislative consent motion, then the LCM should also set out a draft legislative consent motion.

4. The Parliamentary Bureau referred the LCM to the Justice Committee at its meeting on 29 November 2016.

5. Under Standing Orders, an LCM should "normally" be lodged within 2 weeks of the relevant Bill being introduced into the UK Parliament. On this occasion, the Criminal Finances Bill was introduced in the House of Commons on 13 October 2016. The Cabinet Secretary for Justice wrote to the Presiding Officer on 16 November to explain why it had not been possible to lodge the LCM in accordance with Standing Orders.

6. The reason given by the Cabinet Secretary was that the speed at which the Bill was drafted led to last minute drafting by the Home Office on detailed provisions and a lack of consultation. The letter advised this had led to drafting errors and had meant it was only possible to agree within the last week what clauses of the Bill required to be included in LCM. The Cabinet Secretary advised that in addition to this, the last minute introduction of amendments to the Bill by the Home Office have meant last minute changes to the LCM were also required.

¹ <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/102324.aspx>

² <http://www.scottish.parliament.uk/parliamentarybusiness/26512.aspx>

7. Indicative timings from Scottish Government officials suggest the Committee would need to report to Parliament on the LCM by the end of January 2017.

The Criminal Finances Bill

8. The Criminal Finances Bill³ aims 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*.

9. 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

10. 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.

11. 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.

Purpose of the LCM

12. 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

³ <http://services.parliament.uk/bills/2016-17/criminalfinances.html>

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.

Reasons for requiring legislative consent (see LCM for fuller discussion)

Part 1: Proceeds of Crime

13. The LCM states that the over-arching policy intention of the Scottish Ministers is to strengthen the existing provisions within POCA to ensure 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.

14. The Scottish Government sets out its view that Part 1 of the Bill makes provision in relation to matters which fall, in part, within the Scottish Parliament’s legislative competence. It considers that while 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. The Scottish Government is of the view that 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, the Scottish Government believes they are within the Scottish Parliament’s legislative competence and therefore consent is being sought for this to be considered by the UK Parliament. A detailed explanation of each of the relevant provisions of Part 1 of the Bill can be found in the **Appendix to the LCM (page 10)**.

15. The LCM explains that 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). The LCM set out that in addition to this the Bill confers on the Scottish Ministers a regulation-making power to make provision in relation to seized money in confiscation proceedings (clause 23). The Scottish Government is of the view that as these alter the Scottish Ministers’ executive competence, the Scottish Parliament’s consent is being sought.

16. 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. This on the basis that 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

17. The Scottish Government sets out in the LCM that the provisions in Part 2 are aimed at combating the financing of terrorism and recovering terrorist property. The LCM states that 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. It explains 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.

18. The LCM explains that 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. It also explains the schedules confer on the Scottish Ministers a right of appeal against a decision of the sheriff not to make such a forfeiture order. The Scottish Government states in the LCM that these mirror the Scottish Ministers’ current functions in relation to the forfeiture of terrorist cash in civil proceedings in the Sheriff Court.

19. The Scottish Government believes that 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

20. The Scottish Government, in the LCM, provides information on Part 4 of the Bill. Part 4 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.

21. The LCM explains that Clause 45 gives effect to Schedule 5, which makes minor and consequential amendments to POCA as well as other legislation; and that certain POCA amendments relate to confiscation and civil recovery proceedings in Scotland. It further explains that Clauses 46 and 47 will 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. The LCM sets out that Clause 50 will enable the Scottish Ministers to make regulations to commence confiscation-related provisions, after consulting the Secretary of State; and that it also provides for the Scottish Ministers to make transitional, transitory or saving provision in connection with commencement of those provisions.

22. The Scottish Government believes that 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 believe the Parliament’s consent will be required by the UK Parliament in so far as the provisions concern the recovery of the proceeds of devolved crime.

23. Finally, the Scottish Government believes that Clauses 46, 47 and 50 require the Scottish Parliament’s consent as they confer functions on the Scottish Ministers so as to alter their executive competence.

Issues for consideration

24. As the Bill will provide additional powers to Scottish Ministers to make applications to investigate, freeze or seize the property of individuals who are suspected of involvement of, or a connection too serious crime the Committee may wish to be satisfied that the powers are proportionate appropriate safeguards are in place to ensure compliance with the European Convention of Human Rights, in particular with regards to the rights established in connection to the protection of property and the right to respect private and family life. Equally the Committee may wish to be reassured that the powers will be effective against criminals in the manner envisaged by the UK Government.

25. The Committee may also want to seek assurances that there are safeguards in place to mitigate the impact of the Bill on others not under suspicion of being involved with or connected to serious criminality, for example tenants with a legitimate tenancy living in heritable property that may now be recovered more quickly under the provisions of the Bill.

Recommendation

26. **It is expected that the Committee will wish take evidence from the Cabinet Secretary before reporting on the LCM.**

27. **The Committee may also wish to consider issuing a call for written evidence to help inform any evidence session with the Cabinet Secretary, and also with a possible view to taking oral evidence from stakeholders before it hears from the Cabinet Secretary, although there would only be very limited opportunity to do so, given the timetabling requirements in relation to the LCM and the Committee's other commitments. The Committee is therefore asked to agree the draft call for evidence in Annexe B (page 15).**

ANNEXE A

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 Appendix 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**

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.

ANNEXE B

DRAFT Call for written evidence a on a Legislative Consent Memorandum on the Criminal Finances Bill

The Scottish Government lodged a [Legislative Consent Memorandum \(LCM\)](#) on 22 November 2016 for the [Criminal Finances Bill](#).

The LCM explains why the Scottish Government would like the Scottish Parliament to give consent to the Westminster Parliament to legislate in certain areas and to make changes to the powers of the Scottish Ministers in relation to competence.

The Justice Committee must report on the LCM to the Parliament and would very much like to hear the views of experts and stakeholders on the proposed legislation, to inform Parliamentary scrutiny.

The LCM

The parts of the Bill which require the consent of the Scottish Parliament and the reasons for requiring consent are set out below.

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. Provisions in Part 1 require the consent of the Scottish Parliament as they are within the Scottish Parliament's legislative competence and they also seek to alter the Scottish Ministers' executive competence

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. The Scottish Parliament's consent is required because the Bill will confer new functions on the Scottish Ministers so as to alter their executive competence.

Part 4 includes minor and consequential amendments to POCA and other enactments and requires the Scottish Parliament's consent because they confer functions on the Scottish Ministers so as to alter their executive competence.

More detail on the reasons for requiring legislative consent is set out in the LCM itself.

Call for evidence

The Committee would like to hear the views of stakeholders on the LCM. It would be helpful if comments could be broken down by reference to each Part of the Criminal Finances Bill in respect of which the Scottish Parliament's consent is considered necessary. The Committee does not expect stakeholders to necessarily have comments on all parts of the LCM.

The Committee would like to receive views on both:

- The devolved areas in which the UK Government proposes to legislate

- The extent to which the executive competence of the Scottish Ministers will be altered either by the conferring of additional powers or the limitation of their existing powers.

The deadline for submissions is **5.00pm on Tuesday 10 January 2017**.

Procedure

The Parliamentary Business Bureau assigned the LCM to the Justice Committee on 29 November 2016. The Committee will consider the LCM and report to Parliament, which will then vote upon a legislative consent motion on whether to agree to the Westminster Parliament legislating on its behalf. The Scottish Parliament must vote on the motion before the last amending stage of the Bill at Westminster.

More information on the LCM procedure can be found here:

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/31308.aspx>

How to submit your evidence

Written submissions should be in MS Word or similar word processing format, and should be no longer than 4 sides of A4. If your submission is longer than this, please provide a short summary of the main points. Submissions should be set out in numbered paragraphs. If a submission refers to existing published material, it is preferable to provide hyperlinks rather than extensive extracts.

Before making a submission, please read the Parliament's [policy on treatment of written evidence by subject and mandatory committees](#).

If possible, written submissions should be submitted electronically by email to:

JusticeCommittee@parliament.scot

Hard copy written submissions should be sent to:

Justice Committee Clerks
Room T2.60
Scottish Parliament
Edinburgh
EH99 1SP

Contact

Any queries about written submissions should be addressed in the first instance to the Justice Committee clerking team at the above email address or on 0131 348 5047.