Stage 3 proceedings on the Criminal Cases (Punishment and Review) (Scotland) Bill are scheduled to take place on 20 June 2012.

This briefing considers the key recommendations made by the Justice Committee in its stage 1 report, the Scottish Government’s response to those recommendations and relevant stage 2 amendments.
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INTRODUCTION

The Scottish Government introduced the Criminal Cases (Punishment and Review) (Scotland) Bill in the Parliament on 30 November 2011. It contained provisions in relation to two distinct issues:

- Part 1 of the Bill sought to amend some of the statutory rules used by the High Court when calculating the “punishment part” of a life sentence (i.e., the period a life sentence prisoner must serve in custody before being eligible to apply for release on parole). The Scottish Government’s proposals in this area were in response to the decision of the High Court in the case of Petch & Foye v HM Advocate (2011).

- Part 2 of the Bill sought to establish a framework under which the Scottish Criminal Cases Review Commission can disclose information about cases it refers to the High Court, where the relevant appeal is subsequently abandoned. The Scottish Government’s proposals in this area were originally prompted by the case of the now deceased Abdelbaset al-Megrahi (convicted of murder following the Lockerbie bombing).

The Parliament’s Justice Committee was designated as lead committee for parliamentary consideration of the Bill. Its stage 1 report was published on 29 March 2012. The Scottish Government produced a written response to the stage 1 report on 17 April 2012. The Bill completed stage 1 (consideration of general principles) with the stage 1 debate on 19 April 2012.

Stage 2 consideration of the Bill was carried out by the Justice Committee at its meeting on 15 May 2012 and was followed by the publication of the Bill (as amended at stage 2). All of the amendments lodged during stage 2 proceedings related to Part 2 of the Bill. Stage 3 proceedings (final consideration) are scheduled to take place on 20 June 2012.

Two other SPICe briefings, providing information on the Bill as introduced, are also available on the Parliament’s website:

- Criminal Cases (Punishment and Review) (Scotland) Bill: Custodial Sentences (McCallum 2012)
- Criminal Cases (Punishment and Review) (Scotland) Bill: Scottish Criminal Cases Review Commission (Ross 2012)
PART 1 OF THE BILL

Background

Part 1 of the Bill as introduced sought to amend some of the statutory rules used by the High Court when calculating the punishment part of a life sentence or order for lifelong restriction (another form of indeterminate custodial sentence).

The High Court, when imposing such a sentence, must specify a part of the total sentence which is imposed in order to satisfy the requirements of retribution and deterrence. This part is known as the punishment part and must be served in custody before the prisoner is eligible to apply for release on parole. The end of the punishment part does not signal the automatic release of a prisoner. Prior to any release, the Parole Board for Scotland must be satisfied that continued confinement is no longer required for the protection of the public.

As noted above, the Scottish Government’s proposals for changes to the punishment part were prompted by the High Court’s interpretation of the current statutory provisions – within the Prisoners and Criminal Proceedings (Scotland) Act 1993 – in the appeal case of Petch & Foye v HM Advocate (2011). The case dealt with the rules for calculating the punishment part where the court is not legally obliged to impose a life sentence (ie in cases where the offence is something other than murder) – referred to in this briefing as “non-mandatory life sentences”. It is this specific area which is the focus of Part 1 of the Bill.

The current rules for calculating the punishment part of a non-mandatory life sentence direct the court to consider the approach it would have taken if imposing a determinate custodial sentence (ie one for a set period of time). One implication of the High Court’s interpretation of those rules, in Petch & Foye, was that a non-mandatory life sentence prisoner could become eligible to seek parole earlier than would have been the case had the court opted to impose a determinate sentence. How this could occur is outlined in the SPICe briefing on Part 1 of the Bill as introduced (McCallum 2012, p 5-6)

The Scottish Government (2011) has stated that:

“The Criminal Cases (Punishment and Review) (Scotland) Bill, if passed, will resolve a technical anomaly which arose following the Appeal Court’s judgement in the case of Petch and Foye v HMA, which meant that prisoners given a discretionary life sentence or Order for Lifelong Restriction (OLR) can apply to become eligible for parole earlier than those serving sentences of a fixed length. Under this new legislation the courts will regain the discretion to set a ‘punishment part’ of those sentences that it considers appropriate in all the circumstances of a particular case.”

And that:

“we are not seeking to implement new policy in this area of sentencing law, but rather we are seeking in broad terms to give back to courts discretion that had been lost following the Petch and Foye judgement.” (Scottish Government 2012, p 1)

The way in which the Bill as introduced sought to address the issue is also outlined in the above mentioned SPICe briefing on Part 1 of the Bill (McCallum 2012, p 7-11)
Scrutiny of Proposals

There was broad support for the stated aims of the Scottish Government, with the stage 1 report noting that the Justice Committee was:

“supportive of the aim of Part 1 of the Bill in seeking to address the anomaly identified in the Petch and Foye case whereby a life prisoner is likely to have a parole hearing earlier than a non-life prisoner sentenced for a similar crime”. (Scottish Parliament Justice Committee 2012a, para 4)

Given this fact, the most fundamental issue to be debated was whether or not the approach set out in the Bill would actually achieve the stated goal of enabling the High Court to set a punishment part which is appropriate in all the circumstances of a case. This issue was addressed within the following contexts:

- complexity and flexibility – some critics of the proposals argued that they did not provide a clear legislative framework for the judiciary, that they could lead to further difficulties in interpretation and could produce unintended consequences. At least in part, such criticisms appear to be have been founded upon a view that the proposals were too closely based on the current statutory provisions (which have proven difficult to apply in practice) and went too far in trying to direct the exercise of judgement during the sentencing process

- double-counting – there was also some criticism of the proposals on the basis that measures intended to provide the court with the flexibility to increase the length of the punishment part could involve it taking the same factors into account more than once. For example, the seriousness of a particular offence could be considered: (a) when identifying the notional determinate sentence which the court would have considered appropriate if not imposing a life sentence (this is used as the basis for setting the appropriate length of punishment part); and (b) when deciding whether the punishment part of the life sentence should be set at more than one-half of the notional determinate sentence. It was argued that this may amount to inappropriate double-counting of such factors (eg on the ground that the setting of a longer punishment part on such a basis might fail to meet requirements of comparative justice under Article 5 of the European Convention on Human Rights)

In relation to the above points, the Justice Committee said in its stage 1 report (2012a) that:

“The Committee accepts that the existing legislative framework on non-mandatory life sentences is already a complex area of law. However, we also note the difference of views between the Scottish Government, which considers the Bill to provide a clear framework for judges to use when calculating the punishment part of non-mandatory life sentences, and those expert witnesses who consider the legislation overly complex. These views are difficult to reconcile.” (para 94)

“The Committee invites the Scottish Government to consider whether the potential for ‘double counting’ under section 2B(5) referred to by witnesses at stage 1 give rise to any concerns.” (para 109)

With respect to the perceived complexity of the provisions, the Scottish Government (2012) stated:

“We have sympathy with those who consider the provisions are complex. We accept the provisions are complex, but we do not consider they are unnecessarily complex.

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1 The notional determinate sentence must, for this purpose, exclude any period required for public protection.
This is an unavoidably difficult area of the law because there are many different factors necessarily in play for the sake of ensuring that the appropriate punishment part is determined by reference to the particular circumstances of any individual case.

In terms of understanding sentencing decisions, we think it is beneficial if all those involved in a case understand fully the basis upon which a sentencer will set the punishment part. This can be done by presenting to them the framework in Part 1 of the Bill. This framework should also assist the sentencer when explaining how the punishment part has been assessed. In terms of appeals being made against sentencing decisions, we think the most appropriate way of minimising the risk of appeals is for the sentencing framework to be laid out as in Part 1 of the Bill. Although it is possible (as with any law) that appeals will be made, we think more appeals are likely to be made if there is not a clear framework setting out the detail of the rules to be applied by the sentencer when assessing the punishment part. Our view is that there will be more scope to challenge the punishment part if any important aspects are omitted from the statutory framework.” (p 4-5)

And on concerns about double-counting:

“We note the comments, but we do not consider there is a difficulty with ‘double-counting’ under the provisions. The approach we have taken is that the seriousness of the offence, the previous convictions of the offender and other factors relevant to the specific case are factors which are relevant to each of the two separate assessments required under our provisions. (...) We consider these are two separate purposes and therefore we do not consider there is any ‘double-counting’ required under our provisions.” (p 4)

The Justice Committee also noted in its stage 1 report (2012a) that:

“The Committee is attracted by the relative simplicity of alternative approaches to the drafting of Part 1 proposed by some witnesses at stage 1. Following the assurance from the SHRC [Scottish Human Rights Commission] that it believes these approaches to be ECHR compliant, the Committee invites the Scottish Government to consider whether a less prescriptive approach would be clearer and more appropriate.”

In response, the Scottish Government (2012) said that:

“While we would be happy to consider the precise terms of any specific alternative approaches, we believe that providing the prescriptive framework in Part 1 of the Bill is the best way to resolve the Petch and Foye anomaly and (in doing so) achieve clarity and certainty of meaning and effect.” (p 5)

The Justice Secretary added during the stage 1 debate that the Government had not, up to that point, received any specific alternative proposals. Further information about possible alternative approaches is provided in the appendix to this briefing.

The complexity of the provisions in Part 1 of the Bill was also considered in relation to the goal of achieving clarity in sentencing from the point of view of the non-lawyer. In its stage 1 report the Justice Committee (2012a) sought:

“an assurance from the Scottish Government that procedures are in place so that victims and witnesses are able to fully understand what the sentences handed down by the courts mean in practice”. (para 95)
The Scottish Government’s response (2012, p 3) outlined what is done to assist victims and witnesses in that respect.

In general, the stage 1 debate, in so far as it related to Part 1 of the Bill, covered the same issues dealt with in the stage 1 report and Scottish Government response.

**Stage 2 Amendments**

No stage 2 amendments were lodged in relation to Part 1 of the Bill, which thus remains unchanged from when it was introduced.


PART 2 OF THE BILL

Background

The Scottish Criminal Cases Review Commission (“the Commission”) was established by section 194A of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). The role of the Commission is to review and investigate cases where it is alleged that a miscarriage of justice may have occurred. Part 2 of the Bill concerns the role of the Commission and its ability to disclose information in certain cases. After a case review has been completed, the Commission decides whether or not the case should be referred to the High Court. If the Commission does decide to refer a case, and the High Court accepts the reference, the case will be heard and determined by the High Court as if it were a normal appeal. Where the Commission makes a reference to the High Court, it is required to give the court a statement of reasons for making the reference and to send a copy of the statement to every person who appears likely to be a party to the appeal.

In general, any information obtained by the Commission may not be disclosed and it is currently an offence under section 194J of the 1995 Act to do so. Exceptions from obligations of non-disclosure of information held by the Commission are included at section 194K of the 1995 Act. They provide that information may be disclosed for, amongst other things, the purposes of any criminal or civil proceedings.

The Scottish Ministers have, by virtue of section 194K(1)(f) of the 1995 Act, an order-making power allowing them to set out circumstances in which the normal non-disclosure rules that the Commission is subject to may be disapplied. This power has been used, with the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 (“the 2009 Order”) specifying additional circumstances in which the Commission may disclose information, or authorise the disclosure of information, without committing an offence in terms of section 194J(3) of the 1995 Act. The Scottish Government used its power to make the 2009 Order given the public interest issues raised in the case of Abdelbaset al-Megrahi. One of the requirements set out in the 2009 Order was that information could only be disclosed if the person providing it had directly or indirectly consented to this. On 9 December 2010, the Commission issued a news release explaining that it had been unable to obtain the relevant consent from all those who provided information contained in the statement of reasons relating to the al-Megrahi case and, as such, was unable to publish it.

On 25 March 2012, a Scottish newspaper published online a document it described as the statement of reasons in the al-Megrahi case. The newspaper said that it was doing so because it had received al-Megrahi’s permission and because it was in the public interest to do so. After examining the document, the Commission confirmed that it was the statement of reasons in the al-Megrahi case. In its stage 1 report, the Justice Committee noted that this was a hugely significant development given the policy intention behind Part 2 of the Bill but emphasised the importance of placing the Committee’s consideration of all of the evidence received before Parliament. The Committee also underlined that Part 2 of the Bill was drafted not only in respect of the al-Megrahi case but in general terms, and may still be relied upon in relation to other cases.

The provisions in Part 2 apply to all cases where an appeal against conviction has been abandoned or has otherwise fallen following a referral to the High Court by the Commission. The Bill provides that in such circumstances, the Commission may disclose information relating
to the case where it determines that it is appropriate to do so. In determining whether it is appropriate, the Commission is required to consult with those affected by, or who otherwise have an interest in, the information being considered for release. The Commission is also required to have regard to any material representations made to it by affected or interested parties as regards whether the information should be disclosed. However, the final decision on whether to disclose rests with the Commission. There is one exception to this, and that is where the information that is being considered for disclosure has been obtained by the Lord Advocate or the Commission from foreign authorities under international assistance arrangements. For this type of information, the consent of the foreign authority that provided the information is required before the Commission can disclose that information.

**Scrutiny of Proposals**

As indicated above, although scrutiny of the provisions in Part 2 of the Bill centred on the information held by the Commission in relation to the al-Megrahi case, the relevant provisions were drafted in general terms and thus may be relied upon in other cases.

The Justice Committee supported the general principles of Part 2 of the Bill but noted in its stage 1 report (2012a) that there had been very little opportunity to take evidence on the general applicability of Part 2.

The key debate at stage 1 was whether data protection legislation (which is reserved to Westminster) may prove to be a significant hurdle where the Commission seeks to disclose information under the provisions in Part 2 of the Bill. The Scottish Government initially took the view that data protection legislation would prove to be a major obstacle to disclosure of information, but there was a clear divergence of views on this issue.

In their written submission the Justice for Megrahi campaign stated that the whole issue of data protection was “a compete red herring” and argued that the Scottish Government had pursued a fundamentally wrong legislative route in introducing primary legislation to enable disclosure of information in the al-Megrahi case. They stated that:

“Section 194K(4) of the Criminal Procedure (Scotland) Act 1995 (an Act of the UK Parliament) specifically provides that where SCCRC disclosure is permitted by a Statutory Instrument (inter alia) ‘the disclosure of the information is not prevented by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by, under or by virtue of any enactment) (...)’. This means that UK data protection legislation, or any other legislative or common law obligation of secrecy, is no bar to disclosure.” (Scottish Parliament Justice Committee 2012h)

Justice for Megrahi argued that, instead of proceeding with Part 2 of the Bill, the 2009 Order (see above) could be revised, with the requirement to seek the consent of interested parties removed, thus allowing the Commission to disclose information unencumbered by data protection considerations. However, other witnesses did not agree with this interpretation. For example, the Commission drew attention to section 57(2) of the Scotland Act 1998 which provides that the Scottish Government may not make legislation (including subordinate legislation) that is incompatible with European Community law. The Commission noted that the Data Protection Act 1998 implemented a European Directive. James Chalmers of the Edinburgh University Law School (Scottish Parliament Justice Committee 2012g) also noted that the Data Protection Act 1998 post-dated the legislation creating the Commission and as such, it was not clear how section 194K of the 1995 Act “could be taken as pre-emptively carving out an exception to it”.

The Justice Committee (2012a) stated that it was not persuaded by the argument that any data protection obstacles could have been avoided through the Cabinet Secretary for Justice exercising an order-making power rather than introducing primary legislation. It concluded that the legal position on this particular point was clear – that the Parliament does not have the power to override data protection law whether by primary or secondary legislation (para 21).

In a letter to the Convener of the Justice Committee, the Cabinet Secretary for Justice stated that he saw “the only realistic means of meeting the requirements of data protection legislation to allow disclosure of information which consists of personal data or sensitive data” to be the Commission obtaining the consent of interested parties. He added that:

“(…) without steps being taken to remove data protection obstacles, our understanding is that it will be very difficult for the Commission to be able to disclose information in the Megrahi case, even if the Commission decided it was appropriate to do so under the terms of the Bill”. (Scottish Parliament Justice Committee 2012b)

The Cabinet Secretary had earlier written to the UK Justice Secretary requesting the removal of “data protection obstacles” in relation to the al-Megrahi statement of reasons to help give effect to Part 2 of the Bill. In that letter, the Cabinet Secretary had asked the UK Justice Secretary to consider making an order under schedule 3, paragraph 10 of the Data Protection Act 1998 which enables the UK Secretary of State to specify circumstances where the processing of sensitive data is permissible.

The Commission was also initially of the view that data protection would be a potential obstacle to disclosure of information and that an order from the Secretary of State would be necessary in order to allow it to disclose personal and sensitive personal data. At the Justice Committee meeting on 31 January 2012, Gerard Sinclair, Chief Executive of the Commission stated:

“As indicated in our written submission, our starting position is that we will require an order under paragraph 10 of schedule 3 to the 1998 Act, because we believe that the only other method that we could use legitimately to publish the sensitive personal data that are contained in the documentation would be to obtain the consent of the parties. We consider that that would be unlikely, given our previous experiences.

I note that there is some suggestion in the Information Commissioner’s response that paragraphs 7(1)(a) and (b) of schedule 3 might be a route for the Commission to overcome consent.4 Our view is that that is not an appropriate route, but we have indicated that we are happy to meet the Information Commissioner’s Office and the Ministry of Justice to tease out why we believe that. If we persuade them of our views, we will be left with the paragraph 10 order.” (Scottish Parliament Justice Committee 2012c)

However, in written evidence to the Committee (Scottish Parliament Justice Committee 2012e), the Information Commissioner’s Office argued that the provisions in Part 2 of the Bill would, with regard to the key data protection principle that data must be processed fairly, provide “a robust legislative framework which will ensure that such disclosure is fair and lawful”. In oral evidence to the Committee, Dr Ken McDonald, the Deputy Information Commissioner responsible for Scotland, emphasised that the Bill appeared to satisfy the schedule 3 condition that permits the processing of information for the purpose of administration of justice, meaning that the Commission would be able to publish information lawfully without the consent of the data subject (Scottish Parliament Justice Committee 2012d).

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4 Paragraph 7(1)(a) relates to the processing of sensitive personal data necessary for the administration of justice, while 7(1)(b) deals with processing necessary for the exercise of any functions conferred on any person by or under an enactment.
Given the divergence of views on the issue of data protection, discussions to ascertain the best way forward were held which involved the Commission, the Information Commissioner’s Office, the UK Ministry of Justice and Scottish Government Justice Department officials. In summary, the main outcome of those discussions was that the Commission was more receptive to the argument put forward by the Information Commissioner that disclosure of data by the Commission would satisfy the schedule 3 condition of the Data Protection Act 1998 that processing is necessary for the administration of justice. Effectively, this meant that an order under schedule 3, paragraph 10 of the Data Protection Act 1998 would not be required from the Secretary of State.

It is clear from the evidence above that data protection is a complex legal issue, and while the Justice Committee (2012a) stated that the emergence of consensus amongst parties appeared to be a satisfactory outcome, it did note that it was perhaps regrettable that the Information Commissioner’s Office was not consulted before Part 2 of the Bill was introduced – so as to seek greater clarity on data protection issues.

### Stage 2 Amendments

Three amendments were brought forward by the Scottish Government at stage 2. The first amendment (concerning section 3 of the Bill – exception to non-disclosure rule) was lodged in response to concerns raised by the Commission at stage 1 with regard to legal professional privilege (“LPP”).

In evidence to the Committee at stage 1, the Commission (Scottish Parliament Justice Committee 2012i) indicated that LPP may prove to be another potential inhibition on disclosure of information in relevant cases. The Commission noted that:

> “The draft Bill does not refer expressly or specifically to LPP, and there is no indication in the explanatory notes accompanying the Bill that the purpose of the Bill is to override LPP. If the intention of the proposed legislation is to override LPP, the SCCRC believes the Bill may require to make such an intention expressly clear.”

The Commission posited the legal position that privilege could only be overridden by express words or necessary implication in statute, and noted that it was uncertain whether this was currently provided for in the 1995 Act.

In its stage 1 report, the Justice Committee noted that LPP is different from data protection and human rights law in that it is not a reserved matter under the Scotland Act 1998. It invited the Cabinet Secretary to consider the points raised by the Commission.

Moving the amendment, the Cabinet Secretary for Justice stated:

> “Amendment 1 provides that, where the Scottish Criminal Cases Review Commission has determined under the framework in the Bill that it is appropriate in the whole circumstances for information that relates to a case to be disclosed, that disclosure ‘is not prevented by any obligation of secrecy or other limitation on disclosure (…) including any such obligation or limitation imposed by, under or by virtue of any enactment’.

The amendment explicitly provides that that general override does not apply to any court interdict or other court order. In other words, if a court’s decision is that information should not be disclosed by the Commission, that information cannot be disclosed, even if the Commission considered that it was appropriate to disclose it. The amendment addresses a concern that the Scottish Criminal Cases Review Commission expressed in its evidence to the Committee that the Bill as introduced
did not provide the necessary authority for it to disclose information that is covered by legal professional privilege.” (Scottish Parliament 2012e)

The Cabinet Secretary went on to explain that the effect of the amendment was not that any such obligations of secrecy or other limitations on disclosure would be treated as if they did not exist but rather, that it would ensure that such obligations “do not constitute an absolute bar to disclosure”. Essentially, the Commission would be required to consider those obligations before it reached a conclusion on whether it was appropriate, in the whole circumstances, to disclose information:

“...In doing so, the Commission is required to take account of any representations that it receives from an affected person or another interested person regarding the decision to disclose information. The fact that information is covered by legal professional privilege or that a duty of confidentiality or a statutory duty of non-disclosure applies to the information may be considered by the Commission to be a factor that argues against disclosure. However, amendment 1 ensures that that does not represent an absolute barrier to the release of information.” (Scottish Parliament 2012e)

Amendment 1 was agreed to without division.

Amendments 2 and 3 were minor technical amendments.
APPENDIX: ALTERNATIVES TO PROPOSALS IN PART 1

As noted earlier, the Justice Committee indicated in its stage 1 report (2012a) that it was “attracted by the relative simplicity of alternative approaches to the drafting of Part 1 proposed by some witnesses at stage 1” (para 116). Witnesses did not seek to set out in detail how any alternatives might read if inserted into the Bill. However, the following seeks to expand on a suggestion put forward in evidence from the Faculty of Advocates (2012):

“It is not for the Faculty to draft legislation but it does seem that there are alternative drafting techniques by which the policy aims could be achieved. By way of example, the legislation could require the Court to fix a punishment part which reflects the requirements of retribution and deterrence but specify that in doing so the Court is to take into account, inter alia, the early release provisions which would have applied if the accused had been the subject of a determinate sentence. This would leave it to sentencing judges (subject to control by the Appeal Court) to take that factor into account in an appropriate manner when fixing punishment parts in these sorts of case.” (para 6)

Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 currently describes the punishment part of a life sentence as the part of the total sentence which:

“the court considers appropriate to satisfy the requirements for retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public)”.  

In relation to a mandatory life sentence, the 1993 Act directs the court to take the following into account when determining the punishment part:

- the seriousness of the offence for which the person is being sentenced
- any previous convictions
- any reduction in sentence which might be appropriate following an early guilty plea

In light of the points made by the Faculty of Advocates, it might be argued that appropriate provision could be made for determining the punishment part of a non-mandatory life sentence if the provisions of the 1993 Act were amended to direct the court to take into account the three factors set out above plus one additional factor:

- the period the offender would need to serve in custody before he/she may be released under early release provisions if the court had imposed a determinate rather than life sentence
SOURCES


Faculty of Advocates. (2012) Criminal Cases (Punishment and Review) (Scotland) Bill – Written Submission to the Justice Committee from the Faculty of Advocates. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/CC6._Faculty_of_Advocates.pdf [Accessed 12 June 2012]


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