

# Criminal Justice Committee

16th Meeting, 2023 (Session 6), Wednesday 24  
May 2023

## Legislative Consent Memorandum – the UK Government’s Economic Crime and Corporate Transparency Bill

### Background

1. The [Economic Crime and Corporate Transparency Bill](#) was introduced in the House of Commons by the UK Government on 22 September 2022.
2. The UK Government has presented the Bill as having three key objectives:
  - Prevent organised criminals, fraudsters, kleptocrats and terrorists from using companies and other corporate entities to abuse the UK’s open economy. The Bill will reform the powers of the Registrar of Companies and the legal framework for limited partnerships in order to safeguard businesses, consumers and UK national security.
  - Strengthen the UK’s broader response to economic crime, in particular by giving law enforcement new powers to seize cryptoassets used or obtained through unlawful conduct and enabling businesses in the financial sector to share information more effectively to prevent and detect economic crime.
  - Support enterprise by enabling Companies House to deliver a better service for over four million UK companies and improving the reliability of its data to inform business transactions and lending decisions across the economy.
3. The Bill as introduced contained provisions that apply to Scotland and the UK Government has requested legislative consent in relation to these. The Bill has also been amended further during its passage in the UK Parliament and some of the changes made also apply to Scotland and therefore require legislative consent.
4. The process of dialogue between the two governments on this Bill and the issue of consent has been protracted and the Scottish Government has now lodged a [Legislative Consent Memorandum](#) on 5 May 2023 (see **Annex A**).
5. **Members will want to be aware that there remains one provision where the Scottish Government does not yet recommend consent, with the Scottish Government stating:**

“[...] The Scottish Government’s position remains that where the UK Government intends to take powers to make secondary legislation in devolved areas that must be accompanied by effective mechanisms to respect the devolution settlement and to recognise the responsibilities of Scottish Ministers and the Scottish Parliament. The Scottish Government is not therefore currently recommending consent to certain provisions where this applies”.

## Timetable

6. This Bill is now in its final stages in the UK Parliament. The clerks understand that the lodging deadline for any amendments that might be proposed to the Bill at Report Stage is Monday 5 June. As such, the views of this Committee and the Scottish Parliament on the Bill and legislative consent need to be established prior to that.

## LCM process

7. The process for considering consent to the relevant provisions in a UK Bill essentially commences with the publication, normally by the Scottish Government, of an LCM. This LCM relates to a Bill under consideration in the UK Parliament which contains what are known as “relevant provisions”. These provisions could:
  - change the law on a “devolved matter” (an area of policy which the UK Parliament devolved to the Scottish Parliament in the Scotland Act 1998); or
  - alter the “legislative competence” of the Scottish Parliament (its powers to make laws) or the “executive competence” of Scottish Ministers (their powers to govern).
8. Under an agreement formerly known as the “Sewel Convention”, the UK Parliament will not normally pass bills that contain relevant provisions without first obtaining the consent of the Scottish Parliament. The consent itself is given through a motion (a Legislative Consent Motion) which is taken in the Chamber – but the detailed scrutiny is undertaken by a Scottish Parliament committee based on a memorandum. The motion must normally be decided on before the Bill reaches its final amending stage at the UK Parliament in the House in which it was first introduced (although this can be as late as the last amending stage in the second house). On occasion, a memorandum is lodged which invites the Parliament to note that the Scottish Government does not intend to lodge a legislative consent motion on a particular bill.
9. The detailed procedure for scrutiny of Legislative Consent Memorandums and Motions is set out in [Chapter 9B](#) of the Parliament’s Standing Orders.

# Consideration by the Delegated Powers and Law Reform Committee

10. The Delegated Powers and Law Reform (DPLR) Committee will have considered the LCM at its meetings of 16 and 23 May, and is set to publish a report on 23 May. The clerks will arrange to have that circulated to members when published.

## Today's consideration

11. At today's meeting, Tom Arthur MSP, Minister for Community Wealth and Public Finance will attend and give evidence to the Committee on the Scottish Government's LCM and set out his views on the issue of consent.

12. The Scottish Government's draft motion on legislative consent will be as follows (see Annex B):

"That the Parliament agrees that the relevant provisions contained within the UK Economic Crime and Corporate Transparency Bill, with the exception of amendment 77L which introduces new Schedule 6 and with the exception of Section 303Z42 as inserted by Schedule 7, introduced in the House of Commons on 22 September 2022, which fall within the legislative competence of the Scottish Parliament or alters the executive competence of Scottish Ministers, should be considered by the UK Parliament."

## Decisions

13. **Members are invited to discuss the LCM with the Minister for Community Wealth and Public Finance at today's meeting.**

14. **Members will then be asked to discuss whether they agree with the draft motion on consent proposed by the Scottish Government and what recommendation they wish to make to the Scottish Parliament.**

15. **Finally, members are asked to agree that the clerks produce a short, factual report, setting out the Committee's recommendations to the Scottish Parliament on the issue of legislative consent. The draft would be cleared by the Convener and then published.**

Clerks to the Committee  
May 2023

# Legislative Consent Memorandum

## Economic Crime and Corporate Transparency Bill

### Background

1. This Memorandum has been lodged by Shona Robison, the Deputy First Minister and Cabinet Secretary for Finance, under Rule 9B.3.1(a) of the Parliament's Standing Orders. The Economic Crime and Corporate Transparency Bill ("the Bill") was introduced in the House of Commons on 22 September 2022. The latest version of the Bill, the Explanatory Notes and other supporting documents can be found at: <https://bills.parliament.uk/bills/3339>

### Content of the Economic Crime and Corporate Transparency Bill

2. The UK Government has set out that the Bill is the second part of a legislative package to prevent the abuse of UK corporate structures and tackle economic crime. The Bill extends to England and Wales, Scotland and Northern Ireland.
3. The Bill follows on from the Economic Crime (Transparency and Enforcement) Act 2022, which received Royal Assent on 15 March 2022. That Bill was subject to an expedited LCM process, with the Legislative Consent Memorandum lodged in the Scottish Parliament on 4 March 2022, then debated and approved unanimously on 9 March 2022.
4. The UK Government has presented the Bill as having three key objectives:
  - Prevent organised criminals, fraudsters, kleptocrats and terrorists from using companies and other corporate entities to abuse the UK's open economy. The Bill will reform the powers of the Registrar of Companies and the legal framework for limited partnerships in order to safeguard businesses, consumers and UK national security.
  - Strengthen the UK's broader response to economic crime, in particular by giving law enforcement new powers to seize cryptoassets used or obtained through unlawful conduct and enabling businesses in the financial sector to share information more effectively to prevent and detect economic crime.
  - Support enterprise by enabling Companies House to deliver a better service for over four million UK companies and improving the reliability of its data to inform business transactions and lending decisions across the economy.
5. In more detail, specific elements of the Bill are:

- Broadening the Registrar of Companies' powers so that the Registrar becomes a more active gatekeeper over company creation and custodian of more reliable data concerning companies and other UK registered entities such as LLPs and LPs including new powers to check, remove or decline information submitted to, or already on, the register.
- Introducing identity verification requirements for all new and existing registered company directors (People with Significant Control) and those delivering documents to the Registrar. This will improve the reliability of the Registrar's data, to support business decisions and law enforcement investigations.
- Providing the Registrar with more effective investigation and enforcement powers and introducing better cross-checking of data with other public and private sector bodies.
- Tackling the abuse of limited partnerships including Scottish limited partnerships by strengthening transparency requirements and enabling them to be deregistered and introducing new powers, including a power to petition courts to wind up limited partnerships where shown to be in the public interest.
- Amending the Register of Overseas Entities (ROE) to maintain consistency with changes to the Companies Act 2006, and to address anti-avoidance loopholes identified following the expedited passage of the initial ROE provisions in the Economic Crime (Transparency and Enforcement) Act 2022.
- Creating additional powers, for criminal confiscation and civil recovery by amending the Proceeds of Crime Act 2002 to quickly and more easily seize and recover cryptoassets, which are the principal medium used for ransomware. The creation of a civil forfeiture scheme for cryptoassets will help target those offenders who have not been prosecuted but use their funds to further their criminality, including use for terrorism purposes.
- Creating new exemptions from the principal money laundering offences to reduce unnecessary reporting by businesses carrying out transactions on behalf of their customers and giving new powers for law enforcement to obtain information to tackle money laundering and terrorism financing.
- Removing the need for a Statutory Instrument to be laid in order to update the UK high risk third country list.
- Enabling businesses in certain sectors to share information more effectively to prevent and detect economic crime.
- A measure removing the statutory fine limit to allow the Scottish Solicitors' Discipline Tribunal to set its own limits on financial penalties imposed for economic crime disciplinary matters.
- Adding a regulatory objective to the Legal Services Act 2007 to affirm the duties of regulators and the regulated communities to uphold the economic crime agenda.
- Allowing the Serious Fraud Office to use its powers under Section 2 of the Criminal Justice Act 1987 at the 'pre-investigation' stage in any SFO case.

- Creating a new 'Failure to prevent fraud' offence which is committed when a large organisation fails to prevent existing fraud offences from being committed by people associated with the organisation.

## Provisions which relate to Scotland requiring an LCM

6. The Bill as introduced contained provisions that apply to Scotland; the UK Government has requested legislative consent in relation to the provisions as set out below.
7. The UK Government has also set out its views on which amendments tabled for consideration at Lords Grand Committee stage require consent of the Scottish Parliament as set out in the tables below. There is one amendment, Amendment 77B, which inserts new Clause 'Verification of registrable beneficial owners and managing officers' (after Clause 155), which the Scottish Government considers to require the legislative consent of the Scottish Parliament, but which the UK Government does not. This Clause is included in the Legislative Consent Memorandum as the Scottish Government considers it to be a relevant provision under Rule 9B of the Scottish Parliament's Standing Orders.

Policy area	List of Clauses/Lords amendment number	Consent recommended (Yes/No)
Land Reform	153	Yes
Land Reform	76H	Yes
Land Reform	154	Yes
Land Reform	155	Yes
Land Reform	77A	Yes
Land Reform	77B	Yes
Land Reform	156	Yes
Land Reform	157(as amended by 77E, 77F, 77G, 77H)	Yes
Land Reform	77E	Yes
Land Reform	77F	Yes
Land Reform	77G	Yes
Land Reform	77H	Yes
Land Reform	158	Yes
Land Reform	159	Yes
Land Reform	160	Yes
Land Reform	161	Yes
Land Reform	162	Yes
Land Reform	77J	Yes
Land Reform	163	Yes
Land Reform	164	Yes
Land Reform	165	Yes
Land Reform	166 (as amended by 77K)	Yes
Land Reform	77K	Yes

Land Reform	77L	No
Policy area	List of Clauses/Lords amendment number	Consent recommended (Yes/No)
Common Law Fraud	84A-84G and 86B	Yes

Policy area	List of Clauses/Lords amendment number	Consent recommended (Yes/No)
Justice (Legal Services Regulation policy)	Clause 182	Yes
Policy area	List of Clauses/Lords amendment number	Consent recommended (Yes/No)
National Security and Counter-Terrorism Unit	169, Schedule 8	Yes

Policy area	List of Clauses/Lords amendment number	Consent recommended (Yes/No)
Accountant in Bankruptcy	127	Yes
Accountant in Bankruptcy	129	Yes
Accountant in Bankruptcy	130	Yes
Accountant in Bankruptcy	73K	Yes
Accountant in Bankruptcy	73L	Yes
Accountant in Bankruptcy	73M	Yes

Policy area	List of Clauses/Lords amendment number	Consent recommended (Yes/No)
Defence, Security and Cyber Resilience	167, Schedule 6	Yes
	168, Schedule 7	Yes (with exception below)
	Schedule 7	No – new Section 303Z42 as inserted into POCA by Schedule 7
	172 (Information Orders)	Yes
	185 (Serious Fraud Office)	Yes

## Use of name suggesting connection with foreign governments etc; Use of name giving misleading indication of activities

8. Clause 24 creates a new criminal offence if a person carries out a business likely to give the false impression of a connection with a foreign government or international organisation. The definition of person for the offence includes sole traders. As the law relating to sole traders is devolved, this requires legislative consent.
9. Clause 25 creates a new criminal offence if a person carries out a business giving a misleading indication of the nature of the activities of the business so as to pose a risk of harm to the public in the UK or elsewhere. The definition of person for the offence includes sole traders. As the law relating to sole traders is devolved, this requires legislative consent.
10. The Scottish Government considers it is a sensible and proportionate use of the legislative consent process to promote consent for the UK Parliament to legislate for these Clauses, rather than promoting separate Scottish legislation.

## Winding up of limited partnerships (Clauses 127 to 130)

11. Clause 127 makes amendments to the Limited Partnerships Act 1907 (“the 1907 Act”) and inserts new Section 6(3A) and (3B) into that Act to make provision about the persons who may initiate winding up in the event that a limited partnership is dissolved.
12. Whilst the topic of persons who may initiate winding up is included in the C2 reservation under Schedule 5 of the Scotland Act 1998, this reservation applies to ‘business associations’ which excludes Scottish limited partnerships. To that extent, the amendments have a devolved purpose and engage the legislative consent process.
13. Clause 130 inserts a new Section 29 into the 1907 Act and introduces powers for the courts to take appropriate action where there has been a failure to wind up a dissolved limited partnership in accordance with new Section 6(3A) and (3B) – this includes making an order to wind up that partnership. The court can make various orders on the application of the Secretary of State, the Scottish Ministers, the Department for the Economy in Northern Ireland or any other person demonstrating to the court they have an interest. The Scottish Ministers can make an application where the limited partnership is registered in Scotland or where they can demonstrate to the court that they have a sufficient interest. Where the Secretary of State is making the application in the case of limited partnerships registered in Scotland, there is a statutory requirement to consult with the Scottish Ministers.
14. As reflected above, the power afforded to the Secretary of State requires legislative consent due to the involvement of winding up provisions which have a devolved



purpose. In addition, the power conferred on the Scottish Ministers alters the executive competence of the Scottish Ministers.

15. Clause 129 inserts a new Section 28 into the 1907 Act, to enable the court to order the winding up of a limited partnership on a petition in the public interest by the Secretary of State, Scottish Ministers, or the Department for the Economy in Northern Ireland. The operation of this new power for the Secretary of State to petition for the winding up of Scottish limited partnerships will be subject to a statutory consult mechanism with the Scottish Ministers. A concurrent power for the Scottish Ministers operates in relation to limited partnerships registered in Scotland. If such a petition is presented, the court may wind up the limited partnership if it considers it just and equitable to do so.
16. As above, the provision requires legislative consent as the winding up of limited partnerships is excluded under reservation C2. To that extent, the provisions have a devolved purpose. In addition, the power which is being conferred on the Scottish Ministers alters the executive competence of the Scottish Ministers.
17. The Scottish Government is aware that amendments have been tabled and passed introducing a new Section 29A to the 1907 Act, to provide for a specific regulation making power to enable the Secretary of State to make provision that corresponds or is similar to provision in the Insolvency Act 1986 to govern the winding up of limited partnerships under new Sections 28 and 29. The power is subject to the statutory consent of Scottish Ministers where it relates to limited partnerships registered in Scotland.
18. Similarly, amendments have been tabled and passed to provide for notification requirements where concurrent proceedings have been raised. These include amendments to both the 1907 Act and the Bankruptcy (Scotland) Act 2016 and have been taken forward to ensure that relevant proceedings are brought to the attention of the court and, where applicable, the Accountant in Bankruptcy. Additionally, an amendment has been tabled and passed which introduces a new Section 29C to the 1907 Act, which is a future proofing provision and would enable further amendments to the notification requirements under new Section 29B of the 1907 Act to be made by regulations, in case further circumstances are identified that need to be brought to the attention of courts. This will be a concurrent power for both UK Ministers and the Scottish Ministers and where the Secretary of State seeks to make regulations, there is a requirement to seek the statutory consent of the Scottish Ministers.
19. These amendments will require legislative consent because, for similar reasons as noted above, they have a devolved purpose and the regulation making powers alter the executive competence of the Scottish Ministers.
20. The Scottish Government supports the policy aims of these Clauses in strengthening what can be done against the operation of limited partnerships used as a vehicle to facilitate money laundering and financial criminality.

21. The Scottish Ministers have recognised that the concurrent power together with a requirement for the Secretary of State to consult the Scottish Ministers when presenting petitions in respect of limited partnerships registered in Scotland is sufficient and proportionate. Additionally, the requirement for the Secretary of State to seek the consent of the Scottish Ministers to regulations about the winding up process of Scottish limited partnerships; and a concurrent power for the Secretary of State and the Scottish Ministers to make regulations amending notification requirements where there are concurrent proceedings, together with statutory consent requirements where the Secretary of State seeks to make these regulations, respects devolved competence and responsibility.

## Part 3 – Register of Overseas Entities

### Amendments to Register Of Overseas Entities, which extend to non-business overseas entities

22. The Register of Overseas Entities (“ROE”), which was introduced by the Economic Crime (Transparency and Enforcement) Act 2022 (“the 2022 Act”) aims to prevent people from hiding behind anonymous companies and laundering money in UK property and was implemented on 1 July 2022. Clauses 151-166 provide for a number of small ‘tidy-up’ amendments relating to procedural/technical aspects of ROE and to ensure consistency with changes to the Companies Act 2006. Further amendments were voted through at Lords Grand Committee stage on 20 April 2023 to address anti-avoidance measures identified, and close other loopholes. They are new Clause after 153 (Amendment 76H); 2 new Clauses after 155 (Amendments 77A and 77B); amendments to Clause 157 (Amendments 77E, 77F, 77G and 77H); new Clause 163 (Amendment 77J); amendment to Clause 166 (Amendment 77K); new Schedule 5A and new Schedule 6 (Amendment 77L).
23. These Clauses introduce amendments to the ROE, which as a whole extends to any legal entity that is governed by the law of a country or territory outside the United Kingdom. As with the 2022 Act, the consent of the Scottish Parliament is required primarily because overseas entities going beyond ‘business associations’ are required to comply with ROE’s provisions, and therefore with these Clauses. This includes some forms of entity regulation which is within devolved competence.
24. Legal entity, in relation to ROE, is defined in the 2022 Act to mean ‘a body corporate, partnership or other entity that (in each case) is a legal person under the law by which it is governed’. This definition goes beyond the definition of ‘business associations’ in the C1 reservation in Schedule 5 of the Scotland Act 1998. The legislation establishing ROE therefore goes beyond the reservation and into the areas of competence devolved to the Scottish Parliament.
25. Clauses 161 and 162 introduce new, or amend existing, ROE offence provisions relating to the provision of false information, including how the offence operates in Scotland.

26. The Scottish Government supports measures to improve the transparency of ownership of land and property. It also supports the aim of ROE to prevent people from hiding behind anonymous overseas companies and laundering money in UK property. The Scottish Parliament unanimously voted to support the LCM consenting to the inclusion of ROE in the 2022 Act, and the Scottish Government supports these amendments to ensure the smooth operation of ROE. Consent to Clauses 151-166, and amendments 76H, 77A, 77B, 77E, 77F, 77G, 77H, 77J and 77K are therefore recommended.

## Changes to Registers of Scotland's operational duties

27. Clause 165 of the Bill amends the definition of 'registered overseas entity' in land registration legislation, which will impact on Registers of Scotland. This introduces changes to Registers of Scotland's (RoS) operational duties in terms of situations where they must reject an application for registration of land titles by an overseas entity. As this change impacts on the operational duties of RoS, this touches on devolved competence and engages the legislative consent process. Consent to this Clause is recommended for the reasons set out at paragraph 34 below.
28. Clause 153 relating to the provision of title numbers to companies house will impact on the operational duties of RoS. There are no policy or operational issues with this, and RoS have no concerns, however the operational duties of RoS are within devolved competence, and so the legislative consent process is engaged. Consent to this Clause is recommended for the reasons set out at paragraph 34 below.

## Amendment to Scottish Trusts

29. Clause 155 relates to trusts, and amends the details required in relation to trusts, including Scottish trusts, to capture all corporate trustees. As Scottish trusts are a devolved area we consider that the provisions relating to these trusts require the consent of the Scottish Parliament. These provisions will close a gap identified in the existing provisions which means that some, but not all, corporate trustees are captured by the requirements. Further amendments were voted through at Lords Grand Committee on 20 April 2023 to address anti-avoidance measures identified, especially in relation to trusts – they are Amendment 76H (new Clause after 153 'Registration of information about trusts'); Amendment 77A (new Clause after 155 'applications for removal'); Amendments 77E, 77F, 77G, 77H (amending Clause 157); Amendment 77J (new Clause 163 'further information for transitional cases'); and Amendment 77L (new Schedules before Schedule 6 'Schedule 5A Overseas entities: further information for transitional cases' and 'Schedule 6 Duty to Deliver Further Information for Transitional Cases'). We are content with the amendments. The Scottish Government supports measures to improve the transparency of ownership of land and property. Subject to what is said below regarding Amendment 77L, consent to this Clause and amendments is therefore recommended.
30. Power to amend ROE provisions by regulation. Clause 166 will confer a power on the Secretary of State to amend, by regulation, the ROE provisions in the 2022 Act

to mirror changes made in the Bill to the Companies Act 2006. These ROE provisions place requirements on some forms of entity, the regulation of which is within devolved competence. Therefore Clause 166 confers a power on the Secretary of State, albeit narrow, that could potentially be used in respect of provisions which, if in primary legislation, would require, or at least require consideration of, legislative consent. An amendment to Clause 166, Amendment 77K, voted through by Lords Grand Committee on 20 April 2023, requires the Secretary of State to seek the consent of Scottish Ministers when making regulations, within devolved competence, to amend the Register of Overseas Entities provisions in the Economic Crime (Transparency and Enforcement) Act 2022 which correspond to any changes made by the Economic Crime and Corporate Transparency Bill to the Companies Act 2006. This follows engagement between Scottish Ministers and the UK Government, and is welcomed. Any requirement for the Secretary of State to seek the consent of Scottish Ministers in any instance where the power is used to legislate for matters within the competence of the Scottish Parliament engages the Legislative Consent process and requires the consent of the Scottish Parliament.

31. Amendment 77L, voted through at Lords Grand Committee Stage on 20 April 2023, addresses anti-avoidance measures especially in relation to trusts. Amendment 77L introduces new Schedule 6 (Duty to Deliver Further Information for Transitional Cases) which contains a power at 9(1) (Power to exclude descriptions of registrable beneficial owner) allowing the Secretary of State to make further regulations, relating to categories of persons who are not to be treated as a registrable beneficial owner of an overseas entity. The Scottish Government supports the strengthening of the supervisory regime for trusts across the UK, and the intention to address anti-avoidance measures. It appears to us, however, that this power could be exercised in relation to devolved matters. We consider that the use of this power in relation to devolved matters should require the consent of Scottish Ministers in order to ensure accountability for devolved interests. Therefore, the Scottish Ministers have asked the UK Government to provide a consent mechanism to ensure accountability for devolved interests. The Scottish Ministers are in discussions with the UK Government regarding consent being required for this regulation making power and it is hoped a resolution can be reached. Therefore legislative consent for Amendment 77L (in relation to Section 9(1) of new Schedule 6) is not being recommended at this time. Once a response is received, the Scottish Government will consider the position and update the Scottish Parliament as necessary.
32. The Scottish Government considers that it is a sensible and proportionate use of the legislative consent process to promote consent for the UK Parliament to legislate these Clauses, and amendments approved at Lords Grand Committee on 20 April 2023, subject to the exception noted above where consent is not recommended meantime to amendment 77L.

## Proceeds of Crime Act 2002 - Background

33. The Proceeds of Crime Act 2002 (“POCA”) is a UK-wide regime providing for the criminal confiscation or civil recovery of the financial benefit derived from unlawful

conduct. Part 3 of POCA covers criminal confiscation arrangements in Scotland and Part 5 of POCA established a non-conviction based regime for the civil recovery of the proceeds of crime.

34. POCA relates to both reserved and devolved matters. Although the proceeds of crime are generally devolved, POCA also provides for the confiscation and civil recovery in reserved matters such as drug trafficking. However, to the extent that the proposed amendments make provision in relation to the confiscation or civil recovery of the proceeds of crime, which are not reserved then it falls within the legislative competence of the Scottish Parliament, legislative consent is required. It also makes provision which alters the executive competence of the Scottish Ministers.
35. The Scottish Government is supportive of the measures to assist law enforcement to search, seize, detain and forfeit cryptoassets being used by criminals. POCA is a largely uniform scheme across the UK and it is desirable to ensure consistency across jurisdictions. The Scottish Government considers that it is a sensible and proportionate use of the legislative consent process to promote consent for the UK Parliament to legislate for these Clauses. However, the Scottish Government is not currently recommending consent for the part of Schedule 7 which introduces Section 303Z42 to POCA as the Scottish Government has requested that a consent requirement be added to the regulation making power in this Section and this matter has not yet been resolved. This issue is discussed in further detail in paragraph 68 below. Therefore, the Scottish Government recommends that the Scottish Parliament gives consent to Clause 167 and Schedule 6 and Clause 168 and Schedule 7 (with current exception of the part of Schedule 7 which introduces Section 303Z42) in so far as this requires the consent of the Scottish Parliament.

## Cryptoassets - Background

36. Cryptoassets are a store of value which can be transferred or exchanged digitally and are secured cryptographically. They exist electronically and use a peer-to-peer system. There is no central bank, government or centralised structure that manages the system, although cryptoasset providers require to be registered in the United Kingdom for money laundering purposes. Cryptoassets can and are being used by criminals to move and launder the profits of various crimes including drugs, fraud, and money laundering. There is also an increased risk that cryptoassets are being exploited to raise and move funds for terrorist activities.
37. The Bill aims to strengthen the measures available to tackle unlawful use of cryptoassets and facilitate faster and more efficient processes for the seizure of cryptoassets, and to assist that these assets can be recovered (that is, seizing and confiscating assets acquired by individuals as a result of crime). It strengthens the criminal confiscation process currently available to tackle unlawful use of cryptoassets and creates a new civil recovery regime specifically for tackling unlawful use of cryptoassets.

## Part 3 (Confiscation: Scotland) of the Proceeds of Crime Act 2002 (“POCA”)

38. Clause 167 introduces Schedule 6, which amends POCA to make provision in connection with cryptoassets and confiscation orders. Part 2 of Schedule 6 to the Bill amends Part 3 (Confiscation: Scotland) of POCA which relates to confiscation orders in Scotland in relation to persons who benefit from criminal conduct.
39. Paragraph 20 (Seizure of Property) amends Section 127B of POCA and enables officers to seize cryptoassets (or other property) during the course of an investigation without first having arrested someone for an offence and enable officers to seize cryptoasset-related items. This amendment to POCA applies not just to cryptoassets but all seizable property under the Act. The purpose of POCA is to preserve assets to be realised by any future confiscation order. The current seizure conditions under Section 127B of POCA can frustrate the aims of POCA to deprive criminals of their criminal profits or property. For example, if law enforcement attend a property and the suspect is not present in order to be arrested, but realisable property is discovered, it cannot currently be seized. Sufficient safeguards remain in place under POCA including the length of time that property seized in this way can be held for and any seizure remains subject to judicial oversight and the need for it to be justified.
40. Paragraphs 21 and 22 of Schedule 6 introduce and support the concept of a “cryptoasset-related item” as a new class of property and allows an appropriate officer (i.e. a Constable, officer of HM Revenue and Customs, or an immigration officer) to seize any free property if they have reasonable grounds to suspect that such property is a cryptoasset-related item (which includes exempt property<sup>1</sup>). It also gives appropriate officers the power to require information from a person which is stored in electronic form to enable or facilitate the seizure of a cryptoasset. Any information obtained from a cryptoasset-related seizable item may be used to identify or gain access to a crypto wallet and by doing so enable or facilitate the seizure of any cryptoassets, to a crypto wallet controlled by an appropriate officer.
41. Paragraphs 23 to 26 make amendments to the detention and release of property provisions to allow for the further detention of cryptoasset-related items and the conditions for further detention. Paragraphs 23 and 24 amend the detention of property provisions in Sections 127K and 127L of POCA. They provide for the further detention of cryptoasset-related items which are exempt property, pending the making or variation of a restraint order with the authorisation of a senior officer.
42. Paragraph 24 amends Section 127L of POCA to allow exempt property to be seized from the person who holds the property, which may not be the accused. This would initially only be for 48 hours and with approval of a senior officer. This amendment

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<sup>1</sup> “Exempt property” is defined at Section 127C(4) of POCA as –

(a) such tools, books, vehicles and other items of equipment as are necessary to the accused for use personally in the accused's employment, business or vocation;

(b) such clothing, bedding, furniture, household equipment, provisions or other things as are necessary for satisfying the basic domestic needs of the accused and the accused's family.

only applies to cryptoasset-related items. This is due to the unique nature of how cryptoassets are stored in crypto wallets and how these are accessed. Exempt items such as laptops used for work are commonly used to store items used to access cryptoassets. Exempt cryptoasset-related items can only be seized with the approval of a senior officer and where officers have reasonable grounds for suspecting that the item is a cryptoasset-related item and may assist officers in accessing cryptoassets.

43. Paragraph 26 makes provision to deal with cryptoasset-related items which have been released, but where there is no intention on the part of the owner to collect them. It makes provisions for appropriate officers to retain, dispose of, or destroy such property if it is not collected within a year of its release. Before destroying, officers require the approval from a senior officer, and they must have taken reasonable steps to notify people with an interest in the property of its release. Any proceeds from such a disposal are to be paid into the Scottish Consolidated Fund.
44. Paragraphs 27 to 35 make provision about the powers of the court to enforce confiscation orders. Principally, the provisions address powers of the court to order the realisation and payment (or destruction) of cryptoassets towards the satisfying of the confiscation order.
45. Paragraph 27 expands the powers which the court may confer on enforcement administrators in Section 128 of POCA including provision for the destruction of cryptoassets by enforcement administrators.
46. Paragraph 28 of Schedule 6 makes provisions to change “bank or building society” to “financial institution” in subsections (1)(b) and (7) of Section 131ZA. The effect of the change is to add electronic money institutions or payment institutions to the bodies (currently banks and building societies) which may be holding the money in question. The court will therefore be able to order payment where money is also held in such institutions. The Scottish Ministers, under subsection (7) of Section 131ZA have an existing power to amend Section 131ZA so that it applies by virtue of subsection (1) not only to money held in an account maintained with a bank or building society but also to money held in an account maintained with a financial institution “of a specified kind”, or money that is represented by, or may be obtained from, a financial instrument or product of a specified kind. The effect of the amendment, in changing “bank or building society” to “financial institution” modifies the regulation making powers of the Scottish Ministers in that they will no longer be able (nor need) to make regulations specifying electronic money institutions or payment institutions as financial institutions from which the court may order payment under subsection (5). This represents a modification of the Scottish Minister’s executive functions and requires legislative consent.
47. Paragraphs 29 and 36 of Schedule 6 insert new Sections 131ZC and 150A respectively into POCA. These Sections introduce a list of new definitions in relation to UK connected cryptoasset service providers and creates a power to the Secretary of State to amend these definitions by affirmative regulations with a duty to consult Scottish Ministers. This is within the legislative competence of the

Scottish Parliament insofar as these definitions apply to devolved proceeds of crime and necessitates legislative consent.

48. Additionally, paragraph 29 of Schedule 6 inserts a new Section 131ZB into POCA to provide that the court (in Scotland) can make, at enforcement stage, an order to a UK connected cryptoasset service provider to realise, in whole or in part, the cryptoassets held in a crypto wallet they administer, and to pay that amount towards the amount payable under the confiscation order. This is within the legislative competence of the Scottish Parliament and requires legislative consent.
49. Paragraph 30 inserts Sections 131AA and 131ZB into POCA. They enable the Sheriff, as part of the confiscation order enforcement process, to order that seized cryptoassets may be destroyed. This provision is within the legislative competence of the Scottish Parliament insofar as these rights of appeal apply to devolved proceeds of crime and necessitates legislative consent.
50. Paragraph 31 amends Section 131C, to provide a right of appeal to the Court of Session by the Procurator Fiscal or an interested party in relation to an order under new Sections 131ZB and 131AA. This provision is within the legislative competence of the Scottish Parliament insofar as these rights of appeal apply to devolved proceeds of crime and necessitates legislative consent.

## **Part 5 (Civil recovery of the proceeds etc. of unlawful conduct) of the Proceeds of Crime Act 2002 (“POCA”)**

51. Clause 168 introduces Schedule 7, which amends POCA to make provision in connection with cryptoassets and civil recovery. Part 1 of Schedule 7 amends Part 5 of POCA by inserting new Chapters 3C through 3F, which relate to the civil recovery regime, including for Scotland, in relation to cryptoassets which have been obtained through unlawful conduct.

### **Chapter 3C: Recovery of cryptoassets: searches, seizures and detention**

52. New Chapter 3C makes provision for the search, seizure, detention and release of cryptoassets and cryptoasset-related items. It makes provision for prior judicial approval; sets out the conditions for which a report needs to be made to the Appointed Person for POCA in Scotland; the duty of the Appointed Person to make a report to the Scottish Ministers to be laid in the Scottish Parliament; and for the making of a Code of Practice in connection with the exercise of these search powers in Scotland.
53. This Chapter also provides a new search power for a “cryptoasset-related item” that is only exercisable on the proviso that an enforcement officer (i.e., a Constable, an immigration officer, or an officer of HM Revenue and Customs) has lawful authority to be on the premises and has reasonable grounds to suspect that there is an item of property there that is, or that contains or gives access to information



that is, likely to assist in the seizure of cryptoassets under Part 5 of POCA. An enforcement officer cannot require a person to provide information that is subject to legal professional privilege.

## Regulation Making Powers

54. Section 303Z20(1) includes the definition of cryptoassets and crypto wallets and subsection (3) makes provision for the Secretary of State to make affirmative regulations in relation to these definitions with a duty to consult the Scottish Ministers. Insofar as it relates to the forfeiture of devolved proceeds of crime, this provision falls within the legislative competence of the Scottish Parliament as it relates to devolved proceeds of crime and therefore necessitates legislative consent.

## Reports of the Appointed Person for Scotland

55. Section 303Z23 stipulates that an enforcement officer may only exercise the powers conferred upon them under Section 303Z21 with the prior approval of the sheriff or, if that is not practicable, the approval of a senior officer. Where no prior approval has been granted, and where no property is seized under Section 303Z26, or any property that is seized is not detained for more than 48 hours, then the enforcement officer must make a report to the Appointed Person.
56. Section 303Z24 provides that the Appointed Person must prepare a report for the year containing their opinion on any searches conducted under the powers conferred by Section 303Z21 that were undertaken without judicial authority. This Section requires the Scottish Ministers to lay the report before the Scottish Parliament and, as such, alters their executive competence and so requires legislative consent.

## Code of Practice

57. Section 303Z25 requires the Scottish Ministers to prepare, consult upon and publish a Code of Practice on the exercise of powers by Constables conferred by Section 303Z21. This alters the executive competence of the Scottish Ministers and requires legislative consent.

## Seizure and detention of cryptoasset-related items

58. Sections 303Z26 and 303Z27 make provision for the seizure and detention of any item found where an enforcement officer has reasonable grounds for suspecting that it is a cryptoasset-related item: namely, an item that is, or that contains or gives access to information that is, likely to assist in the seizure of cryptoassets. Any cryptoasset-related item seized by an enforcement officer may only be detained for an initial period of 48 hours.
59. Section 303Z28 (Further detention of seized cryptoasset-related items) allows for a Procurator Fiscal or the Scottish Ministers (only in relation to their forfeiture order

functions under Section 303Z41) to make an application to the Sheriff for the further detention of seized cryptoasset-related items seized under Section 303Z26 for up to six months at a time with a maximum of two years. The detention may be extended up to a maximum of three years, on application by the Scottish Ministers, if the court is satisfied that a request has been made for evidence to be obtained from overseas by way of mutual legal assistance in connection with the cryptoasset-related item and that request is outstanding. This alters the executive competence of the Scottish Ministers by conferring a new function on them to apply for an order for further detention, and as such requires legislative consent.

60. Sections 303Z29 to 303Z32 provide for the seizure and detention of cryptoassets where there are reasonable grounds for suspecting that those assets are proceeds of unlawful conduct or intended for use in such conduct. Cryptoassets seized by an enforcement officer may only be detained for an initial period of 48 hours and can be further extended by the sheriff for six months up to a maximum of two years (or three years if evidence being obtained from overseas).
61. Section 303Z32 (Further detention of seized cryptoassets) provides that the detention of any cryptoasset may be extended by a judicial authority for up to six months at a time up to two years. The detention may be extended up to a maximum of three years, on application by the Scottish Ministers, if the court is satisfied that a request has been made for evidence to be obtained from overseas by way of mutual legal assistance in connection with the cryptoasset-related item and that request is outstanding. Again, this alters the executive function of the Scottish Ministers.
62. New Section 303Z33 provides that an enforcement officer must safely store detained cryptoassets and cryptoasset-related items.
63. Section 303Z34 (Release of cryptoassets and cryptoasset-related items) provides that the Sheriff may direct the release of the whole or any part of the property if satisfied that the property is not recoverable property or is not intended for use in unlawful conduct. This confers a new function on the Scottish Ministers to release, in whole or in part, any cryptoasset or other property detained under Chapter 3C of POCA after notifying the Sheriff under whose order the property was detained. This alters the executive competence of the Scottish Ministers and requires legislative consent.

## Chapter 3D: Recovery of cryptoassets: freezing orders

### Regulation Making Powers

64. Section 303Z35 includes the definitions of cryptoasset exchange provider and money and subsection (5) makes provision, similar to Section 303Z20 for the Secretary of State to make affirmative regulations with a duty to consult the Scottish Ministers to amend these definitions. This is within the legislative competence of the Scottish Parliament insofar as these definitions apply to devolved proceeds of crime and therefore necessitates legislative consent.

## Crypto wallet freezing order

65. Section 303Z36 (Application for a crypto wallet freezing order) makes provision for an enforcement officer to apply to the relevant court for a crypto wallet freezing order where they have reasonable grounds for suspecting that cryptoassets held in a crypto wallet administered by a UK-connected cryptoasset service provider are recoverable property or are intended by any person for use in unlawful conduct.
66. Section 303Z37 (Making of a crypto wallet freezing order) provides that the detention of any cryptoasset may be extended by a judicial authority for up to six months at a time up to two years. The detention may be extended up to a maximum of three years, on application by the Scottish Ministers, if the court is satisfied that a request has been made for evidence to be obtained from overseas by way of mutual legal assistance in connection with the cryptoasset-related item and that request is outstanding. This alters the executive function of the Scottish Ministers.

## Chapter 3E: Forfeiture of cryptoassets following detention or freezing order

### Forfeiture Orders

67. Section 303Z41 (Forfeiture Order) provides that the Scottish Ministers may make an application to the Sheriff for the forfeiture of some, or all, of the cryptoassets detained under Chapter 3C, or held in a crypto wallet subject to a crypto wallet freezing order under Chapter 3D. This confers an additional function on the Scottish Ministers to apply to the Sheriff and therefore amends their executive competence and hence requires legislative consent.
68. Section 303Z42 (Forfeiture order: supplementary) makes provision for the Secretary of State to make affirmative regulations concerning the forfeiture and realisation of cryptoassets with a duty to consult the Scottish Ministers. This regulation making power is potentially wide ranging and as currently drafted would allow the Secretary of State to legislate in a devolved area without the consent of the Scottish Ministers. Therefore, the Scottish Ministers have asked the UKG to provide a consent mechanism given the wide breadth of the power sought. The Scottish Ministers are in discussions with the UKG regarding consent being required for this regulation making power and it is hoped a resolution can be reached. Once a response is received, we will consider the position and update the Scottish Parliament as necessary. However, we are not in a position to recommend legislative consent to this provision as it currently stands. This regulation making power could alter the executive competence of the Scottish Ministers insofar as proceeds of crime are devolved, are within the legislative competence of the Scottish Parliament and therefore requires legislative consent.
69. Sections 303Z43 to 303Z45 set out how associated and joint property is to be dealt with when forfeiture is applied for and allows that the Sheriff can transfer the application to the Court of Session where an agreement cannot be made between parties.

70. Section 303Z46 provides that, where a Sheriff makes an order for the forfeiture of some of all of the cryptoassets in accordance with Section 303Z41(4) and the Scottish Ministers appeal, they may also apply for an extension of the account freezing order pending the appeal. The application to continue the wallet freezing order may be made without notice and applies if the forfeiture order has been transferred to the Court of Session under Section 303Z45. This confers a new function on the Scottish Ministers who, may apply to the court or Sheriff for an order that the crypto wallet freezing order is to continue to have effect pending the outcome of any appeal. This alters the executive competence of the Scottish Ministers and requires legislative consent.
71. Section 303Z47 (Appeals) provides for a right of appeal against a forfeiture decision made under Sections 303Z41 to 303Z45 for any party to the proceedings, including the Scottish Ministers. This requires legislative consent because it amends the executive competence of the Scottish Ministers by conferring a new power to appeal.

## Chapter 3F: Conversion of Cryptoassets

### Conversion

72. Chapter 3F sets out the procedure for converting cryptoassets which have been detained under the civil recovery provisions including those subject to forfeiture proceedings. Separate procedure is provided for cryptoassets subject to a crypto wallet freezing order. Section 303Z54 provides for detained cryptoassets to be converted into money, on application to a relevant court. Provision is made for two distinct applicants: an enforcement officer; or the person from whom the assets were seized. Section 303Z55 makes provision where a crypto wallet freezing order has effect.
73. Section 303Z56 (Conversion: existing forfeiture proceedings) makes provision for how forfeited cryptoassets are to be applied if conversion takes place after forfeiture but before they are realised or destroyed. It also ensures that the right of appeal in relation to a forfeiture order over cryptoassets is continued after a conversion and that a party may appeal instead under Section 303Z61. This provision affects the functions of the Scottish Ministers under Sections 303Z41 and 303Z47 and as such requires legislative consent as it alters the executive competence of the Scottish Ministers.

### Detention

74. Section 303Z57 (Detained cryptoassets: detention of proceeds of conversion) applies where cryptoassets are converted into money in accordance with an order under Section 303Z54. The proceeds of the conversion may be detained until the end of the two-year period that the cryptoassets could, immediately before the conversion, have been detained under Chapter 3C. This provides for the Scottish Ministers (in connection with their functions under Section 303Z41) to apply to the relevant court for an order for the period to be extended to three years if the court

is satisfied that a request for mutual legal assistance has been made and the evidence to be obtained is outstanding. This alters the executive competence of the Scottish Ministers by conferring a new function on them to apply for an order for further detention and as such requires legislative consent.

75. Section 303Z58 (Frozen crypto wallets: detention of proceeds of conversion) applies where cryptoassets held in a crypto wallet subject to a crypto wallet freezing order are converted into money in accordance with an order under Section 303Z55. This authorises the detention of converted cryptoassets for up to a maximum of two years from date the cryptoassets were originally detained under Chapter 3C which can be extended to three years if the court is satisfied that a request for mutual legal assistance has been made and the evidence to be obtained is outstanding. This alters the executive competence of the Scottish Ministers by conferring a new function on them to apply for an order for further detention and as such requires legislative consent.

## Release

76. Section 303Z59 (Release of detained converted cryptoassets) This Section allows the relevant court to direct the release of the whole or any part of the converted cryptoassets if the court after an application by the relevant person is not satisfied there are reasonable grounds for suspecting the converted to be released are recoverable property or intended for use in unlawful conduct. This Section confers a new function on the Scottish Ministers to apply for the release, in whole or in part, any cryptoasset or other property detained under Section 303Z57 or 303Z58 after notifying the sheriff under whose order the converted cryptoassets are being detained. This new function amends the executive competence of the Scottish Ministers and so requires legislative consent.

## Forfeiture

77. Section 303Z60 (Forfeiture Order) allows the court or Sheriff on the application of the Scottish Ministers, to order the forfeiture of some or all of the converted cryptoassets if satisfied that the converted cryptoassets to be forfeited are recoverable property or intended for use in unlawful conduct. This confers an additional function on the Scottish Ministers to apply to the Sheriff for forfeiture of some or all of the converted cryptoassets detained under Sections 303Z57 or 303Z58 and as such requires legislative consent as it alters their executive competence.
78. Section 303Z61 (Appeal against a decision under Section 303Z60) allows any party to the proceedings under Section 303Z60 including the Scottish Ministers to appeal against a forfeiture decision. This permits the Scottish Ministers to appeal an order or decision of the Sheriff to the Sheriff Appeal Court, thereby conferring a new function on them and amending their executive competence. It therefore requires legislative consent.

## Schedule 7, Part 2: Consequential and Other Amendments

### Proceeds of Crime Act 2002, Part 8 (Powers of investigation)

79. Consequential amendments in Part 2 of Schedule 7 to the Bill include amendments to Chapter 3 (Scotland) of Part 8 (Powers of investigation) of POCA in order to include cryptocurrency investigations with the scope of the various investigative orders and other associated requirements. These amendments alter the requirements under which the Scottish Ministers (as the sole enforcement authority for civil recovery in Scotland) can apply to the Sheriff for an investigative order. This provision alters the executive competence of the Scottish Ministers and therefore requires legislative consent.
80. This includes an amendment to Section 390 of POCA which changes the scope of the material seized under a warrant to include material seized under a cryptoasset investigation. The Scottish Ministers may retain this material until proceedings have concluded if they have reasonable grounds for believing that the material may need to be produced for the purposes of any legal proceedings, and it might otherwise be unavailable for those purposes. This amends the executive competence of the Scottish Ministers and requires legislative consent.
81. In addition, Sections 391, 397 and 416 of POCA are amended to include cryptoasset investigations within the scope of appropriate orders and an amendment to Section 412 of POCA amends the definition of “appropriate person” and “proper person” thereby altering the executive functions of the Scottish Ministers and requires legislative consent.
82. Section 312(2) of POCA is amended to include additional powers conferred on Scottish Ministers (by virtue of the Bill) that cannot be performed by a Constable engaged in temporary service with the Scottish Ministers. This alters the executive competence of Scottish Ministers and requires legislative consent.
83. Section 459 of POCA amends the functions of the Scottish Ministers in relation to the laying of Statutory Instruments containing an Order in Council made under Sections 444 or 445 of POCA and requires legislative consent as it alters the executive functions of the Scottish Ministers.

### Commencement, transitional and saving provisions

84. It has been agreed with UKG that as confiscation arrangements under Part 3 of POCA apply to Scotland then the Scottish Ministers will commence the provisions under Part 2 of Schedule 6 and Clause 167 (so far as it relates to that Part) after consultation with the Secretary of State. As the civil recovery provisions apply on a UK basis, no regulations may be made by the Secretary of State under Schedule 7 and Clause 168 (so far as it relates to that Schedule) and insofar as they relate to Scotland, unless the Secretary of State has consulted with the Scottish Ministers.

85. The Bill also makes provision for the Scottish Ministers to make transitional or saving regulations in connection with the coming into force of provisions under Part 2 of Schedule 6 to, and Section 167 of the Bill. As this gives certain commencement and transitional and savings provisions to Scottish Ministers, this alters their executive competence and legislative consent is required.

## **Part 5: Miscellaneous**

### Information Orders: money laundering

86. Clause 172 expands information orders for money laundering and terrorism financing to allow National Crime Agency officers to request that the Procurator Fiscal seek an order from a Sheriff on their behalf, to proactively gather intelligence without reliance on the requirement for a suspicious activity report. The altering of these investigatory powers in Scotland relates to a matter within the legislative competence of the Scottish Parliament and therefore requires legislative consent.

### Serious Fraud Office

87. Clause 185 of the Bill amends Section 2A of the Criminal Justice Act 1987 to allow the Director of the Serious Fraud Office (“SFO”) to exercise their investigation powers in order to determine whether to start an investigation. While the SFO’s powers to investigate serious/complex fraud extend only to England, Wales and Northern Ireland, the powers in Section 2 to require persons to answer questions, furnish information and produce documents also extend to Scotland. Powers to apply for search warrants are subject to the control of the Scottish courts.
88. The altering of these investigatory powers in Scotland relates to a devolved matter and therefore requires the consent of the Scottish Parliament through a legislative consent motion.

### Cryptoassets: terrorism

89. Clause 169 introduces Schedule 8, which amends the Anti-terrorism, Crime and Security Act 2001 (ATCSA) to make provision in connection with the civil recovery of cryptoassets and cryptoasset-related items intended to prevent terrorists gaining access to their money that could be used to finance terrorism.
90. The ATCSA was introduced to build on previous counter-terrorism legislation to ensure that the Government has the necessary powers to counter the threat to the UK. Relevant to the Economic Crime and Corporate Transparency Bill, the ATCSA introduced provisions to prevent terrorists from gaining access to their money. They complement provisions in the Proceeds of Crime Act 2002 and ensure that investigative and freezing powers are available wherever funds could be used to finance terrorism.

91. While Proceeds of Crime is generally devolved (except as expressly reserved such as in Head B1 (Drugs) of Part II of Schedule 5 to the Scotland Act 1998), terrorism is a reserved matter in Head B8 of Part II of Schedule 5 to the Scotland Act 1998. Clause 169 makes particular provision for the proceeds of terrorist's crimes for the purposes of the prevention of terrorism (special provisions dealing with terrorism) and are thus reserved.
92. However, Clause 169 also makes provisions which alter the executive competence of the Scottish Ministers. Consequently, it requires the consent of the Scottish Parliament. The relevant provisions which fall within legislative competence, or which alter the executive competence of the Scottish Ministers are set out below.
93. New paragraph 10Z7CA provides that the Scottish Ministers can apply to the Sheriff for a forfeiture order for cryptoassets detained or held in a crypto wallet freezing order. This confers a function on the Scottish Ministers and therefore alters their executive competence and requires legislative consent.
94. New paragraph 10Z7CD makes provision for associated and joint property where a forfeiture order has been made under 10Z7CA, and where a joint owner and parties who applied for or hold the property agree, that a payment can be made to the associated person. This confers a function on the Scottish Ministers to enter into agreements regarding associated and joint property and therefore alters the executive competence and requires legislative consent.
95. New paragraph 10Z7CE deals with the situation where there is no agreement about associated and joint property under paragraph 10Z7CD. The Sheriff can transfer the application made under 10Z7CA to the Court of Session for a decision. Subsection (11) deals with the situation when a person has suffered loss the court may require the Scottish Ministers to make a payment of compensation. This is a duty on the Scottish Ministers and requires legislative consent.
96. Under new paragraph 10Z7CF appeals must be lodged within thirty days. The Scottish Ministers are a party to an appeal under 10Z7CF, therefore a function is conferred on the Scottish Ministers, alters the executive competence and therefore requires legislative consent.
97. New paragraph 10Z7CG provides for the situation where an appeal has been made against the making, or decision not to make an order, under paragraph 10Z7CA. Scottish Ministers are a party to an appeal under 10Z7CF, therefore a function is conferred on the Scottish Ministers, alters the executive competence and requires legislative consent.
98. New paragraph 10Z7DG makes provision for the forfeiture of converted cryptoassets detained under new paragraphs 10Z7DD or 10Z7DE. The Scottish Ministers can apply to the Sheriff for forfeiture of some or all of the converted cryptoassets. The Sheriff can grant a forfeiture order if they decide the property is



earmarked as terrorist property. This confers a function on the Scottish Ministers, alters the executive competence and requires legislative consent.

99. New paragraph 10Z7DH makes provision for any party (including the Scottish Ministers) to appeal to the Sheriff Appeal Court a decision to make or not make a forfeiture order under new paragraph 10Z7DG. This alters the executive competence of the Scottish Ministers and requires legislative consent.

## Failure to prevent fraud

100. Lords amendments 84A to 84G and 86B create a new 'Failure to prevent fraud' offence which is committed when a large organisation fails to prevent existing fraud offences (such as fraud, embezzlement and fraudulent trading offences) from being committed by people associated with the organisation (for example, employees). The offence is committed if a person associated with the large organisation ("the associate") commits a fraud offence intending to benefit the organisation or any person who received services from the associate on behalf of the organisation. The approach enables the offence to be prosecuted anywhere within the United Kingdom and broadly aligns with the existing failure to prevent offences contained in Sections 7-9 of the Bribery Act 2010 and Part 3 of the Criminal Finances Act 2017.
101. The amendments propose regulation making powers which enable Scottish Ministers to add or remove devolved fraud offences from the list of offences covered by the 'failure to prevent fraud' offence and also a regulation making power which enables the Secretary of State to amend the definition of 'large organisation.'
102. The amendments introducing the 'Failure to prevent fraud' offence require legislative consent as most of the criminal law relating to fraud is devolved to Scotland. The amendments also alter the executive competence of the Scottish Ministers.
103. The Scottish Government has written to the UK Government requesting that the exercise of the regulation making power to amend the definition of 'large organisation' should require the consent of the Scottish Ministers in order to ensure accountability for devolved interests. However, the Scottish Government does not recommend withholding consent for these provisions pending a response from the UK Government.
104. The Scottish Government considers that it is desirable for the offence to extend to Scotland. The new offence will help to protect victims and cut crime by driving a culture change towards improved fraud prevention procedures, and holding organisations to account through prosecution if they profit from the fraudulent actions of their employees. The Bill provides a vehicle for enabling this to be achieved with consistency across the United Kingdom and, as stated above, there is a jurisdiction provision which enables an offence to be prosecuted anywhere within the United Kingdom. The Scottish Government considers it is a sensible and

proportionate use of the legislative consent process to promote consent for the UK Parliament to legislate for these amendments.

## Scottish Solicitors' Discipline Tribunal: powers to fine in cases relating to economic crime

105. Clause 182 amends the Solicitors (Scotland) Act 1980 to remove the existing statutory limit on financial penalties that can be imposed by the Scottish Solicitors' Discipline Tribunal (SSDT) for disciplinary matters relating to economic crime offences defined by the Bill. This will allow the SSDT to impose fines of any amount in such cases.
106. Clause 182 has been included at the request of the Scottish Government. It gives the SSDT parity with England and Wales in respect of the fining powers available to the SSDT for economic crime related solicitor misconduct. Currently, the SSDT may impose a maximum fine of £10,000. In comparison, the equivalent tribunal in England and Wales (the Solicitors Disciplinary Tribunal) has the power to impose an unlimited financial penalty. This change will provide the SSDT with powers that act as a proportionate deterrent against breaches of the rules and legislation related to economic crime, including offences linked to money laundering, terrorism financing and sanctions.
107. The exercise of this power is subject to the oversight of the Court of Session by virtue of the ability to appeal decisions of the SSDT to the court and the role of the Lord President in approving the SSDT rules and procedure.
108. Clause 182 requires legislative consent as it relates to the provision of legal services which is not reserved.
109. The Scottish Government considers it is a sensible and proportionate use of the legislative consent process to promote consent for the UK Parliament to legislate for this Clause. It would provide the earliest opportunity to legislate for this Clause. Consent to Clause 182 is therefore recommended.

## Consultation

110. There has been no specific Scottish Government consultation on those areas requiring legislative consent. However, the Scottish Government has sought to engage with, and take account of the views of Registers of Scotland, who have a role in implementing ROE. The Scottish Government has also engaged closely with Crown Office and Procurator Fiscal Service in connection with the amendments which introduce the 'Failure to prevent fraud offence' and with Crown Office and Procurator Fiscal Service, Civil Recovery Unit, Police Scotland and the Scottish Courts and Tribunal Service on the cryptoasset Schedules. The areas where legislative consent is required are generally at the margins of delivering the UK Government policy intent for the Bill.

111. The UK Government has consulted with a wide range of stakeholders on the measures in the Bill and have won broad support from business and professional groups, law enforcement agencies and civil society. This includes:

- (Then) BEIS consulted on a broad range of potential measures for Companies House reform in 2019, receiving over 1,300 responses, and announced high-level plans for reform in 2020. Significant policy development followed since September 2020, including three further consultations examining detailed proposals on the powers of the Registrar, implementation of the ban on corporate directors, and improvements to the financial information on the register. Reforms were set out in a white paper in February 2022 – [Corporate transparency and register reform - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/corporate-transparency-and-register-reform)
- Full public consultation and Govt response on Limited Partnerships Reform – [Limited partnerships: reform of limited partnership law - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/limited-partnerships-reform)
- Law Commission report on Corporate Criminal Liability - [Law Commission sets out options to Government for reforming how companies are convicted of criminal offences - Law Commission](https://www.lawcommission.gov.uk/publications/reports/corporate-criminal-liability)

## Financial Implications

112. No significant additional costs to the Scottish Government or its key stakeholders are envisioned as a direct consequence of the provisions within Economic Crime and Corporate Transparency Bill.

## Conclusion

113. The Scottish Government is supportive of the intent of the Bill and engagement has been good overall between officials on this topic. The Scottish Government is grateful for amendments that have been made to reflect devolved matters, and welcome the progress that has been made on some of the issues raised. The Government's position remains that where the UK Government intends to take powers to make secondary legislation in devolved areas that must be accompanied by effective mechanisms to respect the devolution settlement and to recognise the responsibilities of Scottish Ministers and the Scottish Parliament. The Scottish Government is not therefore currently recommending consent to certain provisions as described above.

114. However, as the Scottish Government supports the overall and detailed policy intentions of the Bill, it considers that the most effective, efficient and timely way to legislate for the provisions within devolved competence is through UK legislation, which can also make necessary changes to the competence of Scottish Ministers. The Scottish Government therefore recommends the Scottish Parliament gives its consent to the relevant provisions of the Bill as indicated in this memorandum.

## Draft Legislative Consent Motion

115. The Scottish Government will finalise a legislative consent motion in the light of discussions with the UK Government on the outstanding issues described in this memorandum. The Scottish Government's current draft legislative consent motion is<sup>2</sup>:

“That the Parliament agrees that the relevant provisions contained within the UK Economic Crime and Corporate Transparency Bill, with the exception of amendment 77B which inserts new Clause 156 and with the exception of Section 303Z42 as inserted by Schedule 7, introduced in the House of Commons on 22 September 2022, which fall within the legislative competence of the Scottish Parliament or alters the executive competence of Scottish Ministers, should be considered by the UK Parliament”.

Scottish Government  
May 2023

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<sup>2</sup> Please note that this paragraph contains an error and the Scottish Government has written to the Committee (see Annex B) with the correct text.

**ANNEX B**

**Letter from the Deputy First Minister to the Committee (19 May 2023)**

Dear Convener,

I am writing to inform you that a correction is required to the Legislative Consent Motion for the Economic Crime (Corporate Transparency) Bill which currently states the Draft Legislative Consent Motion at paragraph 115 is:

115. The Scottish Government will finalise a legislative consent motion in the light of discussions with the UK Government on the outstanding issues described in this memorandum. The Scottish Government's current draft legislative consent motion is:

"That the Parliament agrees that the relevant provisions contained within the UK Economic Crime and Corporate Transparency Bill, with the exception of amendment **77B which inserts new Clause 156** and with the exception of Section 303Z42 as inserted by Schedule 7, introduced in the House of Commons on 22 September 2022, which fall within the legislative competence of the Scottish Parliament or alters the executive competence of Scottish Ministers, should be considered by the UK Parliament".

The correction is that the Draft Legislative Consent Motion at paragraph 115 should state:

115. The Scottish Government will finalise a legislative consent motion in the light of discussions with the UK Government on the outstanding issues described in this memorandum. The Scottish Government's current draft legislative consent motion is:

"That the Parliament agrees that the relevant provisions contained within the UK Economic Crime and Corporate Transparency Bill, with the exception of amendment **77L which introduces new Schedule 6** and with the exception of Section 303Z42 as inserted by Schedule 7, introduced in the House of Commons on 22 September 2022, which fall within the legislative competence of the Scottish Parliament or alters the executive competence of Scottish Ministers, should be considered by the UK Parliament".

I have also copied this letter to the Delegated Powers and Law Reform Committee.

Yours sincerely,

**SHONA ROBISON**