INTRODUCTION

1. This document relates to the Criminal Justice (Scotland) Bill introduced in the Scottish Parliament on 26 March 2002. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 50–EN.

POLICY OBJECTIVES OF THE BILL – GENERAL

2. The Bill deals with a number of aspects of the Scottish criminal justice system. The broad policy objectives are to improve public protection including victims’ rights, promote effective sentencing, maintain an efficient criminal justice system, keep the law up to date and make certain changes in the law relating to young people.

3. The provisions cover a wide range of issues relating to these overall objectives. This Memorandum reviews each of these. The Bill is divided into parts which deal with the proposed measures within each of the broad categories. These are:

- Part 1: Protection of the public at large (sections 1 to 13 and schedules 1 and 2)
- Part 2: Victims’ rights (sections 14 to 17)
- Part 3: Sexual offences etc. (sections 18 to 20)
- Part 4: Prisoners etc. (sections 21 to 35)
- Part 5: Drugs courts (section 36)
- Part 6: Non-custodial punishments (sections 37 to 42)
- Part 7: Children (section 43 to 44)
- Part 8: Evidential, jurisdictional and procedural matters (sections 45 to 53)
- Part 9: Bribery and corruption (sections 54 to 55)
- Part 10: Criminal records (section 56)
- Part 11: Local authority functions (sections 57 and 58)
- Part 12: Miscellaneous and general (sections 59 to 70 and schedules 3 and 4)
CONSULTATION – GENERAL

4. A number of consultation exercises have been undertaken on the proposals in the Bill. These exercises and the results of them are discussed in detail in the Memorandum beside the subject to which they relate. In addition to the consultation exercises, the Scottish Executive has published 2 White Papers:

- *Serious Violent and Sexual Offenders*, published in June 2001, the White Paper explains the Scottish Executive’s proposed new arrangements for the better assessment and treatment of high risk offenders.

- *Making Scotland Safer: Improving the Criminal Justice System*, published in December 2001, this White Paper describes almost all of the remaining topics which are being dealt with in the Bill.

5. Both White Papers were circulated widely to parties whom it was considered would be interested in the proposals contained in the Papers. The White Papers are also available on the Scottish Executive website on [www.scotland.gov.uk](http://www.scotland.gov.uk) and copies have been placed in the Scottish Parliament Information Centre.

PART 1: PROTECTION OF THE PUBLIC AT LARGE (SECTIONS 1 TO 13 AND SCHEDULES 1 AND 2)

Policy objectives: general

6. The Scottish Executive made a commitment in *Making it work together: A programme for government* to review the law in relation to sexual and violent offenders. Sections 1 to 13 of the Bill make provision for the new arrangements for assessing the risk posed by serious violent and sexual offenders including those with a mental disorder and minimising any risk that is established following that assessment. The provisions are intended to secure maximum protection for the public from this small but difficult group of offenders while restricting the offender’s freedom no more than is necessary in the public interest.

7. The new arrangements are based on the recommendations of a Committee set up by the United Kingdom Government in March 1999 under the chairmanship of Lord MacLean to look at the assessment and treatment of high risk offenders including those with a mental disorder.

8. The MacLean Committee reported to the Scottish Ministers in June 2000 with a series of recommendations for assessing and treating high risk offenders ([http://www.scotland.gov.uk/maclean/docs/svso-00.asp](http://www.scotland.gov.uk/maclean/docs/svso-00.asp)). The Committee’s overarching objective was to develop a uniform and co-ordinated system for dealing with such offenders. The Committee considered that risk minimisation could be better achieved by setting up a body with specific responsibility for co-ordinating research and promulgating best practice in the field of risk management and assessment. This body would also have a direct role in the management of the highest risk offenders – those which posed the greatest risk to public safety – so that their risk could be managed effectively thus minimising the risk to the public. The Committee also recommended a new sentence for the highest risk offenders to be known as an order for lifelong restriction (OLR) and made recommendations on the treatment of high risk mentally disorder offenders.
This document relates to the Criminal Justice (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 26 March 2002

9. The basis of the Scottish Executive’s proposals in the Bill which were announced in the White Paper published in June 2001 is that:

- there will be a new sentence – the order for lifelong restriction which will ensure appropriate lifelong management of the risk posed by the highest risk offenders;
- a new agency, the Risk Management Authority will be set up with a set of roles relating to risk assessment and minimising risk with a specific remit in respect of serious violent and sexual offenders for whom a risk management plan is to be prepared;
- there will be more consistency in the approach to identifying and dealing with high risk mentally disordered offenders.

Policy objectives: risk assessment and order for lifelong restriction

10. The Bill introduces the new sentence of an order for lifelong restriction (OLR) and prescribes the circumstances in which an OLR will be the appropriate disposal. It also provides that certain offenders will require to have a risk management plan prepared for them. At present, the risk management plan requirement is restricted to those offenders who are sentenced to an OLR. However, provision is made in the Bill for the Scottish Ministers to prescribe by order other categories of offender for whom a risk management plan is required.

11. The existing sentencing options for judges when dealing with serious violent or sexual offenders who pose a high risk are a mandatory life sentence (if the conviction is for murder), discretionary life sentence, determinate sentence, extended sentence or a community disposal. In addition where the offender suffers from a mental disorder there are already a number of mental health disposals available to the court. There is no doubt that these disposals are adequate to deal with the majority of offending even when the offender poses a degree of risk. However, it is considered that there is scope, as the MacLean Committee recommended, to provide for a new sentence designed specifically to address the particular issues connected with a high risk offender and ensure that they are dealt with in a consistent way.

12. The OLR will be made available as a disposal for any offender who is convicted of a serious violent or sexual, or a life endangering offence or an offence which indicates a propensity for violent, sexual or life endangering offending. It will not be available for a high risk mentally disordered offender who is suffering from a mental disorder that meets the criteria for a mental health disposal and where the risk is directly or is in significant part related to that disorder. In these circumstances, the court may impose a mental health disposal as provided for in the Mental Health (Scotland) Act 1984.

13. Where the OLR differs from a discretionary life sentence or a long determinate sentence is that there will be specific arrangements put in place for life-long, multi-agency management of high-risk offenders. The process supporting the new sentence will enable the offender’s risk to be assessed against statutory criteria prescribed in the Bill which, if it is determined that they are met, will trigger the imposition of the new disposal. The OLR will provide that the offender’s risk is assessed and managed with a view to minimising that risk as far as possible. OLR offenders will serve a punishment part of this life sentence as imposed by the court. During the time in prison, a risk management plan (RMP) will be prepared. The plan which will be in place
for the rest of the offender’s life will cover steps to minimise the offender’s risk. If the offender’s risk can be minimised to a level where it is considered that he or she does not present a risk to public safety and the Parole Board determines that it is appropriate to do so, the offender may be released into the community subject to conditions and requirements designed to keep the risk at an acceptable level. However, the offender will be liable to swift recall to prison if the level of risk rises or if he or she re-offends.

14. The OLR process will work as follows. (The process for assessing if an offender may have a mental disorder and may be high risk, and how he or she may be dealt with in those circumstances are described separately.)

**Stage 1 – Pre-sentence**

15. Following conviction for a relevant offence or offences as set out in the Bill in the High Court (or following a referral from the Sheriff Court). On an application from the prosecutor or at its own instance, if the court considers that the statutory criteria set out in the Bill may be met such that a risk assessment report should be available, it will make an order, known as a risk assessment order (RAO) commissioning the preparation of a risk assessment report (RAR). The RAR will assist the court in determining whether an OLR is the appropriate disposal. The risk assessment will be carried out in accordance with standards set by the Risk Management Authority. The RAR will be prepared by a person accredited by the RMA for the purpose.

16. The offender will be taken to a place specified by the court and detained there for the purpose of carrying out an assessment of risk and for the preparation of the RAR. The RAR will take into account the offender’s previous convictions and other information which may be relevant to determining the offender’s risk. The assessor will be required to state an opinion as to whether the risk posed by the offender is high, medium or low. The offender will have the right to instruct an alternative risk assessment report or to challenge the findings or content of the risk assessment to be carried out by the assessor.

**Stage 2 – Sentencing**

17. If, following consideration of the RAR and any other relevant information presented to it (such as an alternative report prepared on the instruction of the offender) the court is satisfied that, on the balance of probabilities, that certain statutory criteria are met, it must impose an OLR.

18. The normal rights of appeal for an offender will apply and the prosecutor may appeal against the court not making an OLR where it considers that on the balance of probabilities, the statutory criteria are met.

**Stage 3 – Imprisonment**

19. The court when imposing an OLR will set a "punishment part" that is the part of the sentence that the court considers the offender is required to spend in prison in order to satisfy the requirements for retribution and deterrence. Within the first 9 months of that sentence, and unless the offender is detained in a hospital (because of a mental disorder), the Scottish Ministers must prepare a risk management plan in accordance with agreed standards which will be set by
the RMA which will be in a form specified by the Authority. Provision is made for the RMA to extend the preparation time where a case has been repealed.

20. The purpose of the RMP is to ensure that risk is properly managed on a multi-disciplinary basis. Agencies with statutory responsibilities for the offender such as the Scottish Prison Service, local authority social work services and health services providers are to collaborate on the preparation of the plan. The agencies involved will be known as lead authorities. The lead authority will change depending on the position of the offender (e.g. whether he or she is in prison or released on licence in the community). The RMP must provide an assessment of the offender’s risk, describe the measures to be taken to minimise that risk and how these measures will be co-ordinated. The plan will be submitted to the RMA for approval.

21. The lead authority responsible for the offender (while he is in prison this will be the Scottish Ministers (Scottish Prison Service)) must report annually to the RMA on the implementation of the agreed RMP. There will also be arrangements for reviewing the RMP where there is or likely to be a significant change in the offender’s circumstances. Should such a review suggest that the RMP is no longer suitable or is likely to become unsuitable, then the lead authority must prepare an amended RMP or, if appropriate transfer the lead to a different authority to prepare an amended RMP. In either case, the amended RMP must be submitted to the RMA for approval. Consideration for release by the Parole Board will be one trigger for such a review of the existing RMP. If the Parole Board consider that the offender can be released the lead authority will change – in practice the local authority area where the offender resides will become the lead authority and the process of reviewing and amending the RMP will continue.

22. The offender may remain in prison beyond the period of "the punishment part" until such time as the Parole Board is satisfied that the offender's risk has sufficiently diminished for that person to be released and be supervised in the community.

Stage 4 – Release

23. Where the Parole Board recommends release, this amounts to a significant change in circumstances such that an amended RMP will have to be prepared by the new lead authority. It will have to be submitted to and approved by the RMA before the offender is released. The Plan will reflect the steps required to maintain the offender’s risk at a level which ensures public safety.

Mentally disordered offenders

24. This part of the Bill also deals with high risk offenders who may have a mental disorder including those with a personality disorder. The intention is to try to identify more accurately, and at an early stage, the risk posed by such offenders, whether and the extent to which it is related to the offender’s mental disorder and consequently how the offender should be dealt with – either by a mental health disposal or other criminal justice disposal. The new provisions are intended to supplement existing provisions and will not affect the court’s power to deal with a mentally disordered offender under the provisions currently in the Mental Health (Scotland) Act 1984.
25. The key development is that the Bill provides that where an offender is convicted of a relevant offence (that is to say a serious violent or sexual offence) and may meet both the risk criteria for an OLR and the criteria for an interim hospital order (IHO) (as provided in section 53 of the Mental Health (Scotland) Act 1984) it will make an IHO. The assessment report which the court receives following an IHO, which is in addition to other psychiatric and medical reports that will be available to the court, will contain an assessment of the risk posed by the offender. This is to assist the court in determining the most appropriate disposal for the offender. However, the court is not be required to take this interim step if it is satisfied that the offender satisfies the criteria for compulsory detention in hospital and there is treatment available for the mental disorder which is likely to minimise the offender’s risk. In such circumstances the court will make a hospital order with a restriction order under its powers in the 1984 Act.

26. Where the court has evidence that the offender suffers from a mental disorder which does not meet the criteria for detention in hospital (for example where the offender has a personality disorder) it will not make an IHO but make a RAO.

27. At the sentencing hearing, in the case of an offender with a mental disorder, the court is to consider the appropriate disposal having regard to either the report prepared following a RAO or an IHO and all information available to it. The powers of the court are to be as follows:-

- where the evidence available to the court indicates that the risk posed by the offender is related directly or in large part to a mental disorder which meets the criteria for a mental health disposal and the risk can therefore be reduced by suitable treatment the court may impose such a mental health disposal; or
- where the above circumstances are not present, the court is to consider whether the offender meets the statutory criteria for an OLR.

28. Where the court makes an OLR and the offender meets the criteria for compulsory detention under mental health legislation the court must in addition to the OLR make a hospital direction. Where a hospital direction has been imposed along with the OLR, the lead authority will be a hospital (usually the State hospital) in which the offender is being detained.

Disposal in case of insanity

29. The Bill also makes a change to the disposals available in the case of insanity. Currently, where the court is satisfied that the person is insane so that his trial cannot proceed or if commenced cannot continue it makes an order committing the person to hospital until the conclusion of an examination of the facts.

30. Following an examination of the facts the court may make a finding that the accused did the act or made the omission constituting the offence. Or, if following an examination of the facts, the court is not satisfied that the person committed the offence it shall acquit the accused but if it appears to the court that the person was insane at the time it shall state whether the acquittal is on the ground of such insanity.

31. Alternatively, where evidence is brought before the court that the accused was insane at the time of commission of the offence the court shall find the accused insane and acquit on grounds of insanity.
32. Where the person is acquitted on the grounds of insanity or following an examination of facts a court makes a finding that the accused did the act or made the omission constituting the offence, the court may, as it thinks fit:

- make an order (which shall have the same effect as a hospital order) that the person be detained in such hospital as the court may specify;
- in addition to making an order under paragraph (a) above make an order (which shall have the same effect as a restriction order) that the person shall, without limit of time be subject to the special restrictions set out in section 62(1) of the Mental Health Scotland 1984 Act;
- make an order (which shall have the same effect as a guardianship order) placing the person under the guardianship of a local authority or of a person approved by a local authority;
- make a supervision and treatment order; or
- make no order.

33. The Bill’s provisions add to the disposals available in these circumstances by enabling the court, where a person is acquitted on grounds of insanity or following an examination of the facts, the court has made a finding of insanity then in addition to the disposals available to the court may if it thinks fit make an IHO.

34. Where the assessment report following an IHO states that the offender poses a high risk to the public and meets the criteria for compulsory detention then the court must make a hospital order with a restriction order.

Policy objectives: The Risk Management Authority

35. The Bill provides for the establishment of a new body to be known as the Risk Management Authority (RMA) and sets out the powers and functions of the new authority. The RMA will be a non-departmental public body.

36. It is intended that the RMA will become the recognised expert authority on risk assessment and risk management. In particular it will:

- develop policy and carry out research in risk assessment and management;
- set standards for and issue guidance to those involved in the assessment and management of risk; and
- monitor risk management plans for those offenders who receive an OLR.

Policy and research

37. The RMA will take a strategic long-term approach to defining how risk assessment and risk management services across Scotland should develop. To achieve this aim it will have a number of functions in relation to policy and research. It will:
monitor services provided in Scotland in connection with assessment and management of risk generally and in particular for offenders sentenced to the OLR and where appropriate to make recommendations to the Scottish Ministers for improving those services;

• advise the Scottish Ministers in connection with all matters relating to the assessment and management of risk which may include making recommendations to the Scottish Ministers for the purposes of improving effectiveness in risk management; and

• obtain, compile and keep under review information about research into and developments in the assessment and management of risk and carry out pilot studies.

Guidelines and standards and accreditation, education and training

38. The RMA will define, approve and publish standards for the processes and methods for the assessment and management of risk. Practitioners involved in the assessment and management of risk will be statutorily obliged to have regard to those standards in exercise of their professional duties involving the assessment and management of risk.

39. The Scottish Ministers will be empowered to set up a scheme of accreditation for those persons involved in risk management, which will be administered by the RMA. The RMA will also have the power to carry out educational or training activities, or commission such activities in relation to the assessment and management of risk.

Risk management plans

40. The RMA will initially have an operational role in relation to the small group of serious violent and sexual offenders who will receive an OLR. However, as explained earlier, the Bill makes provision for the Scottish Ministers to extend the operational role to further categories of offender.

41. Lead authorities (as described above) will be obliged to prepare a risk management plan (RMP) which must comply with the standards set by the RMA. The RMP must be submitted for approval to the RMA when first prepared and if, following a review triggered by a change in the offender’s circumstances, such as upcoming release from prison, it is considered that the RMP needs to be amended, a revised RMP will be prepared and submitted to the RMA for approval. The process of preparation, review and revision of the risk management plan is set out below.

Preparation of risk management plans

42. Following imposition of the OLR, the lead authority (usually the Scottish Prison Service acting on behalf of the Scottish Ministers) will be under a duty to prepare a RMP within 9 months from the date of the offender being sentenced (provision is made for extension pending appeals against sentence). The lead authority must consult with all authorities or bodies as it thinks appropriate. Any authority or body consulted by the lead authority will be under a duty to provide such assistance as it is able to the lead authority in the preparation of the RMP. The RMP will be a programme for the management of the risk of the offender which may place responsibilities for implementing the programme upon authorities or bodies other than the lead authority.
43. The RMP must be submitted to the RMA for approval. The RMA must approve the RMP if it meets the agreed minimum standards. If it does not meet the minimum standards, the RMA may reject it (on the grounds that it does not meet minimum standards) and return it to the lead authority. The RMA may make recommendations regarding amendments to the RMP in order to ensure that it meets the standards to which the lead authority is required to have regard to. An amended RMP should then be re-submitted to the RMA. This process may continue until the RMP is agreed.

44. Where the RMA considers that the lead authority has not taken reasonable steps to comply with the agreed standards, it may direct the lead authority to do so. If the lead authority considers that the RMA has made an unreasonable direction, it may appeal to the sheriff on that ground.

Implementation and review of risk management plans

45. The lead authority and any other authority or body will be under a duty to implement their respective responsibilities under the RMP. The lead authority will be required to submit an annual report in respect of each offender with a plan to the RMA. The RMA must satisfy itself that the Plan is being implemented in accordance with its published standards and guidelines and where appropriate is to make recommendations for improving implementation to ensure the RMA’s minimum standards are satisfied.

Grants to local authorities in connection with risk management plans

46. In the event that, in the opinion of the lead authority, there is a significant and lasting change to the offender’s circumstances in the course of the reporting year the lead authority is required to consult with the relevant authorities and to submit an amended RMP to the RMA for approval. Where a change of lead authority is indicated, responsibility for preparing a revised RMP will transfer to the new lead authority.

47. It is envisaged that local authorities will bear the costs of preparing and implementing RMPs because they already have a statutory duty in respect of these offenders. However, it is proposed that where the RMA consider that assistance may be required (for example to purchase a particular intervention or risk minimisation programme) to enable the local authority to meet the standard for the RMP, the RMA can recommend to the Scottish Ministers that they make a special grant for that purpose. The Scottish Ministers are not obliged to comply with the RMA’s recommendation. However, in cases where the RMA’s recommendation is accepted, the Bill provides that the Scottish Ministers can make such a grant to the local authority specifying the exact purpose for which it must be used.

Alternative approaches

Risk assessment and order for lifelong restriction

48. The MacLean Committee consulted on 6 alternative options to the new order for lifelong restriction. These were:

- mandatory life imprisonment for crimes other than murder
- longer determinate sentences
• more extended sentences
• alter the law on supervised release orders
• alter the law on sex offenders
• alter the law on stalking and harassment.

49. The responses to the consultation are set out in more detail in the MacLean Committee’s report. In summary, the consultation showed:
• almost no support for extending the circumstances in which mandatory life sentences should be applied
• little evidence of support for increasing sentence lengths in order to protect the public
• general support for increased use of extended sentences
• concern that supervised release orders carried less stringent conditions than those which could be applied to parole and non parole licences
• concern that the requirement to register under the Sex Offenders Act 1997 was not enough protection for the public from high risk offenders
• that the further work being done by the Scottish Executive (at that time) was noted.

50. In light of the responses to the consultation and its own enquiries, the MacLean Committee concluded that:
• mandatory life imprisonment for non-murder cases could not address the key aim of controlling more effectively those who present the highest level of risk (the Committee consequently recommended the repeal of section 1 of the Crime and Punishment (Scotland) Act 1997)
• the introduction of minimum sentences (longer determinate sentences) would not do anything to address the issue of risk assessment and risk management
• extended sentences are regarded as a useful disposal but they are not lifelong. (The Committee also considered that extended sentences had not been in operation long enough to begin to suggest radical changes, although the provision will be amended to enable extended sentences for up to 10 years for violent crimes. The change can be made by an order amending the existing legislation
• supervised release orders are not designed to deal with high risk offenders
• changes to sex offenders legislation and the work of the Expert Panel on Sex Offending is relevant but not the entire solution for dealing with high risk offenders
• the Committee’s recommendations about risk assessment and risk management might assist the operation of legislation dealing with stalking and harassment but not the other way around.

51. In the light of the MacLean Committee conclusions, it has been concluded that the new disposal of the OLR and the associated plans for dealing with high risk mentally disordered offenders are necessary to complement the RMA and to enable the Scottish Executive to deliver
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a comprehensive package of measures to improve the way high risk offenders are assessed and managed.

The Risk Management Authority

52. It has been concluded that the functions envisaged for the RMA could not be carried out effectively by a body other than a Non-Departmental Public Body (NDPB) after measuring them against the agreed criteria for creating new NDPBs. However, four other options were considered.

53. The first alternative was that there be no change to the current system. The following problems with the existing system were identified which required to be addressed:

- there is no central body acting as a repository of information, guidance and standards and actively taking forward the debate on risk assessment and risk management approaches
- there are differences in systems and approaches between different agencies which reduces the overall effectiveness of the assessment and management package provided to an offender
- the work of each agency, whether statutory, private sector or voluntary sector, and the individual professionals working within it, is being made more difficult by problems of interagency communication and information exchange. Although there are areas where practice in interagency working is already excellent, there is a lack of consistency across the country.

54. The second alternative was that the roles envisaged be carried out by an existing body or agency. However, there are no other existing bodies or agencies equipped to carry out the functions, as one of the key functions envisaged for the RMA is the ability to co-ordinate risk management plans between the agencies responsible for the management of high risk offenders such as the Scottish Prison Service and the local authority social work services.

55. The third alternative was that the roles be carried out by the private sector. However, because of the nature of the work involved and the interaction with criminal justice agencies, it is felt that the functions envisaged for the new body could not be carried out by the private sector.

56. The final alternative would be for the role to be carried out by a body under the direct control of the Scottish Ministers. However, it was felt more appropriate that these functions should be carried out at arm’s length from the Scottish Ministers, which cannot be achieved by a body under their direct control longer determinate sentences.

Consultation

57. Following the publication of the MacLean Committee’s report, the Scottish Executive consulted immediately upon the report’s recommendations. The consultation exercise ranged widely and 52 responses were received from social work, mental health, legal and police interests. The responses were supportive of the Committee’s recommendations. The information The Consultation Analysis was published in June 2001 and is available on the Scottish Executive
PART 2: VICTIMS’ RIGHTS (SECTIONS 14 TO 17)

Policy objectives

58. The Scottish Strategy for Victims published by the Scottish Executive in January 2001 sets out the broad framework to deliver the Scottish Executive’s policy to improve the role and status of victims in the criminal justice system. (See www.scotland.gov.uk/library3/justice/spv-00.asp). Sections 14-17 establish a legislative base to implement key elements of this strategy.

59. The provisions are based on three principles:
   • giving victims the opportunity to participate in the criminal justice process;
   • improving the information provided to victims; and
   • strengthening the support for the victims of crime.

Victim statements

60. In particular, the Scottish Executive intends to give victims the opportunity to participate in the criminal justice process by conferring on victims of certain crimes the right to make a statement about the impact of the crime. The statements will then be made available to the court prior to sentencing.

61. At present, some information may be available to the court. For example, trial judges can, and sometimes do, request additional information to be obtained from a victim about the impact of the crime. In guilty pleas, the prosecutor may also provide information about the impact of the crime on the victim. However, in both these cases it is factual information about the crime which is sought. At present, a victim may also give information about how the crime has affected them to the police or the prosecutor but not directly to the court other than when giving evidence. The policy intention is to strengthen the present arrangements.

62. Thus victims will be given an opportunity to make a statement. The aim is to provide the court with the victim’s own personal account of the impact that the crime has had on them and to help victims feel that they have a more central role in the criminal justice process.

63. The statements will cover victims of certain crimes although the Bill does not specify the range of offences. This will be done by secondary legislation. It is however intended that initially the crimes will include victims of non-sexual crimes of violence; crimes of indecency; domestic housebreaking and racial offences.

64. The primary victim will have the right to make a statement i.e. the person subject to the commission of an offence. Where the primary victim is dead or mentally incapacitated, or is under 14 the right will transfer to:
   • the primary carer in the case of a child,
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- the nearest relative in the case of death or mental incapacity, according to a specific hierarchy which includes cohabitees whether or not of the same sex. In cases where the victim is dead more than one person can make a statement.

65. If the nearest relative, or in cases involving a child the primary carer, is accused of involvement in the offence, he or she would not be eligible to submit a victim statement. Businesses or companies are not to be considered as victims under this legislation, although it is intended that business losses may be referred to in the context of a victim statement.

66. The right to make a statement will come into effect after a decision has been taken to bring a prosecution although there will also be provision to allow for a statement to be taken earlier in certain circumstances. Administrative arrangements will be put in place to support the operation of the provisions.

67. The victim will have the right to include whatever information they wish in the statement and will receive guidance on its completion and also on its intended use. They will also have the right to make a supplementary statement that may add to the original victim statement and this right will continue until the sentence is imposed on the offender by the court. The procedures to be followed will be set out in the administrative arrangements.

68. One of the key policy objectives is that the statements will help inform the decision-making process. Thus the Crown will make the statement available to the court at the time of sentence (with a copy provided to the offender). The court will be under a duty to have regard to the statement prior to determining sentence.

Victim’s right to receive information concerning release etc. of offender

69. The Victims’ Strategy also highlights the importance of providing victims with information specific to their cases. Thus the policy is intended to give victims of certain crimes the right to receive certain information on their assailant’s release into the community. Administrative arrangements are currently in place but the intention is to make this a right and so strengthen the current procedures.

70. Unless it appears that there are exceptional circumstances why the information ought not to be made available, the Scottish Ministers will have the power and be under a duty to pass information to victims in the following circumstances:

- if the victim is a victim of certain offences. These will be prescribed by Ministers in subordinate legislation and are likely to include murder, attempted murder, incitement to or conspiracy to murder, culpable homicide, assault with a weapon to severe injury or to danger of life, robbery involving use of firearms, possession of a firearm in contravention of sections 16 or 17 of the Firearms Act 1968, rape, assault with intent to ravish, non-consensual sodomy or attempted sodomy, unlawful intercourse with a girl under 13, all assaults to severe injury, all robbery, threats, extortion, indecent assault, and clandestine injury. By giving Ministers a subordinate legislation making power they can extend the range of eligible victims;
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- if the offender is sentenced to imprisonment or detention for 4 years or more where the offender was sentenced on or after 1st April 1997. Where the offender is sentenced before that date the Scottish Ministers are to have discretion to provide information to eligible victims;
- where the offender has been convicted whilst under age 16, the right to receive information applies where the offender is still in custody at age 16 or over; and
- if the victim has confirmed in writing that they wish to receive such information.

71. Ministers will have powers to extend the type of information that they may pass to a victim.

Release on licence: right of victim to receive information and make representations

72. It is also the policy intention to give victims of certain crimes, who wish it, the right to make written representations to the Scottish Ministers who will pass these on to the Parole Board before a decision is taken on the release of their assailant and on the licence conditions to be imposed. Again, victims who desire it, will be given the right to receive information about the outcome of Parole Board reviews and licence conditions.

73. Administrative arrangements for making representations to the Parole Board and receiving information about release and licence conditions are already in operation. This legislation will give victims of certain offences the right to this information and so strengthen the current arrangements.

74. Where decisions concerning licence conditions are taken by the Scottish Ministers, the victim is to have the right to make representations to the Scottish Ministers and they are under a duty to consider these representations.

Disclosure of certain information relating to victims of crime

75. The Victim’s Strategy recognises the importance of providing emotional and practical support to the victims of crime. Thus the legislation will extend police powers so that they can pass information regarding victims to a body that provides counselling and other support to victims of crime. It will be necessary however for the organisation to be prescribed by the Scottish Ministers, and is likely to be Victim Support Scotland (VSS).

76. The victim will give consent to the police before details are passed. Administrative arrangements will govern the procedure for obtaining consent.

77. Where the primary victim is dead or is incapable the rights of the victim will transfer to the nearest relative and where the primary victim is a child under 14 years the rights should transfer to the parent or guardian of the child. If the nearest relative, or in cases involving a child the parent or guardian, is accused of involvement in the offence, then such rights will not transfer to that individual but are to transfer to the next nearest relative who is not involved in the commission of the alleged offence.
78. The information which the police are to be empowered to disclose is the victim’s name, address, telephone number, e-mail address and age as well as a general description of the offence. The police are to have discretion to decide the amount of information that it would be appropriate to provide in any case. However, no information concerning the accused is to be passed to VSS.

**Alternative approaches**

79. The provisions in relation to victim’s rights seek to formalise and in some cases extend, certain existing arrangements. Procedures in relation to the receipt of information concerning release of offenders from prison (section 15), making representations to the Parole Board (section 16) and the passing of certain information relating to victims of crime (section 17), have all been in operation for some time and therefore the decision has been taken to build on these rather than consider alternatives. Where appropriate, the existing arrangements have been extended.

80. In the case of victim statements, the provisions are entirely new and so the intention is to pilot the scheme initially. Alternative options were subject to consultation, including:

- the offences to be included in the scheme: a narrow range of offences was proposed for the purposes of the pilot which will be broadened as a result of the consultation;
- the persons to acquire the right to make a statement in case of death or incapacity of the victim, or where the victim is a child: a range of persons were proposed which is to be widened following the consultation;
- the stage in the process at which the statement is made: two options were proposed one at the stage a crime is reported and the other after the papers had bee passed to the procurator fiscal as a result of the consultation the latter proposal has been taken forward; and
- the victim statement to be made available to the accused.

**Consultation**

81. These provisions meet commitments set out in the *Scottish Strategy for Victims*, published in January 2001. The Strategy drew on Scottish research as well as on wider international work including the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and relevant European developments. The strategy was developed by the main agencies which make up the criminal justice system in Scotland and which are represented on the Victims Steering Group (VSG). As well as the statutory agencies, voluntary organisations are represented on the VSG. This group has provided a route to wider consultation with individual reference groups.

82. The proposal for victim statements, were set out in a consultation document that was widely circulated and elicited 57 responses. The policy has drawn on the responses to this consultation.
AMENDMENTS IN RELATION TO CERTAIN SERIOUS AND SEXUAL OFFENCES
(SECTION 18)

Policy objective

83. **Section 18** deals with a number of changes to existing legislation dealing with sex
offences and other serious offences. Certain of the measures will bring the law in certain areas
into line with the requirements of the European Convention on Human Rights, increase the
penalties for certain offences and take account of developments in the law since certain
provisions were enacted.

*Civic Government (Scotland) Act 1982*

84. Subsection (1) increases the penalties for possession, and possession and distribution, of
child pornography from six months and three years imprisonment to five and ten years
respectively. These changes apply to offences prosecuted on indictment; summary penalties are
unchanged.

85. These changes bring Scotland in line with the increases brought in England and Wales
under the Criminal Justice and Court Services Act 2000. There is a need for the maximum
penalties for these crimes to be in line north and south of the border. This is a crime with
international aspects and, as far as is practicable, the Scottish Ministers wish to maintain a
common policy with the rest of the UK on combating it.

86. The Scottish Ministers also consider that the penalty levels in force at present do not
appropriately reflect the fact that consumers of paedophilic material are creating a market in the
sexual exploitation of children, nor do they take account of the actual abuse of children which
has to take place for these paedophilic images to exist.

*Criminal Law (Consolidation) (Scotland) Act 1995*

87. Three changes are being made to the sexual offence provisions in the Criminal Law
(Consolidation) (Scotland) Act 1995. The changes to sections 8 and 15 of the Act reflect the
need to keep the law up to date as respects the first 2 and in line with the requirements European
Convention on Human Rights. The change to section 16 of the Act will improve criminal
procedure.

- **Section 18(2)(a)** of the Bill repeals sections 8(1) and (2) of the Criminal Law
(Consolidation) (Scotland) Act 1995. Section 8(1) of this Act makes it an offence to
take an unmarried girl under 18 out of the possession of her parents (or whoever has
lawful charge of her) without their consent. This occurs whether or not the woman
has agreed to leave. Section 8(2) states that a defence may be used to any charge
under 8(1) that the person charged had reasonable cause to think that the girl was over
the age of 18 years. Sections 8(1) and 8(2) can not be justified in modern context as a
woman of 16 is free to marry. Subsection (2)(a) repeals the out of date provision. No
appropriate protections will be lost however, and it will still be an offence to abduct a
woman.
• **Section 18(2)(b)** of the Bill repeals section 15 of the Criminal Law (Consolidation) (Scotland) Act 1995 which creates the defence to a charge of indecent assault committed against a girl under 16 that the person so charged had reason to believe that the girl was his wife. There is no situation where indecent assault can be justified and that is why the provision is being repealed.

• Existing legislation allows for certain sexual offences committed abroad to be tried summarily but there is no provisions to confer jurisdiction on a particular Sheriff court district. In effect under current legislation they can only be tried in the High Court. Subsection (2)(c) amends section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 to allow such cases to be tried in the Sheriff Court district where the accused is apprehended or in custody or in such sheriff court as may be determined by the Lord Advocate.

**Crime and Punishment Act 1997**

88. Section 1 of the Crime and Punishment (Scotland) Act 1997 provides for an automatic life sentence in certain situations, essentially where a person is convicted of two or more serious offences. The section has not been brought into force.

89. The MacLean Committee on Serious Violent and Sexual Offenders considered the issue of mandatory life sentences during the preparation of its report. The Committee concluded that in non-murder cases the mandatory life sentence was a blunt instrument which did not address the key aim of controlling more effectively those who presented the highest level of risk. The Committee believed that mandatory life sentences should be confined to cases of murder. The Committee concluded that section 1 of the 1997 Act had no place in the range of disposals presently available and no role for it in its scheme for the sentencing and management of high-risk offenders. The Scottish Ministers accepted the recommendation that section 1 should be repealed as part of the implementation of the MacLean package. Subsection (3) implements that policy.

**Alternative approaches**

90. The increase in penalties for possession etc. of obscene photographs is considered essential. The changes proposed to the sex offence provisions in the Criminal Law Consolidation (Scotland) Act 1995 Act are required to comply with the ECHR. There is no alternative to the correction to the law proposed by section 18(2)(c) if the policy objective identified above was to be achieved.

91. No provision has been made since the Crime and Punishment (Scotland) Act 1997 received Royal Assent to bring section 1 into force. The repeal or otherwise of section 1 will not therefore have any effect in practical terms on the law as it currently stands. Repeal of the section will simply remove unused legislation from the statute book.

**Consultation**

92. The proposal to increase the penalties under the 1982 Act was widely welcomed when announced by the Scottish Ministers. No consultation was required to correct the technical flaw
covered by section 18(2)(c). There was no consultation about the provisions in 18(2)(a) and (b). The proposals were however outlined in the White Paper *Making Scotland Safer: Improving the Criminal Justice System*.

93. In its report on the response to its consultation exercise the MacLean Committee stated that “almost no support was received during consultation for an extension to the circumstances in which mandatory life sentences should be applied”.

**EXTENDED SENTENCES (SECTION 19)**

**Policy objective**

94. **Section 19** enables an extended sentence to be imposed for the crime of abduction.

95. An extended sentence is a sentence of imprisonment which combines the term of imprisonment which the court would have passed on the offender and a further period for which the offender is to be subject to a licence. Subject to a number of provisions and to a maximum statutory period, the length of this further period is determined by the court’s opinion of the need to protect the public from serious harm from the offender. Under current law, an extended sentence is only available for sexual or violent offences. A person found guilty of abduction in circumstances which do not involve violence or the commission of a sexual offence (as defined in s 210A(10) of the Criminal Procedure (Scotland) Act 1995) cannot at present be made subject to an extended sentence. Experience has shown that abduction can occur without an element of physical violence yet in circumstances where there is significant risk that the abduction was a precursor to a violent and sexual offence.

**Alternative approaches**

96. This amendment to include abduction in the definition of *violent offence* will allow abduction to fall within the terms of section 210A of the Criminal Procedure (Scotland) Act 1995 (even where the act of abduction does not involve physical violence) and is the most straightforward option to provide the required additional sentencing power to the courts.

97. The inclusion of “abduction” in the definition of sexual offences, for example, may have required consequential amendments to other legislation. The current definition of sexual offences in the 195 Act is the same as that in the Sex Offenders Act 1997 except that it does not contain the same age qualifications that the 1997 Act for some offences. There is merit in maintaining this consistency to allow us to rely on an agreed set of offences for both purposes.

**Consultation**

98. No consultation has taken place on this provision. However, the lacuna in the current legislation on extended sentences was highlighted in a particular case brought to the Scottish Executive's attention by a senior member of the judiciary. The amendment to the law is in response to the gap identified.
SEXUAL AND CERTAIN OTHER OFFENCES: REPORTS (SECTION 20)

Policy objective

99. Section 20 implements certain recommendations of the Expert Panel on Sex Offending chaired by the Honourable Lady Cosgrove. The Panel was established in 1998 with a remit to advise the Scottish Ministers on relevant issues relating to sex offenders. The Panel published its report *Reducing the Risk: Improving the Response to Sex Offending* in June 2001. This section takes forward four of its recommendations which relate to strengthening procedures in Scottish courts.

Reports for the court

100. The policy objective is to improve the information available to the court when assessing, post-conviction, the risk posed by sexual offenders or offenders where there are significant sexual elements to the offences. This will be achieved by making it mandatory for courts to obtain:

- social enquiry reports and a psychological assessment in solemn proceedings; and
- social enquiry reports in summary proceedings.

101. Currently there is no requirement for such reports to be prepared for all sex offence cases and some sex offenders are sentenced without such reports being prepared. It is considered necessary that a report be obtained in all sex offence cases because the level of risk posed to the public by such offenders is often not apparent especially where the offence of which the offender is convicted is relatively minor. It is expected that the reports will give the judge better information on this aspect and thus assist the sentencing process.

102. The requirement to obtain a psychological assessment in solemn proceedings is based on recognition that forensic or clinical psychologists have a key contribution to make to the assessment of risk in individual cases. In particular, through the use of psychometric and other tests, they can bring improved understanding of those attitudes and personal characteristics which may support an individual’s sexual offending and thus provide an even more informed understanding of the level of risk involved.

Period of adjournment for reports

103. The transfer of detailed offence information to report writers and the completion of the full risk assessment process for sex offenders is often difficult to achieve within the current maximum statutory periods. These periods require to be extended so that reports can be prepared.

Information for report writers and judge’s note for the report writers

104. Report writers currently receive only a copy of the complaint or indictment and a list of previous convictions. There is little additional information either to challenge or to corroborate the version of events offered to the report writer by the offender. With only the offender’s version, the report writer is unable to reach an informed view about the level of risk presented by
the offender and thus about the services and resources which might be required to address the offending behaviour in the community, in custody or in hospital.

105. To address this, in cases where a plea of guilty is tendered and accepted, a record is to be made of the prosecutor’s submission concerning the facts of the case and anything said on behalf of the accused. The transcription is to be made available to report writers. An explanation of the precise circumstances of the offence represents a significant improvement and ensures that there is a reliable basis, independent of the offender’s account, upon which to assess the offender’s situation.

106. In cases which proceed to trial, there is no identifiable part of the proceedings which could be transcribed to reflect the precise facts which the judge has found established. Therefore the only method of providing a suitable independent summary is by imposing a duty on the trial judge to provide a brief note setting out the salient facts. Whilst this will place an additional burden on the trial judge, this is felt to be justified by the importance of the risk assessment process in these cases, not least in respect of sentence.

Alternative approaches

107. The approach taken in this Bill to improve the information available about a sex offender for report writers and courts was informed by work of the Expert Panel on Sex Offending which was an independent panel. After 3 years of deliberations involving external organisations and presentations to the panel by other relevant organisations, the panel produced a report which made a series of recommendations. Better alternatives to these proposals to change procedures in Scottish courts did not come out of the work of the Panel or the consultation exercise.

Consultation

108. The Expert Panel’s membership included the judiciary, prosecution service, prison service, social work and health, children's and psychological services and so represented a broad range of views. The Scottish Executive has also consulted widely on this report with local authorities, the Scottish Prison Service, the Crown Office and procurator fiscal service, the police, members of the legal profession and the voluntary and education sectors between June and September 2001. This consultation showed very broad support for the proposals generally and in addition comments on many points of detail were received. Specifically, the recommendations that led to these proposals were supported.

CUSTODY AND TEMPORARY DETENTION (SECTIONS 21 TO 23)

Policy objective

109. Sections 21-23 will make changes in three areas related to custody and temporary detention, which will make the current arrangements more efficient.
Remand and committal of children and young persons

110. **Section 21** provides that certain young people under the age of 21 who have been remanded in custody may be held in a young offenders institution, in addition to the options that presently exist.

111. At present, the law makes provision for young persons to be remanded in local authority accommodation, in a prison, or in a remand centre, depending on their age and circumstances. This means that the Scottish Ministers have a limited number of options when considering the most appropriate place to house young persons awaiting trial or sentence, especially as there are currently no remand centres in Scotland.

112. The Scottish Prison Service considers that in some circumstances, especially in the case of persons under the age of 16 who have been certified by the court to be unruly, a young offenders institution may provide a more appropriate environment for the detention of a young person than a prison. However, at present the law does not allow for this. A change in the law is therefore considered necessary to allow persons aged under 21 who could currently be detained on remand in a prison to be detained on remand in young offenders institutions. However, young persons between the ages of 14 and 16 who are remanded in custody and who are not certified as unruly will continue to be held in local authority accommodation and will not be held in either a prison or a young offenders institution.

Legal custody

113. **Section 22** amends the law in relation to the production of prisoners at the request of the police.

114. Currently when police wish a remand or convicted prisoner to be brought to a police station for interview, identity parade or similar purpose, the prisoner requires to be accompanied at all times by prison officers, even though police officers may also be present.

115. These arrangements create administrative difficulties for the Scottish Prison Service and the police. Prison officers can spend considerable periods of time escorting and remaining with a prisoner during his detention at a police station. This is considered unnecessary from a security perspective since, when in a police station, the prisoner will always remain within the sight and under the control of police officers and so the time spent by prison officers on such escort duties is an unproductive drain on resources. Furthermore, the arrangement complicates the task of the police, since it means that when a prisoner is taken to a police station, arrangements must be made for prison officers to be in close proximity to the prisoner at all times. This can cause practical difficulties, especially where a prisoner is required for an identity parade.

116. The requirement for prison officers to remain with a prisoner at all times when he or she is in the custody of the police, or in the custody of one of the new police custody and security officers that are to be created by the Bill, will therefore be removed. However, the approval of the Governor will continue to be required before the prisoner is allowed to leave the prison and conditions can be imposed by the Scottish Ministers regarding the time that the prisoner can spend out of the establishment.
Temporary detention of person being returned to prison in England and Wales etc.

117. **Section 23** enables persons unlawfully at large from another domestic jurisdiction who are arrested in Scotland, to be detained temporarily in a Scottish prison or young offenders institution pending their transfer to the parent jurisdiction.

118. At present Scots Law does not allow the Governor of a Scottish penal establishment to admit a person arrested by the police in Scotland who is unlawfully at large from another domestic jurisdiction. This can create difficulties for the police, because they must continue to hold the person in their own custody until he can be delivered directly into the custody of the authorities in the other jurisdiction. In administrative and practical terms it would be preferable if such persons could be held in a prison or young offenders institution until arrangements can be made, to transfer the person to the other jurisdiction under the normal procedures for the transfer of prisoners between jurisdictions. This section would allow this to be done.

**Alternative approaches**

119. The changes proposed are straightforward and there are no alternative approaches that would bring about the desired effects.

**Consultation**

120. There has been no consultation on the provisions contained in section 21.

121. The Association of Chief Police Officers in Scotland has on several occasions voiced concern about the present law on the production of prisoners at the request of the police. They have been advised of the proposal to change the law as set out in section 22 and have welcomed this as addressing their concerns.

122. The proposal on detention of prisoners unlawfully at large from other jurisdictions which is embodied in section 23 arises from discussions the Scottish Prison Service has had with Scottish police forces and with HM Prison Service in England and Wales, both of whom have welcomed the change in the law that is now proposed.

**CONSECUTIVE SENTENCES (SECTION 24)**

**Policy objective**

123. We propose to provide the courts with a new power to order that a subsequent determinate sentence or life sentence should be served consecutively to the punishment part of an existing life sentence. Similarly the court would be given the power to order that a subsequent life sentence should be served consecutively to an existing determinate sentence. This new power will be without prejudice to the existing powers of the courts and will be contained in the Criminal Procedure (Scotland) Act 1995.

124. At present there is no means by which a determinate sentence can be ordered to run otherwise then concurrently with a life sentence. Thus if a prisoner sentenced to a life sentence commits a serious crime while in prison the effect of the sentence he is given for the later crime
depends upon when during the life sentence the individual is convicted of it, as it cannot be ordered to start at a date after the date of sentence.

125. In addition, under provisions contained in the Convention Rights (Compliance)(Scotland) Act 2001 the courts, on sentencing a person to life imprisonment either for murder or for any other offence, require to set a punishment part of the sentence. The punishment part is the part of the life sentence that the court considers appropriate to satisfy the requirements of retribution and deterrence, ignoring the period of confinement, if any, which may be necessary for the protection of the public. At present, if a prisoner sentenced to life imprisonment is, at a later date given a second life sentence while serving the first, there is no means by which the punishment part of the second sentence can be ordered to begin at the expiry of the first punishment part. The effect of this is that the prisoner will only serve to the end of that part punishment which expires later, at which time he will have the right to have his continued confinement reviewed.

126. The change brought about by the Bill will mean that where a prisoner serving a life sentence is convicted of another crime during the punishment part of the sentence, the court will have the power, irrespective of when he commits the second crime, to order that the sentence for the second crime will begin at the expiry of the existing punishment part. This will ensure that the prisoner serves a proportion of the new sentence in addition to the punishment part of the life sentence before he is considered for release. Similarly, where a prisoner serving a determinate term is given a life sentence, the court will have the power to order that the punishment part of the life sentence should not commence until the prisoner would otherwise have been entitled to release under the determinate term.

Alternative approaches

127. There is no alternative approach. Amending the law is the only means by which to achieve this outcome.

Consultation

128. There has been no consultation on this matter.

RELEASE OF PRISONERS (SECTIONS 25 TO 34)

129. Sections 25 to 34 amend the Prisoners and Criminal Proceedings (Scotland) Act 1993.

130. Sections 25-34 deal with various provisions relating to the release of prisoners. The current release provisions are contained in the Prisons (Scotland) Act 1989 and the Prisoners and Criminal Proceedings (Scotland) Act 1993. These are referred to as the “1989 Act” and the “1993 Act”. The question of which is applicable depends, in most cases, on the date of sentence. The former Act generally applies only to those sentenced to a determinate term before 1 October 1993.
Release on licence etc. under 1989 Act and Release on licence under 1993 Act – sections 25 and 26

Policy objective

131. It is proposed to delegate from the Scottish Ministers to the Parole Board the decision on whether or not a prisoner sentenced to 10 years or more should be released on parole.

132. At present, when a long-term determinate prisoner sentenced under the 1993 Act (i.e. one sentenced to 4 years or more) has served half of the sentence, the Scottish Ministers may, if recommended to do so by the Parole Board, release him or her on licence. In the case of those sentenced to less than 10 years, if the Board recommends release, the Scottish Ministers have, since 1 April 1995, been statutorily obliged to accept the recommendation (unless the person is liable to removal from the UK on his or her release). In respect of a prisoner with a determinate sentence under the 1989 Act, the present position is that after one-third of the sentence or after a year (whichever is the longer) the Scottish Ministers may, if recommended to do so by the Parole Board, release him or her on licence. Again, from 1 April 1995, the Scottish Ministers have been statutorily obliged to accept this recommendation where the sentence is for less 10 years. By virtue of changes in the law governing the release of life prisoners contained in the Convention Rights (Compliance) (Scotland) Act 2001 and which came into force on 8 October 2001, the decision on whether or not any life prisoner requires to continue to be confined for the protection of the public, after the punishment part of the life sentence has expired, is a matter for the Parole Board. It is considered that, given the Parole Board has the power to order the release of long-term prisoners with a sentence of up to 10 years and life prisoners, it is anomalous for the Scottish Ministers to retain discretion for the class of determinate prisoner with a sentence of 10 years or more. It is therefore considered appropriate to amend the law to provide that the Parole Board has the power to order the release of this class of prisoner.

Alternative approaches

133. There is no alternative approach.

Consultation

134. The Parole Board has been consulted and supports the proposed changes.

Release on licence etc. of life prisoners

Policy objective

135. **Section 27:** It is proposed to amend the existing provisions contained in section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 that relate to the timing of the Parole Board’s review of a life prisoner’s continued confinement where a prisoner has served the punishment part of the life sentence. At present, where the Board declines to direct such a prisoner’s release it must fix a date, for a maximum of 2 years away, when it will next consider the case. Where a prisoner receives another sentence after the Scottish Ministers have referred the prisoner’s case to the Parole Board and before the Board has determined it and the Board declines to direct that the prisoner should be released, the amendment in section 27 will enable the Board to fix such a date as it thinks appropriate for the next consideration of the case, but will not be bound to make it less than 2 years away. In fixing such a date, the Board is to have
This document relates to the Criminal Justice (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 26 March 2002

regard to the date on which the prisoner would be eligible to be released or considered for release from the other sentence.

Alternative approaches

136. There is no alternative approach to legislating on this matter.

Consultation

137. There has been no consultation.

Release etc. under 1993 Act of prisoner serving consecutive or concurrent offence and non-offence terms

Policy objective

138. **Section 28:** It is proposed to amend the existing provisions contained in the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") pertaining to the operation of non-offence terms of imprisonment (i.e. terms of imprisonment for non-payment of fines and contempt of court) and the relationship of such terms with offence terms (i.e. sentences of imprisonment).

139. The Bill modifies the law in order to address problems that have arisen with the existing provisions and to clarify ambiguities in those provisions. In particular this section:

- explicitly provides that where an offence term and a non-offence term are imposed on the same day and are consecutive then the offence term should always be served first, although in other circumstances, whichever term is imposed first should be served first;
- amends paragraph 2(c) of Schedule 1 to the 1993 Act is amended so that there is no longer a one day overlap in the calculation of consecutive offence and non-offence terms;
- clarifies the meaning of the terms “wholly concurrent” and “partly concurrent”;
- provides that when a prisoner is serving partly concurrent offence and non-offence terms, both terms are taken to be into account in establishing entitlement to early release, and the prisoner is not released from one term until he or she has satisfied the early release requirements in relation to both terms;
- provides that prisoners are eligible to be considered for parole at the parole qualifying date of an offence term;
- amends section 220(1) of the Criminal Procedure (Scotland) Act 1995, which relates to the part payment of fines, at paragraph 3 of Schedule 3 to the Bill to make it clear that the sum paid is offset only against the term that was imposed for fine default.

Alternative approaches

140. There is no alternative approach.
Consultation
141. There has been no consultation.

Prisoners repatriated to Scotland

Policy objective
142. Section 29 amends the Repatriation of Prisoners Act 1984. This Act provides for the transfer to Scotland of certain UK citizens who have been sentenced to imprisonment in foreign countries so that they can serve the remainder of their sentence here. It also regulates the way in which their eligibility for early release is to be calculated. Normally, prisoners transferred to Scotland will have to spend at least some time in custody in Scotland before being eligible for early release. However, as the law stands, prisoners serving a sentence of less than 4 years who have served half or more of their sentence before coming to Scotland require to be released from custody immediately on arrival in Scotland. It is considered that foreign jurisdictions are unlikely to agree to the repatriation of a prisoner on this basis. The current law can therefore hinder the repatriation of prisoners who otherwise meet all the criteria for repatriation.

143. Section 29 will remove that hindrance by changing the law so that persons who are serving sentences of less than 4 years imposed abroad who are repatriated to Scotland will require to serve one half of the balance of their sentence that remains outstanding on their arrival in Scotland. This should make other countries more willing to consider repatriation in such cases where this would otherwise be appropriate. It will also provide time for the prisoner to be prepared appropriately for release in the same way as other prisoners who are held in Scottish prisons.

Alternative approaches
144. There is no alternative approach.

Consultation
145. There has been no consultation.

Suspension of conditions and revocation of licences under 1989 Act; Suspension of licence conditions under 1993 Act – sections 30 and 31

Policy objective
146. These sections make provision so as to enable certain conditions in a person’s licence to be suspended for the period during which he or she is being lawfully detained following the imposition of another sentence or on remand.

147. Where a prisoner is released from a sentence on licence he or she will remain subject to the conditions set out in it either for life (following release from a life sentence) or until the period specified in the licence has expired. In certain circumstances a licence may be revoked, in which case the person will be recalled to custody to continue serving the original sentence. However, it is also possible that a person may be detained in prison without the licence being revoked. This can happen at present, for example if the licence holder receives a short prison
sentence which does not suggest that the prisoner presents an unacceptable risk to the public such as to justify revocation of the licence. Alternatively, he or she may be held on remand in connection with an alleged offence which is not of such a character as to justify revoking the licence.

148. In these situations, the prisoner is still subject to all of the licence conditions, yet some of them, such as the statutory one relating to supervision, will be either impossible to fulfil, or inappropriate. Provision is therefore made to enable such conditions to be suspended for the period during which the person is in prison. The remaining conditions will continue to be effective and, if they are breached, the licence will be capable of being revoked while the person is in custody, under the provisions of section 17, as amended by section 33 of the Bill. Equally, if a condition is breached before the person is detained is then suspended, the Scottish Ministers may still revoke the licence on the basis of the breach, notwithstanding that at the time of revocation the condition has been suspended. The suspension of a condition will not, therefore, have any retrospective effect on its operation before the suspension. Release will trigger the full effectiveness of all of the licence conditions once again.

Alternative approaches
149. There is no alternative approach to legislating on this matter.

Consultation
150. There has been no consultation.

Revocation of licences under 1993 Act – section 32

Policy objective
151. Section 32 repeals the provision contained in section 16 of the 1993 Act under which a section 16 order made by a court revokes any existing licence under which a prisoner has been released from custody.

152. Section 16 of the 1993 Act currently makes provision to deal with those released from prison who commit a further offence, punishable by imprisonment, during the period between the date of release and the date on which the sentence imposed by the court would have been served in full. Under the current arrangements, in the case of a person who has been released from custody on licence, the making of an order under section 16(2) or (4) ("a section 16 order") means that, in terms of section 16(7)(a) the licence is revoked and the person is liable to be detained until the original sentence expires. As the section 16 order constitutes a sentence under the 1993 Act, the person will be released at the half-way point (if it is for less than 4 years) or, otherwise, will be eligible for parole at that point. Where the court orders a short period of return under a section 16 order, it may be quite impractical to assemble, for consideration at the half-way point, the reports which under statute must be provided to the Board in order that it can make an assessment of the risk associated with the prisoner’s re-release on licence. This can therefore, result in an individual remaining incarcerated for a period beyond the half-way point. In addition, because the passing of a section 16 Order, automatically triggers revocation of the licence, it may result in the person being detained for longer than the court might have intended. If the new offence has little or no relationship with risk factors relevant to the original offence
then the grounds for the prisoner’s continued detention beyond that required under the section 16 order may be hard to justify in terms of public protection.

153. The repeal of section 16(7) will not affect the existing powers of a court to punish a person for committing a further offence before the expiry of the original sentence but it would leave the Scottish Ministers, normally after consultation with the Parole Board, to decide whether the nature of the further offence suggested an unacceptable risk to the safety of the public such that the licence should be revoked, under section 17.

154. Section 32 requires the Scottish Ministers to revoke the licence and recall to custody all prisoners released on licence where this is recommended by the Parole Board.

155. Given that under the proposals detailed in paragraphs 131 and 132 the Parole Board will be responsible for deciding on the release of all classes of prisoner, it is considered appropriate that it should similarly be responsible for deciding whether or not a prisoner’s conduct while on licence suggests an unacceptable risk to the safety of the public such that the person should be recalled. This would mean that the discretion exercised by the Scottish Ministers in certain classes of case over whether to accept or decline a recommendation from the Board would be removed.

**Alternative approaches**

156. There is no alternative approach to amending the law in order to achieve these changes.

**Consultation**

157. The Parole Board has been consulted and it supports the proposed changes.

**Extended sentences: recall to custody and revocation of licences**

**Policy objective**

158. **Section 33:** It is proposed to amend section 26A of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”) so as to make clear that an extended sentence prisoner, irrespective of the length of the sentence, who has been recalled to custody, has the right to unconditional re-release once the expiry date of the extension period is reached.

159. At present, the effect of section 26A(9) of the 1993 Act is not entirely clear. It is thought as requiring an extended sentence prisoner who is recalled to custody to be liable to be detained until the end of the entire extended sentence rather than to the end of the extension period. In some situations, the latter will be considerably earlier than the former. The situation is contrary to the policy intention underlying the provision and so it is proposed to make this matter clear.

160. This will only affect those whose custodial term of the extended sentence is less than 4 years. Such people will be released on licence at the halfway stage of the custodial term to begin to serve the extension term. However, if they are recalled to custody in terms of section 17 of the 1993 Act then, at present, the effect of section 26A(9) is understood to be that they will be detained, unless the Parole Board directs that they be re-released, until the end of the entire...
extended sentence and not until the end of the extension period. As the latter starts at the half way stage of the custodial term, it will expire earlier. For those serving custodial terms of 4 years or more there will be no such difference between the date of expiry of the extended sentence and of the extension period as the latter will begin, in terms of section 26A(5)(a), when the prisoner would have ceased to be on licence in respect of the custodial term (rather than at the point at which he or she was released from it).

Alternative approaches
161. There are no alternative approaches to legislation on this matter.

Consultation
162. There has been no consultation.

Special provision in relation to children – section 34

Policy objective
163. It is proposed that the Scottish Ministers delegate to the Parole Board the decision of whether any child sentenced to detention (other than detention without limit of time) under section 208 of the Criminal Procedure (Scotland) Act 1995 should be released on parole. At present the Scottish Ministers have discretion to release children so detained, on the recommendation of the Parole Board.

164. This and the changes detailed in paragraph 131 and 132 above will ensure a consistent approach under which it is the Parole Board that will determine the release on parole of all classes of long-term and life prisoner and detainee.

Minor technical amendments
165. It is proposed to make some minor/technical amendments to the Convention Rights (Compliance) (Scotland) Act 2001 and to the Prisoners and Criminal Proceedings (Scotland) Act 1993 and to repeal redundant provisions in certain other statutes relating to the early release of prisoners.

Alternative approaches
166. There is no alternative approach.

Consultation
167. The Parole Board has been consulted and supports the proposed changes.

Remote monitoring of released prisoners

Policy objective
168. Section 35 provides that the Scottish Ministers may include a licence condition requiring an offender’s whereabouts or compliance with other licence conditions to be monitored by means
of remote monitoring. This condition is an attempt to reduce the opportunity for re-offending and is part of a package of supervision and monitoring measures available to the Parole Board.

169. In the White Paper *Serious Violent and Sexual Offenders* published in June 2001, the Scottish Executive gave a commitment to continue to give priority to the provision and further development of services such as the use of electronic monitoring. This was in response to the recommendation of the MacLean Committee and subsequently the report of the Expert Panel on Sex Offending (chaired by Lady Cosgrove) that electronic monitoring should be used as part of a range of measures to enhance the supervision of dangerous offenders in the community after their release from custody.

170. Remote monitoring of offenders subject to restriction of liberty orders made under section 245A of the Criminal Procedure (Scotland) Act 1995 has been piloted for 3 years. Following consideration of an evaluation of the pilots and the response to a consultation exercise on additional uses of electronic monitoring in the criminal justice system, the Scottish Ministers announced that provision would be made to extend the availability of electronic monitoring for use as a condition of release on licence. Electronic monitoring would thus be used as part of a range of measures for the safe management of high risk offenders in the community.

171. It is generally accepted that remote monitoring in its present form if managed properly could enhance community safety particularly for the categories of offenders dealt with in the reports of the MacLean Committee and the Expert Panel on Sex Offending. However, there are also likely to be offenders who do not fall into the category of serious violent or sexual offender but whose reintegration or rehabilitation might be supported by a condition of remote monitoring of their compliance with other licence conditions. With this in mind the provision will allow a remote monitoring condition to be included in a release licence irrespective of the nature of the offence. It is intended that the conditions may be imposed in respect of an offender released at age 16 and above.

**Alternative approaches**

172. The alternative would be not to extend remote monitoring in this way, losing the extra protection which it provides.

**Consultation**

173. Consultation on the report of the MacLean Committee took place between June and September 2000 and on the report of the Expert Panel on Sex Offending between June and September 2001. Respondents to both reports were broadly in favour of the use of remote monitoring.

**PART 5: DRUGS COURTS (SECTION 36)**

**Policy objective**

174. As part of the commitment to addressing drug related crime the Bill provides for the establishment of drug courts which will deal with cases involving persons dependent on, or with
a propensity to misuse drugs. Whilst sitting as a drug court the sentencer's powers are to be extended.

175. The Report of the Working Group on the Glasgow Drug Court (available on the Scottish Executive website) concluded that the availability of additional intermediate sanctions would strengthen the operation of the drug court. This is supported by international experience where positive drug tests and other lapses can be dealt with by the court whilst still enabling the order and the drug treatment to continue.

**Alternative approaches**

176. The nature of the offenders likely to be subject to drug court orders is such that positive tests and other lapses will not be uncommon. However, for the order to be successful, it will be important to ensure that the offender remains subject to the order, and therefore in drug treatment, for as long as possible. Interim sanctions will provide drug court sentencers with a punitive option in cases where the offender has committed minor failures to comply with the order. Without this provision, the sentencer may feel compelled to revoke the drug court order and resentence the offender, thus ending the offender's drug treatment. Alternatively, if the sentencer does not revoke the order, but deals with the failure to comply in another way and allows the order to continue, the drug court may appear to lack authority with the result that the offender's failures to comply with the order may continue or even increase.

**Consultation**

177. The need for this provision was identified by the Working Group on the Glasgow Drug Court, which included representation from sheriffs, the Scottish Court Service, the Crown Office and procurator fiscal service, the Glasgow Bar Association, Glasgow City Council Social Work Department, Greater Glasgow Health Board, Strathclyde Police and the Scottish Drug Enforcement Agency and which consulted sentencers and officials in other drug courts around the world.

**PART 6: NON-CUSTODIAL PUNISHMENTS (SECTIONS 37 TO 42)**

178. Sections 37-42 detail amendments to a number of provisions relating to non-custodial punishments, in order to make disposals more effective. These are:

- to allow transfer of restriction of liberty orders between courts;
- to introduce interim anti social behaviour orders;
- to allow the court to impose a requirement for remote monitoring in a probation order or a drug treatment and testing order;
- to introduce a power of arrest for breach of a non-harassment order; and
- to make restriction of liberty orders a direct alternative to custody and change the arrangements for supervised attendance orders.
Restriction of liberty orders

Policy objective

179. Section 37 rectifies an omission from section 245A of the Criminal Procedure (Scotland) Act 1995, by introducing provisions to allow a court to make an restriction of liberty order (RLO) where the offender resides or is to reside outwith the jurisdiction of that court.

180. There is presently no power within the existing legislation for the court to permit the transfer of an RLO from one court district to another. This is likely to cause difficulties when restriction of liberty orders are made available to courts across Scotland from 1 May 2002. Currently if any changes are required to the RLO, the offender can apply to the court for a variation of the order. However, the court can not effect a transfer to another court jurisdiction if for example the offender changes address. These provisions will allow any resultant breaches or requests for variation to be heard by the court in the new jurisdiction.

Alternative approaches

181. The alternative would be for the court that made the RLO to vary the RLO to the new address whilst retaining responsibility for it. However, in the event of breach of the order or a concurrent order that had been transferred or a further request for variation the offender would be required to attend the original sentencing court. The approach adopted has the advantage of removing the requirement on the offender to travel back to the originating court. The originating court still retains the power if it so wishes to continue with the administration of the order.

Consultation

182. This provision brings RLOs into line with transfer provisions available for other community disposals such as probation orders therefore it is considered to be a technical amendment and has not been the subject of consultation.

Interim anti-social behaviour orders

Policy objective

183. Anti-social behaviour orders (ASBOs) are intended to provide protection from anti-social acts or conduct in a particular area by any person named in the order. Over 50 ASBOs were granted in 2000 and they are generally viewed as a helpful way forward in tackling anti-social behaviour. In particular, ASBOs can offer an alternative remedy to eviction in the case of tenants in the social rented sector. ASBOs were introduced to enable anti-social behaviour to be stopped effectively and quickly. Delays in considering and implementing an order can undermine its effectiveness and subject individuals and families to continuing exposure to anti-social behaviour. While it is inevitable that the necessary legal process will take some time, particularly where the application is defended, the policy intention is that the court should have the power to grant an interim measure to deal with anti-social behaviour pending the full order.

184. Section 38 introduces a system of interim anti-social behaviour orders to take effect pending the outcome of the application for an ASBO. Interim ASBOs will provide protection more immediately than would be possible under the full ASBO application procedure.
Alternative approaches

185. Any delay between an application for an ASBO and the granting of the order, particularly when individuals or families continue to be subjected to the anti-social behaviour referred to in the order should be minimised. Consideration has been given to the speed with which courts process ASBOs. Courts attempt to process the applications as expeditiously as possible but it is not always possible to carry out the due process of the law quickly.

Consultation

186. A report into the use of ASBOs by the Chartered Institute of Housing in Scotland in May 2001 identified the main concern as being the complexity of the court procedures and the consequent time it took to secure an order. This issue was returned to during the Social Justice Committee’s Stage 2 consideration of the Housing Bill when a number of MSPs sought to introduce amendments to the Housing Bill to introduce a system of interim ASBOs for the social rented sector. The Minister for Social Justice confirmed during the Stage 3 debate on 13 June 2001 that the Scottish Executive would legislate to provide for interim ASBOs as soon as a suitable legislative opportunity was available.

Requirement for remote monitoring in probation order and requirement for remote monitoring in drug treatment and testing order – sections 39 and 40

Policy objective

187. It is proposed to allow the court to make as a condition of a probation and a drug treatment and testing order a requirement that the offender comply with restrictions on his movements and for that compliance to be monitored remotely.

188. Restriction of liberty orders, in which the offender’s compliance with the order is monitored electronically, have been available to the sheriff courts in Aberdeen, Hamilton and Peterhead since August 1998, and will be rolled out to other courts across Scotland from 1 May 2002. Currently, Scotland, England and Wales are the only jurisdictions in Europe to impose an electronic monitoring sentence not associated with other, rehabilitative, work. It is accepted that there will continue to be cases where, having exhausted other community disposals, a sheriff may wish to impose a stand alone RLO, as preferable to a short custodial sentence.

189. Provision is currently available to impose RLOs concurrently with probation or drug treatment and testing orders but there is no direct relationship with progress or compliance between the orders. The introduction of a remote monitoring provision as a condition of a probation or drug treatment and testing order will give the sentencers the option of imposing a punitive condition when the order is made and will provide the supervising officer with an overview of the offenders progress on the whole order.

Alternative approaches

190. The experience of RLOs pilot projects in Aberdeen, Hamilton and Peterhead has shown that remote monitoring has a place in the range of options available to the courts. The introduction of new provisions and varied use will build on the existing infrastructure. The alternative to this provision would be to make no change to the current legislation. However, this would not allow the achievement of the policy objectives outlined above.
Consultation

191. Respondents to the consultation paper Tagging Offenders: The Role of Electronic Monitoring in the Scottish Criminal Justice System (October 2000) (available on the Scottish Executive website) considered that restriction through remote monitoring would have added benefit to the rehabilitation of offenders if combined with other more rehabilitative orders.

Power of arrest where breach of non-harassment order

Policy objective

192. The Protection from Harassment Act 1997 introduced a system of non-harassment orders (NHOs) which allow victims to obtain a court order to prevent further harassment. Breach of a NHO is a criminal offence punishable on indictment by up to five years imprisonment. At present there is no statutory power of arrest without warrant for breach of a non-harassment order although the police have common law powers of arrest.

193. In order to strengthen the law and protection for victims of stalking and harassment, section 41 introduces a specific power for a police constable to arrest without warrant a person who is suspected of being in breach of a non-harassment order. This will allow police to act immediately to prevent further distress, alarm or violence before it takes place.

Alternative approaches

194. The Scottish Executive issued a consultation paper in March 2000 (Stalking and Harassment Consultation Document available on www.scotland.gov.uk/consultations/sah-00.asp) which set out a number of options in relation to the law on stalking and harassment; no change; changes to the current law; changes to current practice; and a new statutory offence of stalking.

195. Analysis of the responses to the consultation exercise suggested that there is no one obvious course of action in respect of stalking and harassment. Instead a case has emerged for a staged approach comprising a series of actions aimed at early changes to existing law and practice and future consideration of the need for a new offence following the findings of a comprehensive research project. The introduction of a specific power of arrest for the breach of a non-harassment order is part of this staged approach and reflects concerns raised by many of those who responded to the consultation paper concerning the adequacy of police powers in this area.

Consultation

196. The consultation document specifically raised the possibility of introducing a power of arrest without warrant on suspicion of breaching an NHO. 35 responses were received from a wide range of criminal justice bodies, victims’ and women’s organisations, individual victims and others.

197. The proposal to introduce a power of arrest without warrant for breach of a NHO received general support. Some respondents suggested that the common law powers of arrest are
seldom used in such circumstances and that the proposal would help to clarify the situation and increase the protection available in particular to victims of stalking.

Amendments in relation to certain non-custodial sentences

Policy objective

198. Section 42 proposes amendment to current provisions for supervised attendance orders (SAOs) and provides for restriction of liberty orders (RLOs) to be available as a direct alternative to imprisonment or any other form of detention.

199. SAOs can be used to require an offender aged 18 or over, who has failed to pay a fine to undertake a programme of designated activities for a specified number of hours. The orders constitute a time penalty of between 10-100 hours for the offender to undertake constructive activity within the community. SAOs may also be used as a first disposal for offenders aged 16 or 17. It is proposed to introduce two changes to the arrangements for these orders.

200. Current legislation restricts their use as a first disposal to 16-17 year olds. This provision was piloted but encountered problems through a combination of the current penalties for breach of an SAO (see paragraph 202 below) and the difficulties encountered by this age group in adjusting to the adult criminal justice system. Removal of the upper age limit and hence the opportunity for use of SAOs as a first disposal with a wider age group is designed to assist the Scottish Executive's policy objective of reducing to a minimum the number of custodial sentences served by fine defaulters. At the same time it is proposed to reduce the minimum age limit for the use of SAOs with fine defaulters from 18 to 16.

201. Although a recent evaluation of SAOs reported a generally positive picture, fewer SAOs were imposed in the year 1999-2000 in comparison to the previous year. In part this can be attributed to ongoing concerns that the maximum lengths of sentence available to sentencers in dealing with breaches of SAOs are disproportionate in relation to the original offence or size of outstanding fine. It is understood that in many instances offenders are opting to serve short periods of custody when defaulting on fines rather than face the prospect of a substantially longer period in custody should they fail to successfully complete their SAO. The objective is to minimise the number of fine defaulters being sent to custody and a greater take up of SAOs is considered one way of achieving this outcome.

202. The maximum length of the custodial sentence courts may impose for a breach of an SAO is therefore reduced from 3 months in a sheriff court and 60 days in district courts to 30 and 20 days respectively. The proposed revised maximum lengths of custodial sentence seek to recognise the fact that an offender has not only failed to pay the full original fine imposed but has also failed to comply with the terms of the SAO subsequently imposed by the court.

203. A RLO requires an offender to be restricted to a specified place for a maximum period of up to 12 hours per day and / or from a specified place or places for up to 24 hours per day for up to 12 months. RLOs have been made available to Aberdeen, Peterhead and Hamilton sheriff courts since 1998. Following a positive evaluation of their success and a consultation exercise, RLOs will be rolled out to other courts in Scotland from May 2002. As RLOs are used generally
as a high tariff disposal, it is proposed to make provision for RLOs to be available as a direct alternative to custody.

**Alternative approaches**

204. With regard to the proposed reduction in the maximum penalty for breach of an SAO it is possible to envisage both a greater and lesser reduction. A greater reduction, for example, to match the maximum lengths of non-payment of a level 1 or 2 fine (7 and 14 days respectively) would fail to give recognition to the fact that the offender has failed to comply with a second order of the court. A lesser reduction is likely to lead to continued resistance by offenders to being made the subject of an SAO and choosing instead to serve a short period of custody when in default of a fine. The proposed reduction attempts to strike a balance between these considerations.

205. Current legislative provision allows for the use of RLOs as a community disposal. The experience of the pilot projects are that RLOs are used as a high tariff disposal i.e. for offenders whose crimes are serious in nature or whose offending patterns are such that they are at risk of custody and in the majority of instances used as a direct alternative to custody. Consideration was given to retaining the existing legislative provision and thus retaining the right of sentencers to impose RLOs for less serious crimes. However, this did not reflect the high tariff nature of the disposal or the invasiveness of the limitations on movement imposed by the order. When provision was made for community service orders to be imposed as a direct alternative to custody it increased the level of replacement of custodial sentences from around 40% to 60%. This provision should likewise ensure that RLOs are used most appropriately.

**Consultation**

206. Proposals for the amendment of existing legislation in respect of SAOs were drawn up by a working group set up by the Criminal Justice Forum to look at issues in relation to fines enforcement. Informal consultation, which was broadly supportive, took place with groups of sentencers with regard to the conclusions reached by the working group. Endorsement of the proposed changes was subsequently given by the Criminal Justice Forum, which comprises representatives from all the key agencies involved in the criminal justice system.

207. Th proposal in respect of RLOs arose from suggestions made by respondents to the consultation paper *Tagging Offenders: The Role of Electronic Monitoring in the Scottish Criminal Justice System* published in October 2000.

**PART 7: CHILDREN (SECTIONS 43 AND 44)**

208. These sections deal with the measures to clarify the law in relation to the physical punishment of children under 16 and the introduction of a power for the Scottish Ministers to set up youth crime feasibility pilot schemes for 16 and 17 year old offenders.
Physical punishment of children

Policy objective

209. The Bill will provide improved protection for children against physical assault. By giving greater clarity to the law, it aims to help their parents and carers avoid the use of unnecessary and excessive physical punishment. For those cases which come to court, it aims to provide clearer guidance to the courts on the factors which they must consider, and bring these into line with judgements of the European Court of Human Rights.

210. The Scottish Ministers consider it essential that every child should have the best possible start in life. The Scottish Executive is pursuing an integrated strategy to support children’s early years, spanning improvements to health, housing, childcare and education. The challenge facing parents has never been greater; and both the UK Government and the Scottish Executive are working to help parents achieve work/life balance and to support them in their parenting role. In Sure Start Scotland they have developed a strategy which aims to support families with very young children (aged 0 to 3), with a focus on those living in deprived communities. The Youth Crime Review dealt with crime in the community and the Discipline Task Force covered misbehaviour in schools. This provision is aimed at modernising the law covering how misbehaviour is dealt with in the family setting.

211. Those with parental responsibilities and rights in respect of a child under the Children (Scotland) Act 1995 have a responsibility to provide direction and guidance to the child. Both they and any other person who has care and control of a child must safeguard and promote the child’s health, development and welfare. The Scottish Ministers consider that it is vital that children grow up with a strong sense of right and wrong, and a clear disciplinary framework. Where necessary, parents are entitled to punish children for doing wrong, and this can include the use of physical punishment within limits. The Bill is intended to set the limits clearly and for the benefit of children, without encroaching needlessly in the private life of the family.

212. Under the current common law in Scotland parents, guardians and other persons with care or control of children are entitled to use force for the purpose of disciplining a child. The reasonable physical punishment of a child can be a justified assault where the force is moderate and not inspired by vindictiveness.

213. This Bill aims to provide clarification in this area by setting out the circumstances in which the physical punishment of a child will never be regarded as reasonable, and by setting out a non exhaustive list of the factors which are to be taken into account when considering whether such punishment is reasonable. The courts will be able to take into account any other relevant factors.

214. The factors which the court will be required to consider in determining whether the physical punishment of a child under the age of 16 is reasonable will be:

- the nature and context of the punishment;
- its duration and frequency;
- its physical and mental effects on the child;
• the personal characteristics of the child, including the sex, age and state of health of the child.

215. These factors were laid down by the European Court of Human Rights, and re-affirmed in the case of A-v-UK. Although this was directly concerned with the law in England, the law of Scotland is substantially the same.

216. The Bill prohibits the use of physical punishment on a child under the age of three. The Scottish Ministers consider it wrong to inflict physical punishment on very small children. This risks injury to the immature body of a young child, and may be ineffective before a child has developed language and reasoning abilities. Setting an age limit provides clarity to parents and reduces the risk that children will be physically punished at an unreasonably early age. Ministers consider that the limit should be set at the age of three.

217. The Scottish Ministers consider that the following should never be regarded as reasonable punishment by the courts:

- blows to the head;
- shaking;
- the use of implements.

218. These are all methods which risk injury to a child. It is hard to judge the impact of a blow on an immature body when using an implement. The Scottish Law Commission recommended prohibiting the use of implements in its report entitled Report on Family Law in 1992.

219. The effect of the Bill should be to change parents’ behaviour. Ministers do not intend to introduce any new investigation and enforcement regime. If potential cases of assault are brought to the attention of the police or the procurator fiscal, they will continue to be investigated and dealt with as at present. No new penalties are proposed and sentences for assault will continue to be limited by the sentencing powers of the court involved. At present, most such cases will result in non-custodial sentences, and this is not expected to change.

220. Physical punishment by childminders and in non-publicly-funded pre-school centres will also be banned by separate regulations under the Regulation of Care (Scotland) Act 2001 to bring them into line with publicly funded pre-school centres where physical punishment is already banned. However, babysitters and nannies working in the child’s home will not be banned from using physical punishment. They will be subject to the ground rules set by parents, so that discipline within the home can be consistent.

Alternative approaches

221. The “no change” option was considered. Currently physical punishment of a child will normally constitute the common law crime of assault, but there is a right to administer moderate physical punishment to a child. Such punishment, if within the bounds of what a court considers reasonable, will not expose the parent or other person with lawful control of the child to a
criminal conviction for assault. Since the incorporation of the European Convention on Human Rights, Scottish courts must take into account the factors set out in paragraph 214. However, there would be no clear statement of the law in statute, and parents would have to be advised on the basis of cases under the common law.

222. If only long-term change in parental attitudes and behaviour were desired, an alternative would be not to legislate but to embark on a programme of public education. The Scottish Ministers feel that by itself this would not quickly bring about changes, and in the meantime would not provide protection for the most vulnerable children. Legislation provides a clear signal to parents and carers about what is not permitted. The Scottish Ministers will also develop a strategy for providing information to the public and advice in conjunction with relevant voluntary organisations.

223. Another alternative was to introduce a complete ban on the physical punishment of children. This would in theory provide complete protection for children. However, the Scottish Ministers do not believe that there is public support for such a ban and it would be impossible to enforce. It would be an excessive intrusion into the rights of parents to bring up children.

224. The Scottish Ministers believe that the proposals as contained in the Bill have the merit of clarity. They contain guidance to the courts as to what factors are relevant to deciding whether an alleged offence has been committed, and they also contain clear “dos and don’ts” for parents. It would be clear to a parent who acted in the manner which is prohibited, that he or she was liable to prosecution. Physical removal of a child from danger, or light warning taps to attract a child’s attention to a danger would, as now, not constitute a crime. Smacking as such, which is the method chosen by most parents to administer physical punishment, would be permitted provided it was “reasonable” and the child is at least 3 years of age.

Consultation

225. Following the case of A-v-UK in the European Court of Human Rights, the consultation paper The Physical Punishment of Children in Scotland was issued in February 2000. 220 responses were received. Of the responses received:

- 47% supported the Scottish Executive’s proposals for clarification;
- 34% wanted complete ban on smacking;
- 17% opposed any change to law;
- 6% gave other answers.

226. The majority (77%) agreed there should be some clarification of the law and/or further restrictions introduced.

227. The views of children themselves were sought by asking bodies such as local authorities to seek their views. Children in Scotland was commissioned to canvass children’s views on these questions and research was conducted in small groups across Scotland. Children’s views were against smacking, which was seen as frequently unfair and counterproductive.
228. Seventeen per cent of the responses to the consultation wanted no change in the law. It was argued that the law had been sufficiently clarified by the judgement in A v the UK and that there was no need to impose further restrictions on parents. Some religious groups and individuals have claimed that their understanding of the Bible is that it encourages or demands the use of implements such as “the rod” on children. Some go so far as to claim that not to use the rod is to withhold proper correction from a child. They claim that any interference with the physical punishment of children under three, or the use of implements on any child, would be an infringement of their religious beliefs and would be contrary to Articles 8 (Respect for private and family life), 9 (Freedom of thought, conscience and religion) and 14 (Prohibition of discrimination) of the European Convention on Human Rights. The Scottish Ministers consider that if there were any such infringement then it would be justified by the overall aim of protecting children from unnecessary physical violence. It was noted that not all responses from religious organisations to the consultation were opposed to legislation.

229. Some responses said that the use of implements allowed the hand to be used in love and the rod for reproof. The ritual of fetching an implement allowed a parent time to cool down. Parents who were not permitted to smack might bottle up their rage, risking an uncontrollable explosion of violence. The Scottish Ministers consider that, to the extent that these considerations are valid, parents are able to control themselves by alternative methods, and one of the aims of the legislation is to ensure that parents are not permitted to inflict their own lack of control on the children.

230. A number of organisations and individuals consulted were in favour of a complete ban on the physical punishment of children. The 34% of those who responded to the paper who wanted a complete ban included leading bodies representing the interests of children. Some bodies cited experience in Sweden, which imposed a complete ban ahead of public opinion. However, the Scottish Ministers do not believe that there is public support for such a ban and it would be impossible to enforce.

**Monitoring**

231. The aim of **section 43** is to help parents and carers avoid unnecessary and excessive physical punishment. The Scottish Executive has commissioned research which will establish a baseline for the incidence of physical punishment in Scotland, of injuries to children, and of parental attitudes to physical punishment. This will enable the subsequent effects of legislation to be monitored.

**Youth crime pilot study**

**Policy objective**

232. The Bill enables pilot schemes to be developed to test the effectiveness of appropriately diverting 16 and 17 year old minor offenders away from the adult criminal justice system to the children’s hearings system wherever this is appropriate.

233. The pilot schemes will be designed to address offending behaviour and to prevent the young people from continuing their offending into adult life. As appropriate, persistent minor offenders will be subject to special programmes addressing their offending behaviour and contributory factors in their individual backgrounds.
234. The pilot scheme would enable 16 and 17 year olds to be referred to the Principal Reporter for consideration if necessary by a children’s hearing, even where the 16 and 17 year old was neither currently under a supervision requirement by a children’s hearing, or subject to prosecution in courts, under which process the courts may at present refer the case to the hearing for advice and or for disposal.

235. The proposal is based on a recommendation of the advisory group on youth crime report *It’s a Criminal Waste* which reported in June 2000.

236. The report concluded that changes were needed in the way in which 16 and 17 year old offenders were dealt with and suggested improvements in services and procedures for 16 and 17 year olds within the existing system. It also recommended that more should be done to develop a coherent bridging system which crossed the divide between the children’s hearings and the adult criminal justice system. The advisory group recommended a detailed examination of the feasibility of a bridging pilot under which as many 16 and 17 year olds as possible would be referred to hearings rather than the courts.

*Alternative approaches*

237. No alternative approaches are possible within existing primary legislation. 16 and 17 year olds who are subject to a supervision requirement, may be referred to the children’s hearings system only after the adult criminal justice system has reached a conclusion and so the amendment is required to enable the policy objective to be met.

*Consultation*

238. The advisory group’s report was the subject of public consultation. These proposals were also announced in, *Making Scotland Safer: Improving the Criminal Justice System.*

**PART 8: EVIDENTIAL, JURISDICTIONAL AND PROCEDURAL MATTERS (SECTIONS 45 TO 53)**

*Certificates relating to physical data: sufficiency of evidence*

*Policy objective*

239. Section 284(2) of the Criminal Procedure (Scotland) Act 1995 allows the prosecution to serve a certificate signed by an authorised person and stating that fingerprints or other similar impressions were taken from a named individual at a specified time, place and date. This has to be done not less than 14 days before the trial. The certificate is then deemed to be sufficient evidence of the facts stated in it. Concerns have been expressed about the absence of any express defence right of challenge to the contents of this certificate at present. Section 37 amends this provision, to provide such an express right of challenge.

*Alternative approaches*

240. The Scottish Ministers are unaware of any alternative approaches to protecting the accused’s rights in this context.
Consultation

241. Formal consultation was not thought necessary on this relatively minor and self-contained measure.

Taking samples by swabbing

Policy objective

242. Currently in Scotland a constable has power to take from persons detained under section 14(1) of the Criminal Procedure (Scotland) Act 1995 or under arrest and in custody fingerprints, palm prints or other prints and impressions of an external part of the body as he reasonably considers it appropriate to take. A constable can not take samples for DNA or other forensic analysis without the authority of an inspector or above, even where the use of force is not required. Provision is to be made to allow such samples to be taken by mouth swab without requiring authorisation from an inspector. More intrusive methods of taking such samples, and the use of reasonable force to take samples by mouth swab, will continue to require the authorisation of an inspector.

243. DNA samples are routinely taken on arrest, like fingerprints. This proposal makes the relevant police powers more similar.

Alternative approaches

244. Beyond retaining the status quo, the alternative approaches for this proposal would entail giving constables wider powers to take DNA samples without authorisation, for example including more intimate DNA samples or taking samples by force. The Scottish Ministers do not consider a wider power necessary at the moment.

Consultation

245. The proposal stems from a suggestion from the Association of Chief Police Officers (ACPOS) in Scotland on how to improve this area of police powers. There has been no formal consultation on the proposal before its inclusion in the White Paper Making Scotland Safer: Improving the Criminal Justice System.

Retaining sample or relevant physical data where given voluntarily

Policy objective

246. The police will be allowed, with the consent of the donor, to retain fingerprints, other prints and impressions, and samples given voluntarily, for example in mass screenings, as well as any information derived from them. The donor will be able to consent to the retention for use in connection with a particular investigation only or, in respect of all investigations in general. The donor may withdraw this consent at any time but the withdrawal of consent will have prospective effect only. Evidence obtained from the prints or samples etc. before the withdrawal of consent will still be able to be used in a prosecution arising from the investigation. Otherwise the withdrawal of consent will place the police under a duty to destroy the prints, samples etc. and information derived from them as soon as possible after the withdrawal of consent becomes effective.
247. Currently such prints and samples etc. are destroyed after they have been used in the investigation for which they were obtained. This means that the same individuals may be asked for further samples, which is a waste of both their time and police time and resources. The proposals will allow the police, subject to the terms of the consent given, to retain these prints, samples and information for use in future investigations and prosecutions.

Alternative approaches

248. We also considered whether the consent should be irrevocable once given. This approach to the same question has been taken in England and Wales. The Scottish Executive concluded that this would act as a disincentive to giving such consent and that an individual should be free to withdraw his consent at any time.

Consultation

249. A similar proposal for England and Wales was included in a consultation paper produced by the Home Office in August 1999. At that time ACPOS indicated that a similar provision would be useful in Scotland. The details of our proposals were later published in the White Paper second White Paper Making Scotland Safer: Improving the Criminal Justice System.

Transfer of sheriff court proceedings

Policy objective

250. At present while it is possible to transfer some cases between courts in a Sheriffdom, legislation does not allow for the transfer of cases across a Sheriffdom boundary. To improve operational effectiveness, section 36 will introduce the power to transfer business both within and outwith a sheriffdom. It will be possible to transfer cases from one sheriffdom to another even if the crime was not connected with the sheriffdom. This will apply in both solemn and summary cases.

251. The new arrangements for transfer outwith the sheriffdom will be applied only in exceptional circumstances where the “home” Sheriffdom was not in a position to handle the case. The transfer will only be with the consent of the Sheriff Principal of both Sheriffdoms. It is envisaged that such a power might be used if there was a major disruption of business through e.g. technology or utility breakdown, damage to the courthouse, or some disease of epidemic proportions. The policy intention, however, is that the provision will not be allowed to be used where the disruption was of the type which could reasonably be foreseen or if the level of sickness was also foreseeable.

Alternative approaches

252. There are no other alternative approaches which would enable court business to continue to be dealt with efficiently and in particular there is no alternative approach available in relation to Glasgow Sheriff Court which currently operates both as a court and a sheriffdom and there is therefore the restriction on the capacity for transfer in the event that Glasgow Sheriff Court needed to react to a major contingency.
Consultation

253. The proposal has the support of the sheriffs principal.

Competence of justice’s actings outwith jurisdiction

Policy objective

254. At present a sheriff, magistrate or justice does not have power to sign a warrant or other legal document relating to procedure taking place in his sheriffdom, unless the relevant document is signed within the Sheriffdom. This proposition was confirmed in the case of *Shields v Donnelly 1999 SCCR 890* (2000 SLT 147). Section 49 will allow sheriffs to sign any legal document including warrants while they are outwith the Sheriffdom covered by their commission provided they are in Scotland.

255. It is not uncommon for sheriffs to reside outwith the sheriffdom within which they normally sit and sheriffs are frequently contacted at their homes with applications in relation to matters which arise outwith normal business hours. This proposal will increase the flexibility of the judicial process by giving sheriffs the power to conduct their duties in a lawful manner irrespective of where in Scotland they sign any warrants or legal documents requiring signature.

Alternative approaches

256. The alternative approach is to make no change. This would continue the anomaly whereby a Sheriff is prevented from conducting business, including emergency business speedily, simply because of a geographical restriction.

Consultation

257. The sheriffs principal are fully supportive of the proposal.

Unified citation provisions

Policy objective

258. Section 50 allows sheriff clerks to sign and issue citations for ancillary hearings associated with breach and review hearings for community disposals and drug treatment and testing orders.

259. At present an alleged breach of community disposal is reported to the court by the supervising social worker. Where the judge/sheriff decides to take further action and authorises citation to attend court, this requires the Procurator Fiscal to issue a citation to the offender adding an additional administrative step to the process.

260. It is proposed to remove this administrative step by allowing the clerk of court to issue citations to attend court instead of the Procurator Fiscal, which will result in breach of community disposal cases being dealt with more expeditiously.
**Alternative approaches**

261. There is no alternative approach. This step is simply designed to streamline the administrative process and minimise delay in processing such cases. There are no policy implications.

**Consultation**

262. Crown Office is fully supportive of the proposal.

**Citation other than by service or indictment or complaint**

**Policy objective**

263. Section 66 of the Criminal Procedure (Scotland) Act 1995 provides for the citation of an accused. Under the present law, an indictment or complaint can be competently served by affixing the indictment, and list of witnesses, or the complaint to the door of the accused’s domicile of residence. However, there is no guarantee that the accused will actually receive the document(s) or that it will not fall into the hands of someone for whom it is not intended. The proposal permits citation to be effected by the police leaving a notice at an accused person’s home stating where the case against him will be heard in court and that the indictment or complaint should be collected from a specified police station. The aim of the proposal is to create greater flexibility in the law of citation.

**Alternative approaches**

264. There are already a range of options available for the service of an indictment or complaint. This measure is designed to increase the number of options available.

**Consultation**

265. This measure has been the subject of consultation with the Crown Office, which fully supports it.

**Adjournment at first diet in summary proceedings**

**Policy objective**

266. Where the accused does not appear at the first calling of a case in court and it is not clear whether postal or personal service of a complaint has been successful, there is a practice of courts granting continuations without plea in order to keep the proceedings alive while attempts are made to secure the attendance of the accused in court. As the High Court pointed out in Lees v Malcolm 1992 SCCR 589, there are serious doubts about the competency of proceeding in this manner.

267. The objective of section 52 is to clarify the law by allowing the court to continue without plea any complaint which the procurator fiscal has sought to serve upon the accused by post or personal service and for that order to have the effect of maintaining the Complaint in existence throughout the period of the continuation.
Alternative approaches

268. The High Court observed in the case of Lees v Malcolm that consideration could be given to amending the current statutory provisions for adjourning summary cases so that they take account of present day practice and in particular so that the circumstances in which continuations without plea may be granted are more clearly defined. The measure is designed to achieve that end.

Consultation

269. As the measure is a technical amendment implementing the observations of the High Court, it has not been subject to consultation.

Review hearing of drug treatment and testing order

Policy objective

270. Section 53 will amend section 234F of the Criminal Procedure (Scotland) Act 1995 to clarify the role of the procurator fiscal at the periodic review of a drug treatment and testing order.

271. On no occasion since drug treatment and testing orders were introduced, has the procurator fiscal or depute been asked to contribute anything to the review hearing. The Scottish Ministers are of the view that the requirement for the procurator fiscal to be represented at these review hearings is unnecessary and not the best use of public money.

272. Section 234F of the Criminal Procedure (Scotland) Act 1995 does not specify whether the procurator fiscal is required to be present at a review hearing of a drug treatment and testing order. Therefore the Scottish Executive proposes that drug treatment and testing orders be treated like probation and community service orders, with the procurator fiscal only becoming involved in the enforcement of breach proceedings.

273. The procurator fiscal may, in exceptional circumstances, wish to contribute to a review hearing. Accordingly this amendment will allow the procurator fiscal to decide whether or not to attend at any review hearing but it is made explicit that the review hearing can take place in the absence of the procurator fiscal.

Alternative approaches

274. There are no alternatives to achieve this policy objective.

Consultation

275. The procurators fiscal in the drug treatment and testing order pilot areas were consulted and were unanimous in their support for these proposals.
PART 9: BRIBERY AND CORRUPTION (SECTIONS 54 AND 55)

Policy objective

276. Sections 54 & 55 will change the current Scots Law on corruption to increase its effectiveness in dealing with international aspects of corruption. The changes will ensure that Scots Law complies with the international obligations entered into by the UK Government.

277. These provisions will take forward two measures – to put beyond doubt that it is an offence under Scots Law to bribe or corrupt a foreign official of another state or of an intergovernmental organisation and to give Scottish courts extra-territorial jurisdiction over bribery and corruption offences committed abroad by UK nationals and UK companies. It will enable certain offences, when committed by UK nationals, bodies corporate or Scottish partnerships, to be prosecuted, in Scotland, wherever the offences take place.

Alternative approaches

278. The UK has signed a number of international instruments on the prevention of corruption. The UK cannot meet its obligations under these instruments until the law in all parts of the UK complies with the international requirements.

Consultation

279. The Anti-Terrorism, Crime and Security Act 2001 introduced equivalent provisions to strengthen the law on international aspects of corruption in England, Wales and Northern Ireland. During the debate of the 2001 Act in the Scottish Parliament on 15 November 2001, the then Deputy Minister for Justice confirmed that the Scottish Executive intended to bring forward Scottish legislation in this area.

REGISTRATION FOR CRIMINAL RECORDS PURPOSES (SECTION 56)

Policy objective

280. Part V of the Police Act 1997 will be amended to enhance the arrangements for carrying out criminal record checks on those who propose to work with children and vulnerable adults. These amendments will address issues identified in current legislation.

281. Those applying for criminal record certificates or enhanced criminal record certificates must have their applications countersigned by a “registered person”. Under current arrangements there are no explicit powers for Ministers to check that those applying to be registered persons are suitable persons to have access to criminal record information. Nor do they have powers to refuse to register anyone who applies; and they may only cancel registration in limited circumstances unconnected with the person’s suitability. In addition, Ministers do not have powers to assess the suitability of persons who may act as countersignatures.

282. Ministers are required to publish a Code of Practice in connection with the use of the information provided to registered persons under Part V. The fact that the Code may deal only with the use of such information is regarded as too restrictive. Moreover, the only sanction
available to Ministers for failure to comply with the Code is to refuse to issue a certificate under sections 113 or 115 of the 1997 Act.

283. Current provision does not allow enhanced criminal record certificates to be available to general medical practitioners, general dental practitioners, pharmacists, ophthalmic opticians and prospective children’s panel members.

284. It is proposed to amend Part V of the Police Act 1997 to address these issues by providing for:

- the vetting of persons applying to be registered under section 120 of the Act
- the refusal of applicants considered to be unsuitable for registration
- the cancellation of registration of registered persons considered to be unsuitable for registration
- the cancellation of registration of registered persons who fail to comply with the Code of Practice
- the extension of the scope of the regulations provided for under section 120(3)
- the widening of the scope of Code of Practice (section 122) beyond “… in connection with the use of information provided to registered persons”
- the extension of the types of position “qualifying” individuals for enhanced criminal record certificates under section 115, that is doctors, dentists, pharmacists and opticians, prospective adoptive parents and prospective children’s panel members; and others involved in the children's hearing system; and
- the Scottish Ministers are to be enabled to notify the registered person who countersigned the application for a criminal conviction certificate or an enhanced criminal record certificate or the person on whose behalf the application was countersigned, of convictions which the Scottish Ministers become aware of after issuing the certificate.

Alternative approaches

285. The only alternative approach examined was that there should be no change in the existing legislation. That approach was considered unsatisfactory as, under the existing legislation, unsuitable persons could obtain access to criminal conviction information. That situation could be exploited by paedophiles who could apply to become registered persons to assist "associates" to obtain access to children. Other criminals may do likewise in relation to vulnerable adults. Also the highest level of certificate—the enhanced criminal record certificate—would not be available for those who may have access to some of the most vulnerable children and adults.

Consultation

286. The proposed measures have not been the subject of consultation. They were, however, outlined in the White Paper Making Scotland Safer: Improving the Criminal Justice System.
PART 11: LOCAL AUTHORITY FUNCTIONS (SECTIONS 57 AND 58)

Policy objective

287. Sections 57 and 58 amend the Social Work (Scotland) Act 1968 to:

- extend funding of prescribed criminal justice interventions in respect of the 100% funding arrangements for criminal justice social work; and
- to fund groupings of (in addition to individual) local authorities for delivery of criminal justice social work services.

288. The Scottish Executive is committed to ensuring that there is a sufficiently broad range of disposals/interventions available to sentencers, procurators, fiscal etc. The funding of these community disposals is provided by the Social Work (Scotland) Act 1968, which specifies the functions funded under these legislative provisions known as the 100% funding arrangements. It is intended to add to the current range of services to be provided by local authorities by providing that, if required to do so by the Scottish Ministers, they are to provide certain services to persons arrested and detained in police custody and to persons in respect of whom the court has deferred sentence. Where the local authority is required to provide such services they will be entitled to funding.

289. Current legislation allows for funding to be provided to individual local authorities. However, local authorities are currently reorganising into groupings for delivery of criminal justice social work. The Scottish Executive proposes to provide the appropriate legal powers to allow disbursement of funding to local authorities where they act jointly to provide criminal justice social work services.

290. Each group has prepared a strategic plan for delivery of relevant services and submitted the plan to the Scottish Executive in support of funding for the group in respect of relevant services. It is intended that the Scottish Ministers will determine an amount of funding to be paid to each group. The amount of funding will include a certain block amount of core funding for each local authority within the group and specific earmarked amounts for individual authorities for support programmes.

Alternative approaches

291. The alternative to extending the prescribed range of services would be to seek a broader funding power to avoid the necessity to amend primary legislation where new initiatives were being envisaged. This would be in contrast to the very specific approach adopted to date in respect of these funding arrangements and would require further consideration and consultation.

Consultation

292. In September 1998 the Scottish Office launched the consultation document Community Sentencing- The Tough Option. One of the consultation points related to the restructuring of criminal justice social work services in Scotland. The paper suggested 3 possible options for this restructuring:
• more joint working between local authorities and partnerships with the independent/voluntary sector;
• an area network of around 6 criminal justice social work agencies, perhaps based on sheriffdoms;
• a single national body with strong links both to the rest of the criminal justice process and to locally provided services.

293. The responses to the consultation paper produced no unanimity on the preferred future structure of these services. Each of the options outlined in the paper enjoyed some measure of support but equally each option was seen to have significant disadvantages. Following extensive discussions with COSLA and local authorities it was agreed to establish 11 groupings of mainland authorities (3 of which, Glasgow, Fife and Dumfries and Galloway will continue as single unitary authorities) for the delivery of criminal justice social work services. The island authorities will continue as hitherto.

PART 12: MISCELLANEOUS AND GENERAL (SECTIONS 59 TO 70 AND SCHEDULES 3 AND 4)

294. Sections 59-64 provide for a variety of changes to the criminal justice system. These will be:
• measures in relation to public defence;
• reintroducing the ranks of deputy chief constable and chief superintendent;
• police custody and security officers;
• disqualifying offenders currently subject to community disposals from jury service;
• providing judges discretion to allow juries home for the night while continuing their deliberation of the verdict;
• providing for the backing of a Northern Ireland search warrant by a sheriff or justice of the peace in Scotland.

Public defence – section 59

Policy objective


296. The PDSO provides legal representation to accused in criminal cases if the individual is granted legal aid. The PDSO currently comprises 5 solicitors. They do not undertake any private work and only act in legal aid cases. The solicitors are employees of the Scottish Legal Aid Board and as such are salaried. In the beginning, accused born in January and February were required to use the PDSO but this requirement was removed in mid-2000; now the PDSO obtains its clients in the same way as private solicitors.
297. As required by the 1986 Act, the Scottish Ministers had to publish a report into the operation of the PDSO within 3 years. This has now been done and the title of the report is *The Public Defence Solicitors’ Office in Edinburgh: an Independent Evaluation*. The researchers have now reported on roughly the first 2 years of the Office’s operation. It is a substantial and detailed document, containing both positive and negative issues for the PDSO, private solicitors, and the wider justice community. The pilot has been worthwhile and generated a lot of useful information on how the criminal legal aid system is working now and could work with a permanent PDSO.

298. It is clear however that the findings did not show the PDSO as the definitive way ahead for criminal legal aid. Equally, they do not suggest to the Scottish Ministers that the feasibility study should be terminated. A system of publicly staffed defence solicitors has the potential to achieve significant improvements in how legal aid is provided, as well as delivering substantial savings in the Courts and the Fiscal Service.

299. The Scottish Ministers propose to continue with the Edinburgh office of the PDSO and to create up to 2 more offices in different areas.

*Alternative approaches*

300. There are three main alternatives for the way ahead:

- **Continue with the existing PDSO office alone:** Whilst this is an attractive possibility, there are concerns that seeking to increase the workload of the Edinburgh Office in order to achieve greater cost-effectiveness could impact adversely on firms in the area, lead to public criticism, and could possibly lead to challenges in the courts about unfair practices. There have already been such challenges to the PDSO in a fixed payments context. Moreover, a single office cannot really tell us whether there could be real benefit in a wider PDSO scheme.

- **Create more offices:** This is the preferred option. It would not add to the pressure in Edinburgh; would give an opportunity to see whether the Edinburgh lessons can be replicated elsewhere; would provide an opportunity for increasing the workload without severely affecting local businesses (the PDSO would simply be another competitor); and would enable us to examine whether a public defence service would make sense in a rural setting.

- **Roll-out the PDSO nationally:** the Scottish Ministers do not believe that the research justifies such a step. Further, it is unlikely that a PDSO in every sheriff court would be viable. It is unlikely that there would be enough business in a small rural area to support a PDSO.

*Consultation*

301. The Report is publicly available but the Scottish Ministers do not intend a full consultation on the research. Once plans have crystallised on the location of the new pilots, the Scottish Ministers would propose to consult the Law Society. The Bill provides for the Scottish Ministers to lay a report before the Scottish Parliament on the continuing progress of the PDSO.
Reintroduction of ranks of deputy chief constable and chief superintendent

Policy objective

302. Section 60 reinstates the ranks of deputy chief constable and chief superintendent which are considered necessary for the efficient running of police forces.

303. These ranks were removed by the Police and Magistrates’ Court Act 1994 with the intention of simplifying police hierarchies and encouraging restructuring to reduce costs.

304. However, in practice this did not happen. Police forces continued to appoint both deputy chief constables and chief superintendents. The former were deemed necessary for the overall direction and control of police forces. Chief superintendents were seen as having a key role in providing a link between chief officers and command areas which are frequently headed by superintendents. In addition, once deputy chief constables no longer feature in the statute, the procedures for their appointment differed from those for assistant chief constables and chief constables.

305. The measures to reinstate these ranks in Scotland mirror similar provision made for England and Wales in the Criminal Justice and Police Act 2001 and will remove the variation in rank structure across the UK, which has existed since the 2001 legislation was passed.

Alternative approaches

306. There are no alternative approaches.

Consultation

307. Consultations on the re-instatement of the ranks of deputy chief constable and chief superintendent took place within the Police Advisory Board for Scotland, on which the Association of Chief Police Officers in Scotland (ACPOS) and the Association of Scottish Police Superintendents (ASPS) are represented.

Police custody and security officers – section 61

Policy objective

308. It is proposed to provide certain powers to civilian support staff (to be known in future as "police custody and security officers") employed by police authorities to enable them to carry out their roles more effectively, to broaden the assistance they can give to police constables and thereby allow the police to use resources more efficiently. These powers include the power to search prisoners and visitors, and to restrain or detain.

309. Civilian staff such as turnkeys, prisoner escorts and court security officers currently undertake a number of roles in relation to prisoners without specific powers to do so. In future all of the tasks will be able to be carried out by civilian police custody and security officers. These proposals will give such officers the necessary powers to allow them to be used more widely in these roles. This will allow the police to release constables from such duties for front line policing.
Alternative approaches

310. The objective of this policy is to give chief constables the maximum flexibility to manage their resources in the way they want by allowing them to employ support or contract staff in these roles. No alternative approach, such as employment of such staff by the Scottish Executive would provide this flexibility to the chief constables. Under the status quo, these staff do not have sufficient powers to free up constables from such duties. It is therefore considered that these alternative approaches would not meet the policy objective.

Consultation

311. The proposals follow representations from ACPOS and forces on the best way to make use of support staff, in particular following a pilot with court security officers in Lothian and Borders. Our proposals were first detailed in the White Paper Making Scotland Safer: Improving the Criminal Justice System.

Disqualification from jury service – section 62

Policy objective

312. Current legislation makes provision for the disqualification from jury service of those who have received a custodial sentence. Individuals who are convicted and receive a community disposal are not disqualified. A community disposal includes a community service order, a restriction of liberty order, a probation order and a drug treatment and testing order. Community service and restriction of liberty orders are regarded as direct alternatives to custody, and probation and drug treatment and testing order are aimed at providing alternatives to sentence. It is also intended to disqualify from sitting on a jury in Scotland those persons who have received a community disposal from a court in England, Wales or Northern Ireland.

313. Given their purpose, it is proposed to disqualify those offenders who receive a community service order, a restriction of liberty order, a probation order and a drug treatment and testing order. The period of disqualification will correspond to the respective rehabilitation periods in the Rehabilitation of Offenders Act 1974. It is also intended that disqualification will apply to those currently serving or who have served community disposals and who have not completed the appropriate rehabilitation period. This proposal will bring Scots law into line with the law in England and Wales.

Alternative approaches

314. The alternative would be not to disqualify from jury service convicted persons who receive a community disposal. This would continue the anomaly.

Consultation

315. As the measure corrects a previous legislative oversight, it has not been the subject of consultation.
Separation of jury after retiral – section 63

Policy objective

316. At present when any jury have retired to consider their verdict they are enclosed in the jury room until they are ready to return their verdict. However the presiding Judge or Sheriff has power to make arrangements for the overnight accommodation of the jury and for their continued seclusion if such accommodation is provided. Section 63 provides that in most cases the jury would not be secluded overnight while continuing their deliberation of the verdict, but would be allowed home. The judge will retain the discretion to order seclusion in cases where he thinks this appropriate. This will mirror the position in England and Wales and prove less disruptive to the lives of the jurors. Associated accommodation and transport costs will also be reduced.

Alternative approaches

317. Seclusion overnight inevitably carries some attendant stress, or at least inconvenience, on the part of the serving jury. There will clearly be cases where seclusion is necessary, having regard to the circumstances of particular cases. The attendant stress and inconvenience to jurors can be minimised if judges are afforded discretion to allow jurors to return home, where in the opinion of the judge, this is considered appropriate.

Consultation

318. The senior judiciary are fully supportive of the proposal.

Warrants issued in Northern Ireland for search of premises in Scotland

Policy objective

319. Section 64 amends the Criminal Procedure (Scotland) Act 1995 to make provision for the backing of a Northern Ireland search warrant by a sheriff or justice of the peace in Scotland.

320. The Petty Sessions (Ireland) Act 1851 makes provision for a warrant for the arrest and search of person issued by a judicial authority in Northern Ireland to be endorsed by a judicial authority in Scotland for execution in Scotland. However, there is no procedure by which a warrant for the search of premises in Scotland issued by a judicial authority in Northern Ireland may be endorsed for execution in Scotland.

321. The change will make provision to ensure that Northern Ireland search warrants can be executed throughout Scotland.

Alternative approaches

322. Comparable measures for backing warrants issued in England and Wales are contained in the Summary Jurisdiction (Process) Act 1881 and this provision brings Northern Ireland in line with England and Wales. No alternative approach was considered appropriate.
Consultation

323. No consultation was required.

Sections 65 to 70

324. Sections 65-70 are general provisions dealing with minor and consequential amendments, repeals, interpretation etc.

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

Equal opportunities

325. Only those provisions mentioned below have implications for equal opportunities.

326. Victims’ rights: The enactment of these provisions in the Bill will enhance the position of the victim in the criminal justice process and as such will have a positive impact on equal opportunities. The Scottish Strategy for Victims allows Scotland to comply with the European Union Framework on Victims which has been accepted by the United Kingdom and the Scottish Parliament.

327. Remote monitoring of released prisoners: This option will be available to the Parole Board as a licence condition for all prisoners released on licence, irrespective of their age, gender, race or the nature of their offence.

328. Physical punishment of children: The proposals deal even-handedly with the sexes. It requires the court to take into account the sex of the child, but this is not to suggest that sexes should be treated differently. Rather, it is designed to ensure that the court takes into account any additional humiliation or degradation which may be suffered by a child if some kinds of punishment are performed by someone of the opposite sex, or in front of onlookers of the opposite sex. It is a factor which the European Court of Human Rights requires courts to take into account where appropriate.

329. Reintroduction of ranks of deputy chief constable and chief superintendent: The police are an equal opportunities employer and all officers have the opportunity to progress to senior posts such as chief superintendent and deputy chief constable.

Human rights

330. Only those provisions mentioned below have implications for equal opportunities.

331. Physical punishment of children: The Scottish Ministers acknowledge that restricting the right to give physical punishment to children will to some extent interfere with individuals’ family life. The restriction on the use of implements may also be perceived by some people as interfering with their freedom to manifest their religious practices. However, the Scottish
Ministers consider that these restrictions are proportionate and necessary to provide protection for children from potential injury, and from inhuman or degrading treatment or punishment.

332. **Retaining sample or relevant physical data where given voluntarily:** The Scottish Executive considers that this measure will ensure compliance with ECHR obligations by providing an explicit legal basis for retention of samples and prints given voluntarily. While there is no statutory obligation to destroy such samples in Scotland (as there was in England and Wales), samples and prints obtained voluntarily are currently destroyed once they have been used in the investigation for which they were obtained. The Scottish Executive does not believe that current practice should be changed in the absence of an express statutory power to retain such samples and prints. These measures will provide that statutory basis.

333. **Police custody and security officers:** The Scottish Executive considers that this measure will ensure compliance with ECHR obligations by giving specific powers to support staff to carry out functions that they are currently carrying out in some roles.

334. **Amendments in relation to certain serious and sexual offences:** The changes proposed to certain sexual offences in the Criminal Law (Consolidation) (Scotland) Act 1995 will bring these provisions into line with ECHR requirement.

**Island communities**

335. None of the Bill’s provisions has any specific effects on island communities.

**Local government**

336. Only those provisions mentioned below have implications for local authorities.

337. **Risk management plans:** Local authorities will be expected to bear the costs of preparing and implementing risk management plans (under the order for lifelong learning provisions) from within their own budgets. However, provision is made for the Scottish Ministers to make specific grant in certain circumstances.

338. **Victims’ rights:** The provisions may have implications for local government insofar as they may be involved in providing support to victims of crime.

338. **Local authority functions:** These provisions apply in respect of the 100% funding arrangements for the delivery by local authorities of criminal justice social work services. The majority of local authorities have formed themselves into groupings for the delivery of this service and the provision allows grant to be paid to the groupings in addition to individual local authorities. The funding powers are also being extended to cover additional prescribed services under the 100% arrangements.

**Sustainable development**

339. None of the Bill’s provisions has any implications for sustainable development.
This document relates to the Criminal Justice (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 26 March 2002

CRIMINAL JUSTICE (SCOTLAND) BILL

POLICY MEMORANDUM

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