This memorandum relates to the Bail, Judicial Appointments, etc. (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 25 May 2000

BAIL, JUDICIAL APPOINTMENTS, ETC. (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Bail, Judicial Appointments, etc. (Scotland) Bill introduced in the Scottish Parliament on 25 May 2000. It has been prepared by the Scottish Administration to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Administration and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 17–EN.

POLICY OBJECTIVES OF THE BILL - GENERAL

2. The Bill is designed to ensure that certain statutory procedures relating to bail and the district courts are compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms. It also creates a new judicial office of part-time sheriff in replacement for the office of temporary sheriff (temporary sheriffs having been held by the High Court not to constitute an independent and impartial tribunal for the purposes of article 6 of the Convention).

3. The Convention was ratified by the United Kingdom in 1951. Parties to the Convention are required to give effect to the rights and freedoms that it sets out. Since 1966, British citizens have had the right to apply to the European Commission of Human Rights if they believe that their rights under the Convention have been infringed by the State. The Commission ceased to exist from November 1998 and applications may now be made direct to the European Court of Human Rights once domestic remedies have been exhausted.

4. The Scotland Act 1998 and the Human Rights Act 1998 give further effect to Convention rights in domestic law. The relevant provisions of the Scotland Act are sections 29 and 57(2). Section 29 provides that it is outwith the Scottish Parliament’s legislative competence to enact a provision which is incompatible with any of the Convention rights. Section 57(2) provides that a member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights.
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However, in terms of section 57(3), an act of the Lord Advocate in the course of prosecuting an offence is not unlawful if, as a result of a provision in primary legislation, he could not have acted differently. Legislation or actions of the Executive may be challenged in any civil or criminal proceedings before the Scottish courts and may be struck down as ‘ultra vires’ if they are found to be in breach of any of “the Convention rights” (within the meaning given to that phrase by the Human Rights Act).

5. The Home Secretary has indicated that he intends to bring those provisions of the Human Rights Act which are not already in force into force throughout the United Kingdom on 2 October 2000. It will then be unlawful for any public authority anywhere in the United Kingdom to act in a way which is incompatible with the Convention rights.

6. The Scottish Executive has conducted a detailed audit of both legislation and administrative action for which it is responsible to identify potential ECHR challenges and what changes may be necessary as a result. It has concluded that there is a serious risk of incompatibility in relation to certain provisions of the Criminal Procedure (Scotland) Act 1995 and the District Courts (Scotland) Act 1975. The Bill proposes amendments to these Acts which are designed to ensure that they are compatible with the Convention rights.

7. In addition, the High Court found in Starrs and Chalmers v P.F. Linlithgow (2000 J.C. 208) that a temporary sheriff was not an independent and impartial tribunal and hence their use was incompatible with the Convention rights. No new business has been allocated to temporary sheriffs since the date of that decision. The Executive now proposes to create a new judicial office of part-time sheriff and the Bill includes amendments to the Sheriff Courts (Scotland) Act 1971 for this purpose.

PART 1 – BAIL

Policy Objectives

8. The Executive considers it necessary to amend certain aspects of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) to ensure that they are compatible with article 5(3) of the Convention. The relevant provisions of the 1995 Act relate to the requirement for the accused to apply for bail; the ‘bail exclusions’ which preclude the sheriff from granting bail in certain cases and the right of the accused to appeal against the refusal of bail.

9. Article 5(3) provides that:

“Everyone arrested or detained...shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”
10. The European Court has considered the requirements of article 5(3) as regards bail in two recent cases: *T.W. v Malta* (1999) and *Caballero v United Kingdom* (2000). In *T.W. v Malta*, the European Court found a breach of article 5(3) where the relevant domestic law required the person detained to make an application before the Maltese court could consider whether detention should be continued. The Court ruled that access to a judicial authority was not sufficient to constitute compliance with article 5(3): judicial review must take place automatically without the need for an application being made by or on behalf of the detained person. The Court further held that the judicial authority must have power to consider the merits of the detention, to decide by reference to legal criteria whether there are reasons which justify detention and to order release if there are no such reasons.

11. In *Caballero v The United Kingdom* (2000), the applicant challenged section 25 of the Criminal Justice and Public Order Act 1994, which at the material time precluded the courts in England and Wales from granting bail to a person charged or convicted with an offence of murder, attempted murder, manslaughter, rape or attempted rape who had a previous conviction for one of those offences or culpable homicide. In proceedings before the European Court, the UK Government conceded that these provisions had been in breach of article 5(3), a concession which the Court accepted. Section 25 of the 1994 Act was amended by section 56 of the Crime and Disorder Act 1998 to allow bail to be granted in such cases but only if there are exceptional circumstances which justify it. Section 26 of the Criminal Procedure (Scotland) Act 1995 has a similar effect to the unamended section 25 of the 1994 Act in that, although it is open to an accused in Scotland to petition the High Court to obtain bail, at first instance, the sheriff has no power to consider bail.

12. In the light of the European Court’s judgements in *T.W v Malta* and *Caballero v United Kingdom* the Executive believes that various amendments are required to ensure that the 1995 Act is compatible with article 5(3). At present, the accused must apply for bail under section 23 of the 1995 Act before the issue will be considered. The Bill accordingly proposes that a new duty should be placed on the sheriff or judge to consider whether to grant bail at the accused’s first appearance in court without the need for an application, thus satisfying the requirement for an automatic judicial review of detention. In accordance with article 5(4), the onus will however remain on the accused to make an application for bail at subsequent appearances.

13. Second, the Bill repeals the provisions in sections 24 and 26 of the 1995 Act which preclude the sheriff from considering bail where a person has been charged with or convicted of murder or treason; or where a person has been charged with or convicted of attempted murder, culpable homicide, rape or attempted rape and has a previous conviction for one of those offences or for murder or manslaughter.

14. The removal of the statutory bail exclusions means that the sheriff will be required to exercise his discretion in accordance with the common law and, from 2 October 2000, Strasbourg jurisprudence. It is thought that the courts will continue to be favourably disposed to using the Convention to influence their decisions in the period approaching 2 October. There is well established case law which sets out the principles to be applied in determining whether it is
appropriate for bail to be granted. These include considerations of public safety and securing justice. In addressing this, the court would consider previous convictions (including convictions for similar offences). In practice, the common law would therefore constrain a sheriff from exercising his discretion to grant bail to persons accused of serious sexual or violent offences who had previous convictions for similar offences in the absence of genuinely exceptional circumstances where the accused could show that he would not present a risk to public safety if released.

15. The Bill further provides that where an accused is already in custody for another matter, the court will be required to consider bail for the new offence. This is necessary to ensure that the requirements of article 5(3) are met in relation to the new offence. The accused could of course be released on bail for the new offence only when the reason for the existing custody had expired (for example, on his completing a custodial sentence for the other offence or being granted bail in respect of the other offence).

16. Finally, the Bill will enable the accused to appeal to the High Court against the decision of a sheriff to refuse bail under the new section 22A (consideration of bail on first appearance) or the refusal of an application made prior to committal. This will bring the provisions of the 1995 Act relating to a person arrested on petition into line with that of a person charged on complaint, who may appeal at any time, and in line with the right of the prosecutor who may appeal the granting of bail at any time.

**Alternative Approaches**

17. The Executive considered whether to list on the face of the legislation the common law criteria that the sheriff must consider in exercising his power, but decided that this would add nothing and might simply confuse the position at common law. It would also make it more difficult for the courts to reflect future developments in domestic or Strasbourg case law. The Executive considered that it was more appropriate to leave the matter as one of common law so that judges could take a reflective and reactive approach as Convention jurisprudence and social conditions and attitudes develop.

18. The Executive also considered whether an ‘exceptional circumstances’ test should be introduced, as provided in England and Wales by section 56 of the Crime and Disorder Act 1998. This provision states that a person charged or convicted with an offence of murder, attempted murder, manslaughter, rape or attempted rape who has a previous conviction for one of those offences or culpable homicide will only be granted bail if there are exceptional circumstances which justify it. The Executive also considers that introducing such a test would add nothing to a clear common law position in Scotland that already enables a sheriff to refuse bail in such circumstances.
19. This Part of the Bill is concerned with the appointment of part-time sheriffs and justices of the peace. Chapter 1 of Part 2 deals with part-time sheriffs and abolition of the office of temporary sheriff. Chapter 2 of Part 2 deals with justices of the peace.

**Policy Objectives**

20. Since 1971, section 11 of the *Sheriff Courts (Scotland) Act 1971* has made provision for the appointment of temporary sheriffs. The function of the temporary sheriff is to assist with the operation of the sheriff court by taking cases when permanent sheriffs are unavailable for any reason including annual leave, sick leave, absence on other business or temporary vacancy. Temporary sheriffs may also assist at times of severe pressure when the permanent sheriffs cannot deal with the workload. Temporary sheriffs hold commissions for one year at a time which are renewable annually at the discretion of Ministers, who also have authority to remove a commission at any time during the year.

21. In July 1999 an action was begun at Linlithgow Sheriff Court which challenged the status of the temporary sheriff on the grounds that he was not an independent and impartial tribunal for purposes of article 6.1 of the European Convention on Human Rights. The relevant text of the article reads:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

22. A decision of the High Court in November 1999 on this case (*Starrs and Chalmers v P.F. Linlithgow*) ruled that the use of temporary sheriffs was incompatible with article 6 of the ECHR. The Court had particular concerns about the fact that a commission could be recalled at any time (section 11(4) of the *Sheriff Courts (Scotland) Act 1971*) and about the one-year term of office, subject to renewal at the discretion of Ministers. In view of the decision of the High Court, the Executive discontinued the use of temporary sheriffs for all new business with immediate effect (11 November 1999). In certain circumstances temporary sheriffs were retained to complete cases which had already started before the High Court judgement.

23. In the light of the High Court decision, the first policy objective of Chapter 1 is to abolish the office of temporary sheriff and thus to remove from legislation those provisions which caused the High Court to conclude that the use of such a sheriff was incompatible with the provisions of article 6.1 of the ECHR. The Bill will, however, not prevent temporary sheriffs who have already started cases from concluding these.

24. The Executive’s second policy objective is to create a new office of part-time sheriff in recognition of the fact that the permanent sheriffs do require some form of part-time assistance to cope with the volume of business and to provide continuity when permanent sheriffs are unavailable for any reason. The Bill seeks to provide part-time sheriffs with security of tenure
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and other conditions of service which will make their use compatible with the requirements of the ECHR.

**Qualification and Terms of Part-Time Sheriffs**

25. Part-time sheriffs will require to satisfy the same basic entry requirements as permanent sheriffs. When sitting, they will have the same jurisdiction and powers as a permanent sheriff. The total number of part-time sheriffs will be limited to 60 (with a power subsequently to vary this number by order). This is intended to ensure a measure of Parliamentary control over the extent of business conducted by part-time sheriffs throughout Scotland, in light of criticism by the High Court that the number of temporary sheriffs had been allowed to grow too large, to the point where they carried out a very significant proportion of the total workload in the sheriff courts. The Bill also provides that the sheriff principal (the senior sheriff in each sheriffdom) will direct the work to be undertaken by the part-time sheriffs. The sheriffs principal collectively will be under a duty to have regard to the desirability of ensuring that each part-time sheriff receives an opportunity to sit on not less than 20 days in each 12-month period and does not sit for more than 100 days in each such period.

26. The Bill will also give the Scottish Ministers the power to fix the fees payable to part-time sheriffs. This is consistent with the fact that the cost of part-time sheriffs will be met from the Justice Vote and the Minister for Justice will be answerable to the Parliament for the expenditure.

**Alternative Approaches**

27. There is plainly a need for amending legislation to remedy the deficiencies in the 1971 Act identified by the High Court in *Starrs and Chalmers v P.F. Linlithgow*. It would of course have been possible to remove the provisions relating to temporary sheriffs without replacing them with any other form of part-time office. However for the reasons set out in paragraph 25 above, and after consulting representatives of the judiciary, the Executive considered that there are strong arguments for creating a new judicial office of part-time sheriff in order to assist the permanent judiciary with the work of the sheriff courts.

**PART 2 (CHAPTER 2) – JUDICIAL APPOINTMENTS (JUSTICES OF THE PEACE)**

**Policy Objectives**

28. The policy objective of Chapter 2 also relates to article 6.1 of the Convention, and is informed indirectly by the High Court’s judgement in *Starrs and Chalmers v P.F. Linlithgow*. The aim is to ensure that justices of the peace (JPs) fulfilling judicial functions in the district courts are, and are seen to be, sufficiently impartial and independent.
29. The Executive is satisfied that there is no evidence which casts any doubt on the way in which ex officio and other councillor justices have carried out their judicial functions. Since, however, the local authorities manage the district courts and may be thought to benefit from the imposition of certain fines, the Executive considers that ex officio and councillor JPs might be perceived to lack the necessary independence and impartiality by virtue of their relationship with the local authorities concerned. The Bill allows for the continuation of politically nominated JPs, but stipulates that these JPs should no longer perform court duties. This is achieved by creating the separate categories of signing justices and full justices. Only the latter will be entitled to perform court duties.

30. The Executive does not consider that there is an ECHR difficulty about other justices who are not councillors and who are at present appointed and removed by Scottish Ministers. However, in order to avoid any question that might be raised about the ECHR compatibility of these justices the Executive has also taken the opportunity to have more open appointment procedures for these justices and to improve their security of tenure through new removal arrangements.

Appointment of Justices

31. At present the law provides only a bare outline of the manner in which justices of the peace are to be appointed. No doubts have been expressed about the propriety of this administrative and private process, nor about those appointed under it. However, the system has developed as a matter of practice rather than by design. Expressions of interest in appointment have generally been followed by inquiries as to suitability and if everything is acceptable then a Commission is granted. Not least of the present requirements is that of residence in or within 15 miles of the area for which an appointment is sought. In order to ensure complete transparency and a modern system the Scottish Ministers will be required to comply with procedures and consultation to be set out in detail in a statutory instrument.

Removal Etc. of Justices

32. At present the removal of JPs is at the discretion of the Scottish Ministers. The Bill is designed to introduce new statutory removal arrangements for justices who perform court duties. These will address both the process by which removal might be effected and the circumstances in which it might be appropriate. Removal is now to be based on an open process involving independent assessment by two sheriffs principal appointed by Scottish Ministers, and the conditions for removal are to be made explicit. Such an investigation may be instigated only by the Scottish Ministers, who are required to remove or restrict the functions of a justice of the peace if the report finds that the justice is unfit to perform functions of a judicial nature. The Bill also includes a new interim measure of suspension. The Scottish Ministers must suspend a justice of the peace on the recommendation of sheriffs principal who are undertaking a statutory investigation. Justices who exercise signing duties only will continue to be subject to removal from office at the discretion of Scottish Ministers without the need for an independent assessment into their fitness for office.
Restrictions on Certain Justices

33. The existing legislation allows local authorities to select some of their councillors to become, on nomination, justices of the peace. In addition, persons who are councillors may be appointed as justices by Scottish Ministers. For many years these justices were entitled to, and did, sit in the district court and carry out judicial duties of the type referred to earlier. The policy now is to draw a clear distinction between a full justice (who may undertake any justice task) and a signing justice (who only signs papers and thus does not carry out judicial duties). The Executive’s policy is to exclude members of local authorities from appointment as full justices and to allow appointment only as signing justices. Although no doubts have been expressed about the propriety of any decisions that have made by ex officio and councillor justices, the result of the new distinction and restriction is to prevent those justices who might be perceived to be susceptible/subject to influence or subject to a reasonable apprehension of bias in their judicial duties from undertaking judicial tasks. In other words, those justices who may be perceived to lack the impartiality that is required for the purpose of article 6. The ultimate aim is to ensure that the accused receives a trial which is not only fair on an objective basis but which is also seen to be fair.

Alternative Approaches

34. The Executive considered other options that were compatible with the continued delivery of lay justice on a local basis. Certain options would have required a restructuring of the administration of the district courts and might not have been implemented easily or quickly. Options included relying on the professional judiciary already enjoying sufficient independence and impartiality. This would have involved the transfer of business to the sheriff court, or the greater use of stipendiary magistrates in the district court. The Executive considered that there were no other viable options to ensure compliance of the existing system with the ECHR. The legislative change in this Bill is therefore essential in order to ensure the compliance of the existing system with ECHR.

PART 3 – MISCELLANEOUS & GENERAL PROVISION (PROSECUTIONS BY LOCAL AUTHORITIES)

35. The Convention right of a fair trial might be seen to be undermined significantly where a local authority prosecutes an individual in a court serviced by justices who receive legal advice from a legal assessor who is an employee of the same local authority. To avoid the risk that such proceedings would not be seen to be fair for the purpose of article 6, the Executive’s policy is also to remove from the local authority the power to prosecute cases in the district courts.

36. In practice, occasional prosecutions arise under the Education (Scotland) Act 1980. The Executive’s policy is to enable such prosecutions to continue in the sheriff courts where the local
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authority has no similar connection with the court or to allow the local authority to continue to pass cases to the Procurator Fiscal for independent consideration.

**Alternative Approaches**

37. The Executive also considered other options which would have enabled local authorities to continue prosecuting cases themselves in the district courts. However, these would have also involved a restructuring of administration of the district court and in particular the present system whereby local authorities provide the court with legal assessors. These changes might not have been implemented easily or quickly. Again, the Executive considered that there were no other viable options to ensure the ECHR compatibility of these prosecutions in the district court.

**CONSULTATION**

38. Ministers have consulted representatives of the Scottish Judiciary regarding temporary and part-time sheriffs. They are unanimous in their view that some form of part-time sheriff must be established to assist the permanent judiciary with the work of the sheriff courts. These views are shared by the legal profession generally and by voluntary groups representing court users. Ministers have come under pressure to introduce provisions on part-time sheriffs as soon as possible. There has been no consultation on the detailed provisions, but the drafting takes account of the comments of the High Court in the case of *Starrs and Chalmers v P.F. Linlithgow* and the comments of other senior judges in other cases concerning the status of temporary judiciary.

39. The sheriffs principal were consulted about the role which it is proposed that they should have in relation to the removal of justices.

40. The Executive published a draft of the Bill on the Scottish Executive website ([www.scotland.gov.uk](http://www.scotland.gov.uk)). In addition, the following bodies and individuals were notified of the proposals by letter, and were sent copies of the draft Bill with an invitation to comment on the Executive’s proposals:

- Association of Chief Police Officers in Scotland
- Association of Scottish Police Superintendents
- Chief Executives of Scottish Local Authorities
- Clerks to the District Courts and Clerks of the Peace
- Convention of Scottish Local Authorities (CoSLA)
- Crown Agent
- Dean of the Faculty of Advocates
- District Courts Association
- Edinburgh Bar Association
- Glasgow Bar Association
- Home Office
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Judicial Studies Committee
Procurators Fiscal Society
SACRO
Scottish Court Service
Scottish Human Rights Centre
Scottish Law Commission
Scottish Police Federation
Scottish Women’s Aid
Sheriffs’ Association
Sheriffs Principal
Temporary Sheriffs’ Association
The Law Society of Scotland
The Lord Chancellor’s Department
The Lord Justice General
The Scotland Office
Victim Support Scotland

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT, ETC.

Equal Opportunities

41. There are no implications for equal opportunities.

Human Rights

42. The purpose of this Bill is to ensure that certain statutory provisions in the Criminal Procedure (Scotland) Act 1995, the Sheriff Courts (Scotland) Act 1971 and the District Courts (Scotland) Act 1975 are compatible with the European Convention on Human Rights.

Island Communities

43. There are no implications for island communities.

Local Government

44. Local Government will be affected by the provisions in Parts 2 and 3 of the Bill concerned with the appointment of justices and prosecutions by local authorities (as outlined above). There is heavy reliance in some district courts on a few justices of the peace and a reassessment will be required of the availability of justices of the peace who meet the necessary criteria.
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Sustainable Development

45. There are no implications for sustainable development.
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EDINBURGH: THE STATIONERY OFFICE

Printed in the United Kingdom by The Stationery Office Limited

£2.30

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Produced and published in Scotland on behalf of the Scottish Parliament by The Stationery Office Ltd.

Her Majesty’s Stationery Office is independent of and separate from the company now trading as The Stationery Office Ltd, which is responsible for printing and publishing Scottish Parliament publications.

ISBN 0-338-20080-0