

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Criminal Justice and Licensing (Scotland) Bill introduced in the Scottish Parliament on 5 March 2009. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 24–EN.

POLICY OBJECTIVES OF THE BILL

2. It is critical our justice system is able to cope with the demands placed upon on it by life in modern Scotland. A range of reforms to the justice system have been taken forward since May 2007 including:

- investing additional resources to enhance operational policing by building police capacity through increased recruitment of new police officers and improved opportunities for retention and redeployment of existing police officers to help make Scotland's communities safer;
- committing funding in our ageing prison estate to provide facilities that are "fit for purpose" and capable of holding those serious offenders the public deserve protection from;
- taking forward a National Drugs strategy designed to promote recovery from drug problems as the focus of efforts to tackle drug use;
- taking forward the work of the National Violence Reduction Unit in tackling the scourge of violence within Scotland's communities; and
- using funds confiscated from criminals to fund a host of initiatives that help expand young people's horizons and steer them away from a life of crime.

3. We also need modern, effective laws that work in tackling criminals and their criminal behaviour. We want the dedicated people working in our criminal justice system to be equipped to deal with the impact of offending from the moment a crime is committed, through the police investigation and court process and then when the sentence is handed out to the offender.

4. The Bill is split into the following Parts:

- Part 1 – Sentencing;
- Part 2 – Criminal law;
- Part 3 – Criminal procedure;
- Part 4 – Evidence;
- Part 5 – Criminal justice;
- Part 6 – Disclosure;
- Part 7 – Mental disorder and unfitness for trial;
- Part 8 - Licensing under Civic Government (Scotland) Act 1982;
- Part 9 – Alcohol licensing;
- Part 10 – Miscellaneous; and
- Part 11 – General.

5. The provisions will assist in ensuring Scotland is a safer and stronger place for hard working families to live and work in.

ALTERNATIVE APPROACHES

6. Each topic has an explanation as to what alternative approaches would be available to achieve the policy objectives for each topic.

CONSULTATION

7. Each topic contains a summary of consultation undertaken. References to “Revitalising Justice” contained within this memorandum refer to our proposals document (*Revitalising Justice – Proposals To Modernise And Improve The Criminal Justice System*¹) published in September 2008 outlining measures to be contained within a future Criminal Justice and Licensing Bill.

¹ <http://www.scotland.gov.uk/Publications/2008/09/24132838/0>

PART 1 - SENTENCING

Section 1 – Purposes and principles of sentencing

Section 2 – Relationship between section 1 and other law

Policy objectives

8. To create a straightforward and transparent framework within which sentencers can base their decisions in individual cases; thereby increasing general understanding of the purposes and principles of sentencing and improving confidence in the sentencing process and the wider criminal justice system.

Key information

9. The provisions lay down in statute the purposes and principles of sentencing. This is intended to ensure that the public has a much clearer understanding of what sentencing is actually for and is clear on the key factors that every sentencer must have regard to when making decisions in individual cases.

Consultation

10. Our consultation paper “*Sentencing Guidelines and a Scottish Sentencing Council – Consultation and Proposals*”², outlining the detail of our proposals was published on 1 September 2008.

Alternative approaches

11. There are no alternative approaches that achieve the policy objective.

Sections 3-13 and Schedule 1 – The Scottish Sentencing Council

Policy objectives

12. To help ensure greater consistency, fairness and transparency in sentencing and thereby increase public confidence in the integrity of the Scottish criminal justice system.

Key information

13. The provisions create a Scottish Sentencing Council to provide a new sentencing guidelines regime for Scotland. This proposal originated in recommendations by the judicially-led Sentencing Commission, which examined the issue of consistency in sentencing. The central recommendation of the Commission’s 2006 report “*The Scope to Improve Consistency in Sentencing*”³ was the creation of a procedure for giving effect to sentencing guidelines.

² <http://www.scotland.gov.uk/Publications/2008/08/29100017/0>

³ <http://www.scottishsentencingcommission.gov.uk/docs/consistency/Consistency%20Report%20-%20Final.pdf>

14. At present, sentencing practice in Scotland operates mainly on a case-by-case basis in the criminal courts, with reference to the wide experience of sentencers in criminal cases and Appeal Court decisions. This is supplemented the Appeal Court's power to issue guideline judgements. As a result, it can be difficult for the public to properly understand the sentencing process, or to see clearly the reasons behind decisions in individual criminal cases. This has created the common perception that sentencing is inconsistent, which has had a negative effect on public confidence in the criminal justice system leading, in some quarters, to criticism of the judiciary.

15. It has been argued, particularly by practitioners, that sentencing is not inconsistent but is instead tailored to the facts and circumstances of each individual case. However, the Sentencing Commission examined the available evidence and concluded that, even though there is little empirical evidence to support the contention that inconsistency is present, the public perception of that inconsistency was well founded and was in itself something that needed to be addressed.

16. Additionally, the independent Scottish Prisons Commission recommended in its July 2008 report that the Scottish Government should establish a National Sentencing Council to develop clear sentencing guidelines.

Current legislation

17. Section 118(7) of the Criminal Procedure (Scotland) Act 1995 provides that when the High Court disposes of an appeal, by an offender or by the Lord Advocate, against an offender's sentence following conviction on indictment, the Court can pronounce an opinion on the sentence or other disposal or order that is appropriate in similar cases. Section 189(7) of the Act makes similar provision in respect of appeals following convictions in summary proceedings.

18. Section 197 of the Criminal Procedure (Scotland) Act 1995 provides that in passing sentence a court must have regard to any relevant opinion that has been given under section 118(7) or 189(7) of the Act.

19. The power of the courts to issue sentencing opinions under these provisions has not been used very often.

20. There are also some offences where the sentence is fixed by law. For example, section 205(1) of the Criminal Procedure (Scotland) Act 1995 provides that a person convicted of murder is to be sentenced to imprisonment for life.

Section 3 – The Scottish Sentencing Council

Section 4 – The Council's objectives

21. The provisions will establish a Scottish Sentencing Council (SSC). They set out the objectives of the Council, with a focus on the promotion of consistency in and a greater understanding of sentencing.

Section 5 – Sentencing guidelines

22. The function of the Council is to prepare and publish guidelines for the courts on the sentencing of offenders. The guidelines can relate to the purposes behind sentencing and the principles to consider when sentencing. They can also relate to sentencing levels and the types of sentences that are appropriate for particular offences and offenders. They may also relate to the kinds of circumstances in which they can be departed from.

23. It will be for the Council to decide whether a guideline is general or relates to a specific type of offence or offender. Guidelines may also relate to broad matters in sentencing. The Council must assess the costs and benefits of the guidelines and their impacts on prisons, community justice services and the criminal justice system in general. This assessment will form part of the guidelines.

Section 6 – Procedure for publication and review of sentencing guidelines

24. The Council will be expected to publish draft guidelines for general comment and, in particular, consult the Scottish Ministers, the Lord Advocate and other people it considers appropriate.

Section 7 – Effect of sentencing guidelines

25. Where the SSC has published sentencing guidelines and those sentencing guidelines apply, then courts must have regard to those guidelines unless they consider that there are good reasons not to. This means that when sentencing an offender, courts must have regard to any sentencing guidelines which are relevant to the offender's case. If the courts exercise any other functions relating to the sentencing of offenders, the courts must have regard to any guidelines which are relevant to the exercise of those functions, e.g. a decision to impose a probation order rather than sentence an offender.

26. If the court is of the opinion that it is not appropriate to apply one of more or the sentencing guidelines that are relevant to the offender's case then in imposing a sentence the court must set out the reasons for imposing a sentence that does not follow the guidelines.

27. Under section 108 of the Criminal Procedure (Scotland) Act 1995, the Lord Advocate has power to appeal against certain disposals including a sentence passed on conviction, a probation order and a community service order. Section 108(2) sets out the grounds on which the Lord Advocate can make such appeals. In deciding whether to make an appeal under section 108 the Lord Advocate will be required to have regard to any sentence guidelines that are relevant to the matter which the Lord Advocate is considering appealing.

28. Under section 118(4)(b) of the Act, when dealing with an appeal the High Court can impose a different sentence to that imposed by the original court. In imposing a different sentence the court must have regard to any relevant guidelines that exist at the time of passing the new sentence.

Section 8 – Ministers’ power to request that guidelines be published or reviewed

29. The Scottish Ministers may at any time request that the SSC undertake to develop and publish sentencing guidelines on any matter within the SSC’s remit or review a particular guideline or guidelines. The SSC must consider the Scottish Ministers’ request but it is not bound to undertake to review that guideline or those guidelines. The SSC must include details of any such requests and its response in its annual report.

Section 9 – High Court’s power to request review of guidelines

30. If the High Court in dealing with an appeal disagrees with the content of a relevant sentencing guideline then the intention is that the court can require the SSC to review the guideline. If the High Court makes such a reference, then the SSC must review that guideline or those guidelines. The SSC must include details of any such references in its annual report.

Section 10 – Scottish Court Service to provide sentencing information to the Council

31. The SSC can require that the Scottish Court Service (SCS) provides information that the SSC requests from the SCS relating to sentencing practice, compliance with and departure from sentencing guidelines. The SSC must from time to time publish information about sentences imposed by the courts. The purpose of this is to make the sentencing process more transparent and improve public understanding of how sentencing decisions are reached. The intention is that the SSC will publish research and analyses of sentencing trends and patterns across Scotland – i.e. looking at the differences between courts in different parts of the country, highlighting trends in the types of disposal used for certain offences etc. This will help to inform the judiciary, the wider justice system and the public about how sentencing is actually being carried out and will assist in highlighting where inconsistencies lie and understanding how to tackle them or even whether they need to be tackled.

Section 11 – The Council’s power to provide information, advice etc.

32. The SSC may advise Scottish Ministers and the Scottish Parliament on sentencing practice and issues relating to sentencing. It may also submit proposals on sentencing matters. Scottish Ministers must have regard to these proposals or advice submitted by the Council. The advice can be given at the request of Scottish Ministers or the Scottish Parliament or on the SSC’s own initiative.

Section 12 - Business plan

33. Every financial year the SSC will be required to publish a business plan. The Scottish Ministers will be required to lay a copy of the business plan before Parliament as soon as reasonably practicable after they have received the business plan. The business plan must set out how the SSC intends fulfilling its functions during the year to which the business plan relates. This will include setting out the subject matters that the SSC intends preparing draft guidelines about. The SSC may choose to include other information in its business plan. In preparing the business plan the SSC must consult the Scottish Ministers and the Lord Advocate.

Section 13 - Annual report

34. Every financial year the SSC will be required to prepare an annual report. This report will have to be submitted to the Scottish Ministers as soon as practicable after the end of the financial year for which it is prepared.

35. The annual report must include information as to how the SSC has fulfilled its functions and purposes during the period to which the annual report relates. This must include:

- details of the sentencing guidelines that have been published;
- details of draft sentencing guidelines that have been or are being consulted upon;
- where Scottish Ministers asked for a sentencing guideline to be prepared on a particular topic, whether that request was accepted. If accepted the report should set out the timetable for producing those guidelines and if rejected the report should set out why the request was rejected; and
- details of references made by the High Court of the Justiciary and the Council's response to them.

36. The SSC may also include other information in the annual report.

37. The Scottish Ministers must lay a copy of every annual report received from the SSC before Parliament and the SSC must publish the annual report as soon as practicable after the report is prepared.

Schedule 1 - The Scottish Sentencing Council

38. The SSC is to consist of a combination of judicial and non-judicial members and will be chaired by the Lord Justice Clerk. It is proposed that the Scottish Court Service would provide the property, services and staff required by the Council. The details of the membership of the Council and the approach to appointments are set out in Schedule 1.

Consultation

39. Our "*Sentencing Guidelines and a Scottish Sentencing Council – Consultation and Proposals*"⁴ consultation paper outlining the detail of our proposals was published on 1 September 2008. There were over 40 responses to the consultation from individuals and groups from both within the legal sphere and more broadly. A majority of response were in favour of the proposals and the long term goals of improving transparency and consistency in sentencing.

40. The responses are being analysed and will be used to inform further development and refinement of the policy.

41. A summary of the proposal was also included within the Revitalising Justice paper published in September 2008.

⁴ <http://www.scotland.gov.uk/Publications/2008/08/29100017/0>

Alternative approaches

42. There are none that meet the policy objectives.

Section 14 – Community payback orders

Section 20 - Reports about supervised persons

Paragraph 38 of Schedule 5 - Combination of restriction of liberty orders with community payback orders

Policy objectives

43. To introduce a new style easy to understand “Community Payback Order” to replace an unnecessarily complex range of sentencing options currently available which are not readily understood by the public.

Key information

44. The report of the “*Review of Community Penalties*⁵” was published on 27 November 2007. One of the concerns that the review highlighted was that the range of community sentences was more complex than it needed to be. For example, reparative activities can form all or part of a community service order, supervised attendance order, community reparation order or an additional condition of a probation order. The Review concluded that a new approach to community service was needed to ensure that community service is respected as a high quality disposal which balances the requirement that offenders pay back for their crimes and also have the opportunity to improve their lives. The Review proposed that there should be a single reparative community sentence to be known as a “community service order” and that this would replace the existing community service orders, supervised attendance orders and community reparation orders. It was not proposed to amend the way in which probation orders operated.

45. “*Scotland’s Choice - report of the Scottish Prisons Commission*⁶” was published on 1 July 2008 and made a number of radical proposals for how imprisonment is used in Scotland. It recommended the creation of a single community sentence to be known as the Community Supervision Sentence:

“The Commission recommends that judges should be provided with a wide range of options through which offenders can payback in the community, but that where sentences involving supervision are imposed, there should be one single Community Supervision Sentence with a wide range of possible conditions and measures.”

46. We wish to legislate for the broad substance of this recommendation. The policy aim is for the existing community penalties - probation orders, community service orders, supervised attendance orders and community reparation orders - to be replaced with the new community payback order. In bringing together the options for judges, we are highlighting the scope for

⁵ <http://www.scotland.gov.uk/Publications/2007/11/20142739/0>

⁶ <http://www.scotland.gov.uk/Publications/2008/06/30162955/0>

courts to punish offenders in a way which also addresses the areas of their lives which need to change. Setting out the options in this way also enables us to underline the fact that a community sentence is a punishment and not merely a supportive intervention. We prefer the term “community payback order” to “community supervision sentence” as the sentence may not include a supervision requirement.

47. There are a number of requirements which can be included in a community payback order. When imposing a community payback order on an offender it is intended that the court may include one or more of the following requirements as part of the order.

- A supervision requirement;
- An unpaid work and activity requirement;
- A programme requirement;
- A residence requirement;
- A mental health treatment requirement;
- A drug treatment and testing requirement; and/or
- An alcohol treatment requirement

48. If an offender subsequently breaches the terms of the community payback order, the court in disposing of the case will have access to imposing a requirement of electronic monitoring. This will be one of a number of options open to the court in dealing with breach cases. The community payback order will also provide judges where considered appropriate with the opportunity to carry out review hearings during the course of the order. This is in line with the Prison Commission’s recommendation for ‘progress courts’ to be held as part of the management of the sentence.

49. It is anticipated that approximately 90% of offenders, who are currently sentenced by courts to a community disposal, will in future be made the subject of a community payback order. The intention is to retain the existing specialist drug treatment and testing and restriction of liberty orders alongside the new order and these two existing disposals will deal with the remaining 10% of offenders on community sentences.

50. Ensuring sentences served in the community are robust, immediate and visible to the community will contribute to delivery of a coherent penal policy, and introduce a more structured sentence management regime tailored to the risk and needs of the offender and public safety.

Consultation

51. In formulating its views, the Scottish Prisons Commission⁷ took evidence from COSLA, Lothian and Borders CJA, SACRO, SPS, Scottish Prison Officers Association, Victim Support Group Scotland, ACPOS, HM Chief Inspector of Prisons, SCCCJ, Families Outside, ADSW, Labour, Liberal-Democrat and Conservative Justice Spokespersons, Risk Management

⁷ <http://www.scotland.gov.uk/Resource/Doc/230180/0062359.pdf>

Authority, Prison Governors' Association, Women's Aid, and held public events in Dundee, Edinburgh, Glasgow, Aberdeen and Inverness. In addition to this and in the context of conducting our Reforming and Revitalising – Report of the Review of Community Penalties,⁸ we consulted with the following: ADSW, COSLA, key voluntary sector providers including Turning Point, Phoenix Futures, NCH Scotland, Academics including researchers from the SCCCJ and the Universities of Edinburgh and Strathclyde; selected interest groups including Howard league, Scottish Association for the Study of Offenders, Scottish Consortium on Crime, and the Airborne Initiative; CJA Chief Officers and Conveners; Criminal Justice Agencies – Scottish Court Service, Crown Office, Procurators Fiscal Service, Scottish Prison Service and Social Work Inspection Agency; representatives from health/employment, training and housing bodies; community service supervisors and managers. In addition to this, a consultation session was held at the National Advisory Body on Offender Management attended by representatives of APEX, ACPOS, the Criminal Justice Voluntary Sector Forum, COSLA, Crown Office, Families Outside, Includem, the Parole Board of Scotland, SACRO, Scottish Federation of Housing Associations, the Scottish Prison Service, ADSW, Victim Support Scotland and academics from the universities of Edinburgh, Strathclyde, London and Wales.

Alternative approaches

52. The alternative would be to maintain the status quo and in doing so retain an unnecessarily complex range of sentencing options, which are not readily understood by the public. We do not consider that that approach would be tenable.

Section 15 – Non-harassment orders

Policy objectives

53. To make it easier for prosecutors to obtain criminal NHOs against offenders so that victims are protected from further harassment and repeat offending.

Key information

54. The provisions in the Bill will remove the precondition for a course of conduct amounting to harassment in the consideration of criminal NHOs.

55. Section 11 of the Protection from Harassment Act 1997 (the "1997 Act") amends the Criminal Procedure (Scotland) Act 1995, by inserting a new section (section 234A) to allow criminal courts to make Non-Harassment Orders (NHOs) after convicting a person of a criminal offence involving harassment. This section refers back to the definition of harassment contained in section 8 of the 1997 Act (which is concerned with civil NHOs).

56. Responses to the 2001/2002 consultation on stalking and harassment in Scotland identified a number of issues relating to the usefulness and workability of criminal NHOs. This included the need for prosecutors seeking a criminal NHO to be able to provide evidence of a course of conduct which has amounted to harassment before a judge can even consider the imposition of an NHO.

⁸ <http://www.scotland.gov.uk/Resource/Doc/204067/0054359.pdf>

57. The effect of this is that there must be evidence on the basis of at least two incidents for which an offence is being prosecuted. The offence must itself involve conduct on at least two separate occasions if, following conviction, an NHO is to be considered. For example, if an offender is charged and prosecuted for one incident of breach of the peace, then proceedings for obtaining an NHO cannot even begin because the offence for which the offender has been convicted does not in itself demonstrate a course of conduct.

58. Further provisions on the Bill will amend the legislation on criminal NHOs to ensure that courts should have regard to previous convictions and allow judges access to relevant information to assist in deciding whether to impose an NHO.

59. There is currently concern at the difficulty in using previous convictions as evidence of a course of conduct or to strengthen a case for a NHO. Information about previous convictions can be invaluable in demonstrating the propensity for an offender to commit crimes of harassment in general or to target the same victim repeatedly. Either way, it would be useful if judges were able to see the pertinent details of previous convictions while deliberating on NHOs, rather than simply the list of previous convictions, which is standard practice.

Consultation

60. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

61. There are none that meet the policy objective.

Section 16 - Short periods of detention

Policy objectives

62. To tidy the law, reducing the risk of error and confusion; and to ensure the efficient use of custodial sentences.

Key information

63. Section 169 of the Criminal Procedure (Scotland) Act 1995 permits summary courts to detain an offender at court or at a police station until 8pm in lieu of imposing imprisonment, so long as the offender can get home that day. These provisions date back many years and exist in the 1995 Act as a result of consolidation of the law. In practice, the provisions in section 169 are not currently used, have not been used for a considerable number of years and are no longer of any practical use. Section 15(2) of the Bill repeals section 169 of the 1995 Act to help tidy up the law.

64. Section 206(1) of the Criminal Procedure (Scotland) Act 1995 provides that a summary court cannot impose imprisonment for a period of less than five days. Section 15(3)(a) of the Bill changes this minimum period from five days to fifteen days to reflect our policy on the efficient use of custodial sentences.

65. Subsections (2) to (6) permit the summary courts to sentence an offender to be detained in a certified police cell or similar place for up to 4 days. It is our understanding that there are no such certified police cells in Scotland, and have not been any for some time. This change will not affect “legalised police cells” under the Prisons (Scotland) Act 1989, which can be used to detain prisoners before, during or after trial for up to 30 days. Subsections (2) to (6) are, therefore, repealed by section 15(3)(b) of the Bill.

Consultation

66. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

67. There is no alternative approach available that meets the policy objectives.

Section 17 – Presumption against short periods of imprisonment or detention

Policy objectives

68. To ensure appropriate use is made by courts of short term custodial sentences.

Key information

69. We want to make it clear that sentencers should not impose a custodial sentence of 6 months or less, unless the particular circumstances of the case lead them to believe that no other option would be appropriate. We are also legislating to provide that the sentencer must explain in court the circumstances which made them conclude that only a custodial sentence could be imposed.

70. Reducing the number of custodial sentences of six months or less is a policy priority because of the strong evidence from all quarters that they are ineffective and make it harder for the Scottish Prison Service to invest the time needed in intensive rehabilitation of more serious offenders. Whilst eliminating such sentences altogether would not solve prison overcrowding, reducing their number has the potential to diminish churn and wasted activity in the prison system. We wish to steer judges away from custodial sentences while giving them options which offer real opportunities for rehabilitation but also impose effective (and tough) restrictions on offenders, and making it clear that judicial discretion remains intact.

Consultation

71. The proposal arises following a recommendation in the report of the Scottish Prisons Commission⁹. In formulating its views, the Scottish Prisons Commission took evidence from COSLA, Lothian and Borders CJA, SACRO, SPS, Scottish Prison Officers Association, Victim Support Group Scotland, ACPOS, HM Chief Inspector of Prisons, SCCCJ, Families Outside, ADSW, Labour, Liberal-Democrat and Conservative Justice Spokespersons, Risk Management Authority, Prison Governors’ Association, Women’s Aid, and held public events in Dundee, Edinburgh, Glasgow, Aberdeen and Inverness.

⁹ <http://www.scotland.gov.uk/Resource/Doc/230180/0062359.pdf>

Alternative approaches

72. The alternative would be to maintain the status quo and to lose this opportunity to underline the importance of using a short custodial sentence only when there is no realistic alternative available, given the evidence that community sentences offer more scope both for payback to the community and for individual rehabilitation

Section 18 – Amendments of the Custodial Sentences and Weapons (Scotland) Act 2007

Policy objectives

73. To help deliver a comprehensive offender management structure.

Key information

74. The provisions modify the Custodial Sentences and Weapons (Scotland) Act 2007 to obtain the statutory framework upon which to build, in due course, a modern regime for managing offenders who are sentenced to custody. This will form part of the plan for delivering a comprehensive offender management structure as set out in our plan “Protecting Scotland’s Communities: Fair, Fast and Flexible Justice” published on Wednesday, 17 December 2008.

75. The policy objective will be achieved by retaining the current custody and community provisions in the 2007 Act. However, there will be an order making power subject to affirmative resolution to designate the group of offenders to whom the custody and community provisions will apply eg. offenders sentence to 1 year or more.

76. The custody only provisions in the 2007 Act will be repealed and substituted with new measures to be known as the short-term custody and community sentence. The application of the short-term custody and community sentence arrangements will comprise those offenders to whom the custody and community provisions will not apply eg offenders sentenced to less than 1 year.

77. Short-term custody and community sentence offenders will be released at the halfway point of their sentence but will be subject to a licence for the entire remainder of their sentence. Conditions may be imposed on the licence and a serious breach of a licence condition could mean the offender returning to custody for the remainder of the sentence. A short-term custody and community sentence offender who has been recalled to custody will have the right to have their continued detention reviewed by the Parole Board for Scotland. If the short-term custody and community sentence offender is sentenced to a period of 6 months or more and is subject to the notifications requirements of the Sexual Offences Act 2003, supervision will be a mandatory condition of that offender’s short-term custody and community sentence licence.

78. Aside from a few consequential amendments to integrate the new proposals, there are no other changes to the custodial sentences provisions in the 2007 Act.

Consultation

79. These proposals take account of the recommendations of the independent Scottish Prisons Commission's report "*Scotland's Choice: Report of The Scottish Prisons Commission*¹⁰" that reported in July 2008. The outline proposal was included in our "Revitalising Justice" proposals document published in September 2008. Our wider plan for a coherent offender management strategy set out details of the proposal in "*Protecting Scotland's Communities: Fair, Fast and Flexible Justice*¹¹" published on 17 December 2008.

Alternative approaches

80. Following the findings of the Scottish Prisons Commission, we are of the view that there is no feasible alternative approach that would achieve the objective of better sentence management for those offenders who are sentenced to imprisonment.

Section 19 – Early removal of certain short-term prisoners from the United Kingdom

Policy objectives

81. To remove criminals from the country who wish to leave when coming towards the end of their custodial sentence thus freeing up valuable prison resources.

Key information

82. While "domestic" prisoners can be placed on Home Detention Curfew and curfewed to their home address, foreign prisoners are often either subject to deportation on release, or have no address in Scotland to which they can be curfewed, and have to remain in prison until they reach the point at which they are automatically released. The Bill will give Scottish Ministers discretionary powers to release early a prisoner, subject to the requirement that they are liable for removal from the UK or have the settled intention of residing permanently outside the United Kingdom once removed from prison. This will mirror a scheme that already exists in England and Wales for prisoners liable for removal from the UK, which is being expanded by the Criminal Justice & Immigration Act 2008.

Consultation

83. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

84. There are none that meet the policy objectives.

¹⁰ <http://www.scotland.gov.uk/Publications/2008/06/30162955/0>

¹¹ <http://www.scotland.gov.uk/Publications/2008/12/16132605/0>

Section 21 – Extended sentences for certain sexual offences

Policy objectives

85. To ensure courts are able to protect public safety by being empowered to impose an extended sentence (additional post release supervision) for an offence which discloses a significant sexual aspect to the offender’s behaviour.

Key information

86. Section 210A of the Criminal Procedure (Scotland) Act 1995 provides the court with the power to impose additional post release supervision on sex and violent offenders where it considers that the additional supervision is necessary to protect the public from serious harm from the offender following release. This is known as an extended sentence. The maximum extension period is 10 years. Extended sentences may be imposed only in indictment cases and on the imposition of a determinate custodial sentence of 4 years and over for a violent offence. There is no minimum determinate custodial term for sexual offences.

87. We propose to extend this power to allow the courts, in appropriate circumstances, to impose an extended sentence where a person is convicted of an offence which discloses, in the court’s opinion, a significant sexual aspect to the offender’s behaviour but which is not otherwise covered by the current definitions of “sexual offence” and “violent offence” in section 210A of the Criminal Procedure (Scotland) Act 1995.

88. Courts are currently unable to impose an extended sentence, for example, in respect of a conviction for a breach of the peace where there was a significant sexual element to the offence.

89. The anomaly of the present situation is demonstrated by the requirement in section 21 of the Criminal Justice (Scotland) Act 2003, for certain reports to be produced where an offence has a significant sexual element and also by the possibility that the court may put the person on the “sex offenders’ register” by virtue of an offence with a significant sexual aspect under paragraph 60 of Schedule 3 to the Sexual Offences Act 2003.

Consultation

90. The provisions were identified by the judiciary to improve public protection. It will plug a gap and bring the provisions into line with other legislation which covers offences with a significant sexual element. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

91. There is no alternative approach that can achieve the policy objective.

Section 22 – Effect of probation and absolute discharge

Policy objectives

92. To remove unnecessary references to probation orders, and to ensure that probation orders and orders for absolute discharge are treated appropriately in the Licensing (Scotland) Act 1995

Key information

93. Since changes made in the Criminal Justice (Scotland) Act 1995 came into force in 1996, it has only been possible for Scottish courts to make a probation order following conviction. It had previously been the case that in summary procedure probation orders were made without proceeding to conviction.

94. References in the Civic Government (Scotland) Act 1982 to the court being able to make certain orders when it “convicts a person of an offence or discharges him absolutely or makes a probation order in relation to him” can be simplified to remove the reference to probation orders, which are now redundant.

95. Sections 247(1) and (2) of the Criminal Procedure (Scotland) Act 1995 provide that a conviction of an offence for which an order is made placing the offender on probation or discharging him absolutely shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of laying it before a court as a previous conviction in subsequent proceedings for another offence, and that the conviction of an offender who is placed on probation or discharged absolutely shall be disregarded for the purposes of any enactment which imposes any disqualification or disability upon convicted persons, or authorises or requires the imposition of any such disqualification or disability. It is necessary to displace the effect of these provisions for the purposes of the Licensing (Scotland) Act 2005, to ensure that convictions resulting in probation orders or absolute discharge can be taken into account in the same way as other convictions.

Consultation

96. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

97. There is no alternative approach that meets the policy objective.

Section 23 – Offences aggravated by racial or religious prejudice

Policy objectives

98. To ensure offenders are aware of the seriousness of their racially and/or religiously motivated offending at the point of sentence and harmonise the operation of hate crime aggravations.

Key information

99. The provisions harmonise the application of hate crimes legislation across the statute book and improve the recording of racially and religiously aggravated offences and convictions. They will also ensure that it is made explicit at the point of sentence that racially and religiously aggravated crime will be punished accordingly.

100. Section 96 of the Crime and Disorder Act 1998 (racially aggravated offences) and section 74 of the Criminal Justice (Scotland) Act 2003 (religiously aggravated offences) will be amended to ensure that where the sentence is different as a result of the aggravation, the court

This document relates to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

must record that the sentence was so aggravated and state extent of, and reasons for, that difference or the reasons for there being no difference. This will harmonise the application of these aggravations with the provisions for aggravations relating to disability, sexual orientation and transgender status in the Offences (Aggravation by Prejudice) (Scotland) Bill (introduced into the Scottish Parliament on 19 May 2008).

Consultation

101. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

102. Legislation is required to take forward these changes. Inclusion of these changes in the Offences (Aggravation by Prejudice) (Scotland) (Bill) was proposed but this was considered to be outwith the scope of that Bill.

Section 24 – Voluntary intoxication by alcohol: effect in sentencing

Policy objectives

103. To make clear to offenders and courts that (voluntarily) being under the influence of alcohol cannot be an excuse for offending behaviour.

Key information

104. The provisions in the Bill will enshrine in statute that the commission of an offence while voluntarily under the influence of alcohol should not be considered as a mitigating factor by the courts when sentencing an offender.

Consultation

105. A consultation paper, (*Sentencing Guidelines and a Scottish Sentencing Council – Consultation and Proposals*), outlining the detail of our proposals was published on 1 September 2008.¹²

Alternative approaches

106. The alternative approach would be not to place on statute these provisions. We do not consider this will help meet the policy objective.

¹² <http://www.scotland.gov.uk/Publications/2008/08/29100017/0>

PART 2 – CRIMINAL LAW

Sections 25-28 – Serious organised crime

Policy objectives

107. We have made it clear we want to tackle those involved in serious organised crime to help ensure that Scotland is a safer and stronger place for hard working families to live and work in and to send a message to those involved in such activity that Scotland does not want their business.

108. The Serious Organised Crime Taskforce was established by the Cabinet Secretary for Justice to provide strategic direction to tackling serious organised crime. The Taskforce has proposed the creation of new offences to tackle serious organised crime. These new offences will provide law enforcement in Scotland with additional tools to tackle this problem. It will also send the important message to the communities of Scotland we are committed to taking on these criminals.

109. These provisions put in place new offences to criminalise those people who direct or are involved in the commission of serious organised crime. They also criminalise certain classes of individual who fail to report serious organised criminal activity. The creation of these offences will open up the possibility of any material benefit an offender derives from such criminal activity being seized or confiscated under the Proceeds of Crime Act 2002 where appropriate. We want to pursue those who work together for the purposes of committing and conspiring to commit serious crimes which are intended to generate material benefit, whether directly or indirectly.

Key information

110. Serious organised crime is often carried out by groups of individuals working together to maximise the benefits they derive from their criminal activity. By doing so it allows individuals to obtain a greater benefit from their offending than they might do if working alone and outside an established criminal network. It can also provide protection from those at the very top of such networks who can instruct or direct others to carry out activity on behalf of their network but who do not carry out criminal acts and therefore prove difficult to prosecute. We want to capture all levels of serious organised crime from those at the very top who instruct or direct others to undertake such activity to the drug dealer on the street corner who is supporting serious organised crime in our communities. .

111. This will be a serious offence and attract a maximum sentence of 14 years imprisonment on indictment with an unlimited fine or both. On summary procedure the maximum sentence will be 12 months imprisonment or a fine not exceeding the statutory maximum or both.

Section 25 - Involvement in serious organised crime

112. This provisions will target those who agree to become involved in the commission of serious organised crime and help to ensure that they are held criminally responsible in a way that takes account of the context of their actions. It is intended to capture those who become

involved in criminal activity with at least one other person where their main purpose is to commit or conspire to commit serious offences for material gain.

113. The offence of involvement in serious organised crime is intended to capture those individuals further down the chain of command and subject to criminal penalties those individuals who are less directly involved, but who nevertheless are working in conjunction with others to commit serious organised crime. It will also provide further flexibility to the Crown and may be helpful in circumstances where it was not possible to prove beyond reasonable doubt that an individual was directing serious organised crime.

114. This offence will attract a maximum penalty of 10 years imprisonment on indictment, an unlimited fine or both. In summary procedure there will be a maximum penalty of 12 months imprisonment or a fine not exceeding the statutory maximum or both.

Section 26 - Offences aggravated by connection with serious organised crime

115. In addition to the directing and involvement in serious organised crime offences we propose a statutory aggravation where an offence can be proved to have been connected with serious organised crime. We believe that criminal offences committed with the underlying purpose or motivation of committing or conspiring to commit serious organised crime are more serious on account of the context in which they take place and the motivation of the offender. Using the new statutory aggravation, the court will now have the opportunity to treat an offence committed in this context and with this underlying motivation as having been aggravated by the connection between the index offence and serious organised crime and has discretion to adjust the sentence accordingly.

Section 27 - Directing serious organised crime

116. This offence will help tackle those at the high level end of an organised crime network and help capture those who do not engage directly in criminal conduct but who direct and incite others to commit serious offences with the intention that his or her direction will result in or enable the commission of serious organised crime. Serious organised crime is for these purposes crime which involves two or more people acting together for the principal purpose of committing one or more serious offences, those being indictable offences committed with the intention of securing a material benefit for anyone or acts of serious violence committed with the intention of securing a material benefit in the future.

Section 28 - Failure to report serious organised crime

117. Serious Organised Crime groups rely on the assistance of professional associates and family members. The assistance of professional occupations such as lawyers and accountants is required when hiding the profits of criminal activity or converting illegitimate gains into legitimate assets. We want to ensure that those who have knowledge of an individual's involvement in a serious organised crime network, whether in a professional or private capacity, should be under a duty to report it. The overwhelming majority of professionals comply with the regulatory and reporting requirements, but there are a small number who either turn a blind eye to such activity or who are benefitting from such activity - and it is those that we wish to capture. This offence will capture those who fail to report that they know or suspect such activity is

taking place following information that has come to them in the course of their professional business or employment.

118. We also want to capture those whose knowledge or suspicion arises as a consequence of their close personal relationship with the alleged offender where they have derived benefit from that person's offending when they have known or suspected that the material benefit they gained was a result of serious organised crime.

119. There will be a maximum penalty of 5 years imprisonment, an unlimited fine or both if convicted on indictment and 12 months imprisonment, or a fine not exceeding the statutory maximum or both if conviction is in summary proceedings.

120. We propose that all these offences are added to Schedule 4 (Lifestyle Offences in Scotland) in the Proceeds of Crime Act 2002, which will allow for the confiscation of the criminal benefit gained from such activity or the recovery of assets gained through unlawful conduct. This would be achieved by way of an order made under the Proceeds of Crime Act and is not intended to be included in this Bill.

Consultation

121. Following the recommendations of the Serious Organised Crime Taskforce to look at bringing forward new offences for those directing or being involved in serious organised crime, we have been working closely with the Crown Office and Procurator Fiscal Service to formulate these offences and have regularly updated the Taskforce members on progress. Our intention to create such offences was set out in the Revitalising Justice Document in September 2008.

Alternative approaches

122. We could have decided to maintain the status quo and continue to rely on the current common and statutory laws to deal with serious organised crime.

123. However, at present the common and statutory laws are not providing convictions of those individuals directing or inciting or being involved in serious organised crime. We therefore believe there is merit in making it easier to convict criminals involved in serious organised crime and to subject them to appropriate criminal sanctions. This will also send a clear message to Scottish communities that action is being taken to tackle serious organised crime at all levels.

Section 29 – Articles banned in prison

Policy Objectives

124. To provide an effective deterrent against the use (often for illegal purposes) of personal communication devices within prison.

Key Information

125. The provisions create the specific offences of introduction, use and possession of a personal communication device (including mobile phones and any component part of a mobile phone) in a prison.

126. Intelligence information available to Scottish Prison Service (SPS) suggests that mobile phones are commonly used within prisons for, amongst other purposes-

- the continuation of criminal activities within the prison;
- to intimidate witnesses; and
- to facilitate the supply of, and payment for, illegal drugs.

127. Intelligence information also suggests that prisoners who have access to a mobile phone are frequently bullied by those who do not.

128. The smuggling of mobile phones into prisons is becoming increasingly difficult to detect given that mobile phone technology is decreasing in size. This is particularly problematic bearing in mind that a very common method of smuggling a mobile phone is through packing in a bodily orifice. Other methods are used, however, for example throwing over the prison walls or, at times, introduction via a contractor carrying out work at the prison.

129. In many instances it is simply a SIM card which is introduced. A small number of handsets are shared amongst prisoners, who “take turns” at inserting their SIM cards into them. SIM cards are, of course, extremely difficult to detect.

130. Section 41 of the Prisons (Scotland) Act 1989 makes it an offence to bring or introduce, or attempt to introduce, certain items into a prison without reasonable excuse. The list of prohibited articles includes, amongst others, drugs and offensive weapons. Section 41(1)(e) provides that the prohibited items include any article which is a “prohibited article” within the meaning of the Prison and Young Offenders Institutions (Scotland) Rules 2006. The Prison Rules were amended by Scottish Statutory Instrument on 11 December 2008 to provide that personal communication devices are “prohibited articles”. This means that the effect of section 41(1)(e) is that a person who brings a mobile phone into a prison without reasonable excuse would be liable on conviction to a fine not exceeding level 3 (up to £1,000) of the standard scale or to imprisonment for a period not exceeding 30 days.

131. The provisions alter the Prisons (Scotland) Act 1989 to create additional specific offences in relation to the introduction, possession and use of personal communication devices in prisons. In addition, it will also increase the maximum penalty which may be imposed on a summary conviction to imprisonment not exceeding 12 months, or a fine not exceeding the statutory maximum, or both (the statutory maximum is currently set at £10,000). The maximum penalty on conviction on indictment is imprisonment for a term not exceeding 2 years, or an unlimited fine, or both. We consider maximum penalties of this level will prove a far more effective deterrent than those which can currently be imposed.

Consultation

132. The prohibition of mobile phones has been discussed by senior SPS colleagues and the Serious Organised Crime Taskforce, who fully supported the need to crack down on prisoners who make use of mobile phone technology to commit crimes whilst in prison. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

133. These changes will provide an effective deterrent against the use of mobile phones in prison and help tackle prisoners who continue their criminal activities from inside prison. There are no alternative approaches that help meet this policy objective.

Section 30 – Sale and hire of crossbows to persons under 18

Section 31 – Sale and hire of knives and certain other articles to persons under 18

Policy objectives

134. To allow robust police enforcement of the law in relation to age restrictions on the sale of crossbows by allowing a system of test purchasing and modernise ‘proof of age’ provisions by ensuring consistency with the Licensing (Scotland) Act 2005.

Key information

135. The Crossbows Act 1987 is the only remaining statutory provision relating to age-restricted goods for which it is not legal to operate a test purchasing scheme. A test purchasing scheme allows a child or young person to carry out the purchase of an age-restricted good to check whether the retailer is applying the age restriction in the sale of the good. Crucially, the child or young person is not committing an offence when test purchasing rules are being followed. While it is unlikely that a test purchasing scheme would be established for crossbows alone, it may be desirable to do so as part of a more general scheme relating to the test purchasing of offensive weapons. The provisions proposed will allow test purchasing, following the model in Section 102 of the Licensing (Scotland) Act 2005.

136. The Crossbows Act 1987 provides a defence to the offence of selling a crossbow to a person under 18 if the seller had ‘reasonable ground for the belief’ that the person was 18 or over. The Criminal Justice Act 1988 has a similar defence but it has a higher threshold of ‘reasonable precautions’ and ‘due diligence’. The provisions bring them into line with the standard set in the Licensing Act 2005.

Consultation

137. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

138. The provisions in relation to test purchasing are supported by ACPOS.

Alternative approaches

139. There are none that meet the policy objectives.

Section 32 – Certain sexual offences by non-natural persons

Policy objectives

140. To improve the law.

Key information

141. Sections 9 to 12 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 established a number of offences relating to the sexual services of children and child pornography. The offences relate to:

- paying for sexual services of a child (section 9);
- causing or inciting provision by child of sexual services or child pornography (section 10);
- controlling a child providing sexual services or involved in pornography (section 11); and
- arranging or facilitating provision by child of sexual services or child pornography (section 12).

142. A minor difficulty has been identified with penalties for the offences under sections 9 to 12 of the Act when prosecuted on indictment. The penalty provisions provide that a person is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, except for section 9 offences when involving the sexual services of a child aged 16 or over in which case the maximum term is 7 years. There is no reference to the possibility of a fine, in contrast to the position in summary procedure, and to most other penalty provisions which generally refer to the imposition of imprisonment, or a fine, or both. In the absence of a reference to a fine, there is no inherent power for the solemn courts in Scotland to impose a fine in place of imprisonment, nor to allow a fine to be imposed along with a custodial sentence.

143. Under the provisions it will be competent for the court to impose an unlimited fine following successful prosecution on indictment, instead of or as well as, imprisonment. While custodial sentences are likely to be appropriate for most offenders, the availability of a fine in solemn procedure will allow the courts to deal with corporate offenders such as companies. This will better meet our international obligations on the criminalisation of the sexual exploitation of children.

Consultation

144. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

145. There are no alternative approaches available that meets the policy objective.

Section 33 – Indecent images of children

Policy objectives

146. To help clarify the law and close a gap in existing legislation which has developed as technology advances to circumvent the controls already in place.

Key information

147. Under the provisions of sections 52 and 52A of the Civic Government (Scotland) 1982 it is an offence to make, take, distribute, publish or possess indecent photographs or pseudo-photographs of children. A pseudo-photograph is an image which, though not a photograph itself, appears to be one.

148. The definition of pseudo-photograph does not extend to cover images derived from actual photographs but which do not appear to be photographs themselves. Such images are increasingly easy to make using readily available image manipulation software.

149. The provisions extend the provisions of sections 52 and 52A of the 1982 Act to cover derivatives of indecent photographs or pseudo-photographs to include, for example, line traced and computer traced images. These derivatives will fall under the scope of sections 52 and 52A of the Act and it will therefore become an offence to make, take, distribute, publish or possess such images.

150. There are also a number of technical amendments that will clarify certain provisions concerning indecent images of children as they apply for the purposes of Schedule 3 to the Sexual Offences Act 2003. That Schedule lists offences which trigger the notification requirements in Part 2 of that Act. The amendments will remove any doubt that the provisions contained within paragraph 44 of Schedule 3, which refers to Customs legislation about prohibited goods, covers both photographs and pseudo-photographs. Changes are also intended to be made to Schedule 3 to ensure clarity in respect of age thresholds.

Consultation

151. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

152. There are none that meet the policy objectives.

Section 34 – Extreme pornography

Policy objectives

153. To help ensure the public are protected from exposure to extreme pornography that depicts horrific images of violence.

Key information

154. There have been criminal offences in Scotland for a considerable time relating to the publication, distribution and display of indecent and obscene material. The current legislation on this matter is contained in the Civic Government (Scotland) Act 1982 and the Indecent Displays (Controls) Act 1981, which combined to replace the previous provisions in the Burgh Police (Scotland) Act 1892. Section 51 of the 1982 Act provides that it is an offence to publicly display, sell or distribute any obscene material. It also makes it an offence to make, print, have or keep obscene material with a view to its eventual sale or distribution. Section 52 of the 1982 Act makes similar provision in relation to child pornography while Section 52A provides that it is an offence to possess any indecent photograph or pseudo-photograph of a child. So, while possession of obscene material has not previously been an offence in itself (other than for child pornography), laws have long been in place to prevent obscene material being published, sold or imported to Scotland.

155. However developments in production and distribution technology, including the emergence of the internet, has offered individuals faster, more convenient and anonymous means to publish and distribute material of this type. By implementing a new criminal offence for the possession of extreme pornographic material we intend to protect society from exposure to such material, to which access can no longer be reliably controlled through existing legislation dealing with publication and distribution. These provisions will also protect those who participate in the creation of sexual material containing obscene violence, cruelty or degradation, who may thereby be the victims of crime. By closing the gap in existing legislation, which has developed as technology advances to circumvent the controls already in place, the offence will discourage interest in extreme pornographic material by breaking the demand/supply cycle.

156. This new offence will criminalise the possession of obscene pornographic images which realistically depict the following extreme acts:

- Life-threatening acts and violence likely to cause severe injury;
- Rape and other non-consensual penetrative sexual activity, whether violent or otherwise;
- Sexual activity involving a human corpse; and
- Sexual activity between a person and an animal.

157. The maximum penalty for the new offence will be 3 years imprisonment.

158. It is already illegal to publish, sell or distribute (or to possess with a view to selling or distributing) the obscene material that would be covered by this new offence. It is intended to increase the maximum penalty for publication etc. (under section 51 of the Civic Government (Scotland) Act 1982) in respect of extreme pornographic material from 3 to 5 years to emphasise the seriousness attached to distribution of this type of material.

Consultation

159. The Scottish Executive issued a joint consultation in 2005¹³ with the Home Office on issues relating to the possession of extreme pornography. The consultation sought to determine views on whether advances in technology, including the internet, have resulted in a need for the law in this area to be strengthened and outlined proposals to criminalise possession of obscene and explicit pornography containing actual or realistic depictions of an extreme nature. This consultation ran until December 2005 and 93 Scottish responses were received. The analysis of responses received to the consultation was published on 9 June 2006¹⁴. Although the views expressed in response to the consultation document were polarised those in favour agreed that technological advances have meant that there is a need to strengthen the law as access to this type of material is now much more widespread. In 2006 a short life Working Group was set up by the then Scottish Executive to consider how an offence of possession of extreme pornographic material might be constructed in Scots law.

160. We announced in the “Revitalising Justice” proposals document in September 2008 that we would legislate for a new offence for the possession of extreme pornographic images (which are obscene, appear to a reasonable person to have been produced for the purpose of sexual arousal, are sexually explicit, realistic and depict images of an extreme nature as set out above).

Alternative approaches

161. Three broad options for progressing work on extreme pornography were considered. Option one was to legislate to create a separate Scottish offence of possession of extreme pornographic material as proposed by the short life Working Group and implemented in this Bill. The second option was to replicate the English and Welsh provisions as set out in section 63 of the Criminal Justice and Immigration Act 2008 whilst the third option was to do nothing.

162. The first option was considered most appropriate as it was considered that the definition of “extreme pornography” adopted in England and Wales was insufficiently broad. In particular, that definition does not extend to images of rape, unless they depicted activity likely to result in serious injury to the victim’s breasts, anus or genitals or to threaten that person’s life.

163. Although adopting the second option would result in legislative consistency across the UK, that is not paramount and the Working Group concluded that there was little justification for excluding images of rape from an offence intended to combat extreme pornography.

164. Given that consideration of a possession offence is intended to address the technological advances which have led to individuals being able to access material whose sale or distribution has long been prohibited under existing legislation the status quo was not considered to be acceptable.

¹³ <http://www.homeoffice.gov.uk/documents/cons-extreme-porn-3008051/>

¹⁴ <http://www.scotland.gov.uk/Topics/Justice/criminal/17543/ExtremePornographicMaterial/AnalysisReport>

165. The new offence is therefore similar to that at section 63 of the Criminal Justice and Immigration Act 2008, which applies in England, Wales and Northern Ireland. The Scottish offence goes further, however, in that it will cover all obscene pornographic images which realistically depict rape or other non-consensual penetrative sexual activity, whether violent or otherwise (whereas the English offence only covers forms of violent rape).

Section 35 - People trafficking

Policy objectives

166. To improve the law.

Key information

167. The trafficking of human beings for exploitation is a criminal offence. Scottish provisions relating to those trafficked for sexual exploitation are contained in section 22 of the Criminal Justice (Scotland) Act 2003 with the equivalent legislation for England, Wales and Northern Ireland being contained in sections 57 to 60 of the Sexual Offences Act 2003. The provisions relating to trafficking of people for forced labour, slavery and organ harvesting are contained in sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and these provisions extend to Scotland.

168. The offences in England, Wales and Northern Ireland relating to trafficking of people for non-sexual exploitation were amended by section 31(1)-(2) of the UK Borders Act 2007, which extended the provisions to include facilitating the arrival or entry into the UK of a person for the purposes of exploitation and also removed the limitations on the territorial application of the offence. Therefore, facilitating the arrival or entry into the UK of a person for the purposes of exploitation, regardless of where the facilitation took place and irrespective of the nationality of the facilitator, is caught by the offences. However, these amendments were not extended to Scotland.

169. In addition, section 31(3)-(4) of the UK Borders Act 2007 made similar changes to the provisions in the Sexual Offences Act 2003 concerning the trafficking of people for sexual exploitation. As mentioned above, these provisions do not apply to Scotland as separate provision is made in the Criminal Justice (Scotland) Act 2003.

170. The provisions in this Bill will make similar changes to those contained in section 31 of the UK Borders Act 2007 by amending and clarifying Scots law to:

- ensure that where a person outwith the UK (irrespective of his/her nationality) undertakes trafficking activities and an individual is trafficked to, within or out of the UK for the purposes of sexual or non-sexual exploitation it will constitute an offence under Scots law; and
- extend the offence provisions concerning trafficking for sexual or non-sexual exploitation so that they cover any act of facilitation of an individual into the UK following his/her arrival here (but before they have entered the UK).

171. It will also make clear that the sheriff court has jurisdiction to deal with these extra-territorial offences.

172. The changes will ensure consistency of the law on this issue across the UK.

Consultation

173. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

174. No alternative approaches were considered as these proposals are necessary technical changes to Scots law to ensure consistency of the law on this issue across the UK.

Section 36 – Alternative charges for fraud and embezzlement

Policy objectives

175. To provide an increase in flexibility for a court in reaching a verdict in prosecutions for the offences of fraud or of "breach of trust and embezzlement".

Key information

176. The provisions will ensure that where an accused is charged with the offence of "breach of trust and embezzlement" it will be possible for the court to instead convict the offender of fraud if such a verdict is more appropriate on the evidence led. In a similar way, where in future an accused is charged with fraud he or she may be convicted instead of "breach of trust and embezzlement".

177. An offender may be convicted of certain alternative offences involving dishonest appropriation of property notwithstanding the fact that the indictment or summary complaint refers to a different offence. This applies where the evidence led would not support conviction on the basis of the offence as charged but would support conviction of the alternative offence. For example, an accused person charged with theft may instead be convicted of reset if the evidence led would not support conviction of theft but would support conviction of the alternative offence of reset.

178. The provisions will provide that where an accused is charged under indictment or on complaint with "breach of trust and embezzlement" he or she may be convicted of fraud. Conversely, if charged with fraud he or she may be convicted instead of "breach of trust and embezzlement".

Consultation

179. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

180. There is no alternative approach that can achieve the policy objective. If this measure were not to be adopted, it would perpetuate the existing situation in which a fraud conviction is not an option in a trial for breach of trust and embezzlement even though the evidence led in a trial for becomes, in the course of the case, more suggestive of fraud.

Section 37 – Conspiracy to commit offences outwith Scotland

Policy objectives

181. To provide clarity for Scottish courts to deal with conspiracies in Scotland to commit criminal acts elsewhere in the United Kingdom.

Key information

182. Section 11A of the Criminal Procedure (Scotland) Act 1995 deals with conspiracies to commit offences. This section was inserted by section 7 of the Criminal Justice (Terrorism and Conspiracy) Act 1998. In essence, it provides that conspiracy in Scotland to commit an offence outwith the United Kingdom is itself an offence, provided that the criminal purpose being conspired would constitute an offence in the place where it was intended to be carried out.

183. In light of the Glasgow and London attacks in July 2007, the law on extraterritorial offences was reconsidered. Section 28 of the UK Counter-Terrorism Act 2008 contains provisions allowing proceedings to be taken in any part of the UK for terrorist offences (including conspiracy) regardless of where in the UK the offence is committed. These new provisions will only apply to “terrorist offences”, which would be outwith the legislative competence of the Scottish Parliament.

184. In relation to non-terrorist offences, a gap in law has been identified in that section 11A does not provide statutory coverage for conspiracies formed in Scotland to commit offences in England, Wales or Northern Ireland. Scottish courts can assert jurisdiction and rely on common law to deal with conspiracy, for example, a conspiracy formed abroad where the prospective act, which constitutes a crime under Scots law, was intended be committed in Scotland. However, there is sufficient doubt that exists about the jurisdiction of Scottish courts to deal with conspiracies to commit offences in England, Wales and Northern Ireland.

185. Closing the loophole by amending section 11A of the Criminal Procedure (Scotland) Act 1995 will provide clarity for Scottish courts to deal with conspiracies in Scotland to commit offences in other parts of the United Kingdom, which in turn will mean section 11A can be used to deal with conspiracies to commit offences in any part of the world furth of Scotland.

Consultation

186. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

187. There are none that meet the policy objective.

PART 3 – CRIMINAL PROCEDURE

Section 38 – Prosecution of children

Policy objectives

188. To ensure Scotland meets international standards as regards the age at which children can be prosecuted.

Key information

189. The provisions will raise the age of criminal responsibility by prohibiting the prosecution of children under 12 while still allowing them to be referred to a Children’s Hearing on offence grounds, whilst retaining the existing rule that children under 8 are conclusively presumed not to be guilty of any offence.

190. Section 41 of the Criminal Procedure (Scotland) Act 1995 states that it “shall be conclusively presumed that no child under the age of eight years shall be guilty of an offence”. Under section 42 of that Act “no child under the age of 16 shall be prosecuted for an offence except on the instructions of the Lord Advocate, or at his instance”. The law as it currently stands therefore allows children from the age of 8 up to 16 to be prosecuted in the criminal justice system. This is considered by many to be contrary to international standards and the United Nations Convention on the Rights of the Child (article 40(3)(a)) which suggests that 12 is the minimum acceptable age at which children should be held accountable for their actions before full (adult) criminal justice proceedings.

191. The Bill includes provision to prohibit the prosecution of children under the age of 12 (or a person over that age for an offence committed while under 12). When this takes effect it will mean that, whatever the offence committed, a child under the age of 12 can only be dealt with by the Children’s Hearings system.

Consultation

192. In 2001, the Scottish Law Commission (SLC) consulted a variety of stakeholders during their review of the age of criminal responsibility between 2000 and 2002. Wide support was received for their recommendations to raise the age at which children can be prosecuted in the criminal justice system. The provisions contained in the Bill implement the main recommendations of the SLC report “*Report on Age of Criminal Responsibility*¹⁵” by introducing a restriction on prosecution of children under 12, however the SLC’s recommendation to abolish the existing conclusive presumption in relation to under 8s is not taken forward.

¹⁵ <http://www.scotlawcom.gov.uk/downloads/rep185.pdf>

193. On 18 December 2008, we published a consultation on our response to the 2008 concluding observations from the UN Committee on the Rights of the Child¹⁶. This includes specific reference to the age of criminal responsibility and invites responses on this key issue.

Alternative approaches

194. The current approach to delivering this policy is for the Lord Advocate to choose not to prosecute children under the age of 12. That is a decision entirely for the Lord Advocate. (No children under the age of 12 were prosecuted between 2002/03 and 2006/07). Nevertheless, so long as Scots law continues to allow for prosecution of children under the age of 12 it will remain a possibility which will continue to contravene international standards. Provisions contained within the Bill will resolve this and ensure that children under the age of 12 who commit offences are dealt with effectively in an age appropriate system.

Section 39 – Offences: liability of partners

Policy objectives

195. To establish consistent provision for individual criminal liability of partners for offences committed by Scottish partnerships.

Key information

196. Many statutes creating criminal offences provide for individual liability of directors of corporate bodies. Where such a body corporate is guilty of the offence, and an individual director has consented or connived in the offence or his/her neglect has led to the offence, then that director is also guilty of the offence.

197. More recent statutes have sometimes also made similar provision for partners in Scottish partnerships, but this has not been done consistently. The provisions rectify this by providing that wherever statute provides for individual liability for directors of a body corporate, there will be equivalent individual liability for partners of a Scottish partnership. This will also apply to future legislation and will simplify drafting. A similar approach has already been taken with respect to Limited Liability Partnerships.

Consultation

198. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

199. The alternative approach would be to continue to make piecemeal provision for individual liability of partners for offences committed by Scottish partnerships. The approach adopted has the benefit of achieving consistency.

¹⁶ <http://www.scotland.gov.uk/Publications/2008/12/18090842/0>

Section 40 – Witness statements

Section 62 – Witness statements: use during trial

Policy objectives

200. To ensure fairness for witnesses in giving evidence in criminal cases.

Key information

201. The provisions will allow witnesses to have sight of their statement(s) before giving evidence in court. Lord Coulsfield’s “*Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland*¹⁷” was published in September 2007. The report noted that, although not strictly an issue of disclosure in criminal proceedings in Scotland, this issue is linked and that there was general support for change, to allow witnesses being able to refer to copies of their statements, in all cases where these statements have been made available to the Crown and to the defence.

202. The issue was one of fairness to witnesses who could be presented with their statement(s), or parts of their statement(s), in court for the first time which does not allow any inaccuracies or misunderstandings to be addressed and could have an inadvertent, detrimental effect on their ability to give evidence.

203. Further, with developments in the law on disclosure, witnesses now are commonly the only people in court who have not seen their own statement prior to a trial. There is concern that this is unfair and could turn the witness’s testimony into little more than a memory test.

204. The provisions will:

- enable prosecutors to provide those witnesses that will give evidence at trial with a copy of their statement(s) or otherwise make it available to them by inspection, in all cases where the statement(s) have been made available to the Crown and to the defence (but not necessarily the accused himself), in advance of a trial;
- enable witnesses to refer to their own statement(s) at trial. The Bill will not replace the existing common law on the use to which statements can be put, it is designed purely to allow witnesses to check their statement if they are unsure about anything or cannot remember something. This is something that police witnesses have been and are able to do but not civilians. This is not intended to replace parole or oral evidence given by witnesses. Parole evidence will still be taken from the witness but the court will be able to allow the witness to refer to their statement in certain circumstances; and
- Make clear that “statements” must be contained in a document or otherwise recorded before these provisions apply.

¹⁷ <http://www.scotland.gov.uk/Publications/2007/09/11092728/0>

205. By specifically enabling prosecutors to allow witnesses to see their statement(s) in advance of giving evidence, or to refer to them in giving evidence, through express statutory authority this should remove the risk of successful challenges to otherwise admissible evidence, purely on the basis of the witness having had access to his or her own statement – again, in the same way as police witnesses have long been assumed to be able to consult their notebooks.

206. The detail of how the system for giving witnesses access to their statements in practice will be included in the Code of Practice on Disclosure (see section 114 of the Bill).

Consultation

207. In November 2007 we published a consultation paper on proposals for legislation to implement the recommendations in the Coulsfield Report. Most respondents agreed that witnesses should be able to refer to copies of their statements when called to give evidence but caution was expressed regarding quality of statements, it being essential to ensure that witness statements are recorded or noted using the witness's own words.

Alternative approaches

208. There are none that meet the policy objective.

Section 41 – Breach of undertaking

Policy objectives

209. To ensure consistency in law with how breaches of undertakings and breaches of bail are dealt with.

Key information

210. The provisions will allow an accused who has committed an offence after being liberated by police on an undertaking to be charged with an aggravation of the subsequent offence rather than being charged with the separate offence, as at present.

211. This change means that breach of police undertakings will be treated in the same way as a breach of bail (imposed by the court), both of which can indicate contempt for the criminal justice system.

Consultation

212. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

213. We could continue to charge for the separate offence rather than treat as an aggravation, but we consider it is preferable to have consistency in law with how breaches of bail are dealt with.

Section 42 – Bail review applications

Policy objectives

214. To save court time.

Key information

215. The provisions remove the requirement for a hearing to give consideration to an application made under section 30 of the Criminal Procedure (Scotland) Act 1995 where i) the other party consents to the application and ii) the court is minded to grant the application. An example of an application under this section would be an accused seeking to have the hours of a curfew bail condition altered (perhaps as a result of their working hours changing). Arrangements are already in place to facilitate change of domicile where both parties agree, this proposal will cover other bail conditions.

Consultation

216. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

217. There is no alternative approach that meets the policy objective. The current position could continue whereby courts consider all unopposed bail review applications, but this would continue to waste valuable court time.

Section 43 – Bail condition for identification procedures etc.

Policy objectives

218. To save court time.

Key information

219. The provisions remove the need for the Crown to seek a further special bail condition for an accused to make themselves available for attendance at any ID procedure. Such conditions are becoming more and more common and by including it in the standard conditions, this will save court time through the Procurator Fiscal not having to ask the court to impose the additional condition. The effect of the provision is that the accused will, where reasonably instructed to do so, be required to appear at any ID procedure and to give any print, impression or sample. This requirement will sit alongside the existing list of standard bail conditions.

Consultation

220. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

221. There is no alternative approach that meets the policy objective. Procurator Fiscals could continue to specifically ask the court to impose the requirement to attend an ID procedure; however this would continue to result in taking up valuable court time.

Section 44 – Prosecution on indictment: Scottish Law Officers

Policy objectives

222. To improve criminal procedure.

Key information

223. The provisions will improve the procedures for the raising of indictments in name of the Lord Advocate and, in particular, reduce the risk that proceedings fail due only to an error prompted by the timing of the appointment of the Lord Advocate or Solicitor General.

224. Section 64 of the Criminal Procedure (Scotland) Act 1995 provides that all prosecutions before the High Court of Justiciary or before the Sheriff sitting with a jury shall proceed on indictment in name of Her Majesty's Advocate.

225. A strict reading of the provision means that the indictment requires to run in the personal name of the Lord Advocate, rather than by his or her official title as "Her Majesty's Advocate". Where the Lord Advocate dies or demits office and is immediately succeeded by a new Lord Advocate, without the office of Lord Advocate being vacant for any period, the correct labelling of indictments relies on knowing the precise point at which the warrant of appointment was signed. In practice, this causes administrative difficulties for the Crown in ensuring that indictments are correctly labelled, having regard to the timing of demission and succession.

226. By extension, the same issue arises where the indictment may be in name of the Solicitor General, in the event of the death or demission of office of the Lord Advocate. If the Solicitor General were then to die or demit office and be succeeded while the office of Lord Advocate remained vacant, the same administrative difficulties arise.

227. The current provisions are to be amended to make clear that accused persons should be indicted at the instance of "Her Majesty's Advocate" but that there should be no requirement for the individual Lord Advocate to be named, personally. In addition the provisions are to be amended to ensure that where accused persons are indicted at the instance of the Solicitor General, the individual Solicitor General need not be named, personally, and that the format of an indictment need not be changed on demission and appointment of either the Lord Advocate or Solicitor General.

228. The provisions governing death and demission of office by the Lord Advocate or Solicitor General (section 287 of the Criminal Procedure (Scotland) Act 1995) are also to be amended to cure a lacuna in the current provisions, which deal with the situation where the Law Officers demit office separately or on the same day, but not where the reason for both their

offices being vacant is caused by the death of the remaining Law Officer in office or the deaths of both of the Law Officers. The provisions are to be amended to address this.

Consultation

229. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

230. In addition, the Lord President’s Office and the Crown Office were informed of the proposals and invited to comment.

Alternative approaches

231. The procedures are set down in statute and so any change to those procedures requires an amendment to the relevant legislation.

Section 45 – Transfer of justice of the peace court cases

Policy objectives

232. To enable more efficient court programming and allow the fullest use to be made of Justice of the Peace (JP) courts.

Key information

233. The unification of the summary courts under the administration of the Scottish Court Service is currently being rolled out on a sheriffdom-by-sheriffdom basis using provisions contained within the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. The first three phases of unification are now complete, with district courts managed by local authorities having now been replaced by JP courts managed by the Scottish Court Service in the sheriffdoms of Lothian & Borders; Grampian, Highland & Islands; and Glasgow & Strathkelvin.

234. In sheriffdoms where unification is yet to occur, the district court may sit at various locations within the sheriffdom. The frequency of sittings is determined by the level of business in the area. Where the district court sits infrequently at a particular location, it is common practice to move cases which require to call before the next sitting to a different location.

235. While Justices of the Peace have Sheriffdom wide jurisdiction, JP courts are established by reference to a particular sheriff court district (section 59(3) of the 2007 Act). The provisions in this Bill make express provision to allow cases to be transferred between JP courts in similar circumstances as those specified in sections 137A-137C of the Criminal Procedure (Scotland) Act 1995 for sheriff courts. The Bill provides for the transfer of proceedings to another JP court, either to another JP court within the Sheriffdom or where there are exceptional circumstances to a JP court within another Sheriffdom.

Consultation

236. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

237. In the absence of statutory provision, the view may be taken that cases heard in the JP court could not be moved into another JP Court in the same manner as between district courts. The provisions remove any doubt as to whether or not cases may be similarly transferred between JP courts, ensuring that current practice may continue. This will facilitate the smooth operation of court business.

Section 46 – Additional charge where bail etc. breached

Policy objectives

238. To streamline the administration of justice while continuing to underline the importance to the accused of attending court when they are required to.

Key information

239. The provisions will allow complaints to be amended to include an additional charge covering an offence committed as a result of breaching bail conditions or an offence committed in respect of a failure to appear at a diet. This change will assist the Procurator Fiscal in that they will no longer have to libel a separate charge where such breaches or failures occur.

Consultation

240. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

241. There is no alternative approach that meets the policy objective. The current position could continue whereby the Procurator Fiscal libels a separate charge with respect to the failures to appear, but this would not meet the policy objectives.

Section 47 – Remand and committal of children and young persons

Policy objectives

242. To ensure children (accused of offences) no longer suffer the adverse effects of being remanded in adult prisons alongside convicted adult criminals.

Key information

243. Under section 51 of the Criminal Procedure (Scotland) Act 1995, a child aged 14 or 15 years who appears before a court charged with a crime or offence may, because of their "unruly" character, be detained in the prison system.

244. The provisions will repeal section 51. When this takes effect, it will mean that where a court remands or commits a child for trial or for sentence and does not release him on bail or ordain him to appear, the court shall commit him to an appropriate local authority to be detained in secure accommodation (where necessary) or a suitable place of safety.

Consultation

245. A consultation exercise¹⁸ on the implications of this change was conducted in the summer of 2008, with numerous responses from public bodies such as local authorities and the Children's Commissioner. The responses, which were supportive of the proposed change, are being analysed and will be used to inform any need for alternative provision of accommodation. Analysis of the responses will be published on the Scottish Government website in due course.

246. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

247. In the absence of the repeal, the status quo would remain in place. However, we are convinced that the repeal will ensure that the needs and welfare of young people are best addressed through the use of more appropriate facilities designed specifically to cater for their needs.

Sections 48-51 – Prosecution of organisations

Policy objectives

248. To tidy up the law by clarifying how criminal proceedings against partnerships should operate, and ensure there is consistency between the provisions of sections 70 and 143 of the Criminal Procedure (Scotland) Act 1995.

Key information

249. Section 70 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") deals with proceedings on indictment against corporate bodies. It provides for how the indictment is served, appearance by a representative for certain purposes, and for recovery of fines. While limited liability partnerships are covered, section 70 does not make provision about partnerships or other unincorporated associations.

250. In contrast, section 143 of the same Act, which deals with summary procedure, specifically provides for how proceedings may be brought against partnerships, unincorporated associations, and bodies of trustees as well as bodies corporate.

251. The provisions widen the provisions of section 70 of the 1995 Act to cover partnerships, associations and bodies of trustees to bring it in line with section 143.

252. The provisions extend sections 70 and 143 to other entities not already covered, such as government departments and the Scottish Ministers.

¹⁸ <http://www.angus.gov.uk/ccmeetings/reports-committee2008/Socialhealth/689App2.pdf>

Consultation

253. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

254. There are no alternative approaches that meet the policy objective.

Section 52 – Disclosure of convictions and non-court disposals

Policy objectives

255. To allow the court to have as full a picture as possible of an accused’s behaviour when passing sentence.

Key information

Taking account in sentencing in solemn proceedings of any conviction(s) acquired between the date of the offence and the date of conviction.

256. In summary proceedings, the court may have regard to convictions acquired by a person between the date of the offence and the date of conviction for the offence where sentence is being passed. We consider that this principle should also apply in solemn proceedings and the provisions achieve this.

Disclosure of post-offence direct measures in all proceedings

257. Where an offender is charged with an offence, and accepts, or is deemed to have accepted an offer of a direct measure in relation to a separate offence *between* the date of the offence being prosecuted and the date of disposal, this could not currently be disclosed to the court in passing sentence. The provisions therefore allow the court to take account of offers of fixed penalties (“fiscal fines”) and compensation offers which have been accepted (or have been deemed to be accepted) and work orders which have been completed between the date of the current offence and the date of disposal for that offence.

Changes to disclosure of Procurator Fiscal "Work Orders" to the Court

258. The provisions will ensure that accused persons will be informed that where a work offer is accepted but not completed, that fact may be disclosed to the court in any subsequent proceedings for the offence to which the work offer relates. This is in line with other direct measures such as fiscal fines and compensation offers.

259. The provisions will also ensure that a work order completed in the two years preceding the date of the offence charged can be disclosed to the court in relation to proceedings for a subsequent offence.

Consultation

260. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

261. There is no alternative approach that can achieve the policy objective. Continuing with the status quo would mean criminal cases would proceed in the same way as at present without the court having access to as much relevant information when passing sentence.

Section 53 – Time limit for lodging certain appeals

Policy objectives

262. To improve the operation of certain appeal procedures before the courts.

Key information

263. The provisions extend the time limit for lodging appeals against decisions made at certain preliminary diets from 2 days to 7 days.

264. Sections 74 and 174 of the Criminal Procedure (Scotland) Act 1995 make provision, in solemn and summary proceedings respectively, for appeals against certain decisions of the court. Both sections provide that an appeal is to be lodged no later than two days after the decision.

265. In order to properly consider whether to appeal, parties have to examine the exact details of the decision. It is often difficult to obtain this information within the two-day time limit. By enabling both Crown and defence sufficient time to consider and lodge an appeal against a preliminary decision, the efficiency of the courts will be improved.

Consultation

266. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

267. If this change were not made, it would continue the current position where it is possible for neither the Crown nor the defence to have sufficient time to reach a decision on whether to make an appeal. The Crown might in some High Court cases be able to seek to exercise its general right to challenge any decision of the High Court by way of bill of advocation, however, that provision is a cumbersome alternative and is, in addition, not available to the defence.

Sections 54-57 – Crown appeals

Policy objectives

268. To help ensure public confidence in the legal system is maintained.

Key information

269. The provisions clarify and remove some ambiguities and flaws in the law concerning certain judicial decisions that can end a trial without a verdict of a jury. The provisions also provide the Crown with a right to appeal against those decisions.

270. This right of appeal provides a safeguard for cases where the trial judge's decision to end a trial is disputed and the Appeal Court agree that the case should have continued. Such cases are expected to be highly unusual. Enabling the Appeal Court to consider questions on sufficiency that arise in the course of a Crown Appeal is expected to promote the accurate settling of the law and its proper application to the facts of future cases. It will allow retrieval of prosecution cases which would previously have fallen as a result of an error in law by a trial judge. We accept the Scottish Law Commission's assessment (in looking at this issue) that "public confidence in the legal system is more likely to be maintained if an erroneous ruling at first instance can be reversed" (see paras. 3.4-3.11 of the SLC's Report for further detail).

271. The provisions are based on recommendations contained in the Scottish Law Commission's recent report "*Report on Crown Appeals*¹⁹". The recommendations have largely been accepted for the reasons put forward in the report. Certain recommendations have not been accepted, as explained further below.

272. Three types of ruling can bring solemn proceedings to an end without the verdict of a jury. The first is a ruling of no case to answer, where the judge rules at the close of the Crown case that the evidence led by the prosecution is insufficient in law to justify a conviction. The second is a direction, in the course of the judge's charge to the jury after all evidence has been led, that the jury should not convict on a particular charge, or should consider only a reduced charge. Such a direction, made following a so-called "common-law submission", may be focused on the basis of insufficient evidence. The third is a ruling in the course of a trial that an important item of prosecution evidence is inadmissible, leaving the Crown with no option but to abandon the case. As the law currently stands, the Crown has no means of appealing against any of these rulings.

273. The SLC's Report on Crown Appeals makes 22 recommendations for changes to solemn criminal procedure. The effect of the accepted recommendations as they appear in the Bill will be:

- to introduce a statutory replacement for the "common-law submission" at the close of all (Crown and defence) evidence. However one aspect of the SLC's recommendation on this point has not been adopted (see below).
- to provide the Crown with a right of appeal against rulings of no case to answer, decisions on the statutory replacement of a common law submission and certain findings relating to the admissibility of prosecution evidence.

274. The statutory restatement of the "common-law submission" will allow the defence to make a submission at the close of the entire evidence in a case to the effect that there is:

- (i) an insufficiency of evidence to support the charge in the indictment or any other related offence; and/or
- (ii) no evidence to support some part of the circumstances set out in the indictment.

¹⁹ <http://www.scotlawcom.gov.uk/downloads/reps/rep212.pdf>

275. It will be possible for the defence to make the submission without Crown consent, but the Crown will have a right of reply. If the judge upholds the defence submission, then the judge will either acquit the accused of the charge in question; order that the indictment be amended to reflect a related charge or order that the indictment be amended to reflect the fact that there was no evidence to support some of the circumstances narrated.

Crown Rights of Appeal

276. The Bill grants new rights of appeal to the Crown. It will in future be possible for the Crown to appeal the decision of a trial judge to acquit an accused of a charge following either a submission of no case to answer under section 97 of the Criminal Procedure (Scotland) Act 1995 (the "1995 Act") or using the new statutory formulation of the "common-law submission". It will also become possible for the Crown to appeal against evidential rulings made by a judge during the course of a trial, for instance on the admissibility of a particular piece of evidence. The Crown already has a right of appeal in respect of evidential rulings made during pre-trial procedure, and it would seem consistent for the right to extend to all such rulings.

277. Where the Crown is to appeal a decision by the trial judge, it will be on the basis that the judge's ruling was wrong in law. If the Crown appeal succeeds, the Appeal Court will be able to grant authority to bring a new prosecution where that is not contrary to the interests of justice. If authority is granted, it is anticipated that the normal result should be a re-trial rather than the continuation of the existing trial. This is for reasons of practicality: if it were feasible for an appeal to be heard during a continuation of the existing trial, then this will be permissible.

278. In relation to whether leave of the court should be sought for the Crown to make an appeal, we have departed from the SLC's conclusions. Recommendation 17 of the Report proposed a leave requirement for all forms of Crown Appeal being made possible under this Bill and the draft Bill does require the Crown to seek leave to appeal certain findings relating to the admissibility of prosecution evidence. However, it has been concluded that rights of appeal under either a submission of no case to answer (under section 97 of the 1995 Act) or under the new statutory formulation of the "common-law submission" should not be restricted by a leave requirement. It is not anticipated that these rights of appeal will be used except in a very limited number of cases, and it is not considered that there is a need for a leave requirement in order to guard against overuse of the appeal procedure.

279. Where leave to appeal is required, it should be granted by the trial judge. In making the assessment, the judge should consider the arguability of the Crown appeal and the effect of the evidential ruling (or series of rulings) has had on the strength of the Crown case.

280. Where the Crown has launched an appeal against an acquittal under sections 97, 97B or as a result of evidence being found inadmissible, the Bill allows the court to remand the accused in custody or to admit him to bail. The court may only exercise this power after hearing parties. This provision is intended for use in exceptional circumstances.

281. Provision is also made to allow a trial judge to make an order under the Contempt of Court Act 1981 where an appeal is made by the Crown under sections 107A or 107B, following an acquittal. This will mean that publication of any media report of proceedings can be

postponed where there is a possibility that further proceedings might be brought against the accused.

Departures from the SLC Report

282. It is outlined above that recommendation 17 (in relation to leave to appeal) has not been fully adopted. We have also departed from the SLC's proposals in relation to two other recommendations.

283. The SLC in its first recommendation had proposed an extension of the no case to answer provision under section 97 of the 1995 Act. This extension would have allowed a judge to rule that on the evidence led by the Crown no reasonable jury, properly directed, could convict. We have decided not to adopt the proposed extension of section 97. The issue is a complex one, and there was a substantial level of opposition to the proposal recorded within the SLC's Report. A significant factor in deciding not to adopt this proposal was the concept of allowing the court to consider all of the evidence in its totality. We consider that it is fair as a matter of principle for all evidence to be led (both by the prosecution and the defence) before the court is asked to give a view on the quality of evidence in the case. It has therefore been concluded that the balance is struck appropriately by the current provisions of section 97, and recommendation 1 is not being adopted.

284. Although recommendation 2 has to a large extent been incorporated in the Bill, one aspect of it has not been adopted. This is recommendation 2(a)(iv), which would have included within the statutory replacement for the "common-law submission" an ability for the defence to contend that on the entire evidence led in the case, no reasonable jury properly directed could convict. If it were the case that the Appeal Court handled greater numbers of appeals on the grounds that no reasonable jury could have returned a conviction, then recommendation 2(a)(iv) could be seen as a useful tool to deploy as a way of pre-empting such appeals. However, as appeals on this ground are relatively few in number we have concluded that it is not clear whether adoption of the recommendation would provide any great benefit in practice. The benefit would appear to be that juries would not be compelled to assess a small number of hopeless cases and that an even smaller number of cases would not go to the appeal court where the jury had convicted in circumstances in which no reasonable jury could have reached that conclusion (and so avoiding cost and injustice as a result).

285. Against that relatively limited benefit is to be weighed the potential impact on court time in processing "no reasonable jury" submissions. Although trial judges would be expected to follow the appeal court by maintaining "no reasonable jury" as a very high test, there is a risk that the proposal might create a negative impact on court time.

286. Considering the lack of a significant 'mischief' to be addressed by the proposal and the potential that it bears for disruption to court time, we have decided not to adopt recommendation 2(a)(iv) within the Bill.

Consultation

287. In November 2007 we asked the SLC to consider a reference featuring several topics, including Crown Appeals. In March 2008, the SLC published a Discussion Paper on Crown

Appeals (*discussion paper no. 137*²⁰) which sought views on their emerging findings on reform of the law.

288. The SLC received 14 responses to their discussion paper, which helped to inform the recommendations contained in their final report, published on 30 June 2008. A full list of those who submitted written responses to the SLC's discussion paper can be found at Appendix B to their final report²¹. Those making a response were typically legal academics or practitioners. The SLC also held discussions with a reference group consisting of members of the judiciary and held preliminary consultations with representatives of the Faculty of Advocates' Criminal Bar Association, the Law Society of Scotland's Criminal Law Committee and the Crown Office.

289. Responses to the SLC's Discussion Paper were generally in favour of the proposed reforms. Recommendation 1 attracted the least consensus, with the judges of the High Court, the Sheriff's Association, the Crown Office and two of the Scottish Law Commissioners not in favour. Recommendation 2, with its proposed statutory restatement of the common law submission, attracted the support of all but two respondents. One specific challenge was made to recommendation 2(a)(iv) on the grounds that it would not be appropriate for a judge to rule that on the evidence led no reasonable jury properly directed could convict of the charge libelled. This view was based on the opinion that this issue was not a question of law, but of fact and consequently should be left to the jury. The general principle of providing the Crown with a right of appeal in relation to at least some of the judicial rulings that can bring a solemn case to an end without the verdict of a jury attracted support from all the respondents who expressed a view. In relation to leave to appeal, most consultees favoured our approach of not imposing a leave requirement for rights of appeal under a submission of no case to answer or under the new statutory formulation of the "common-law submission". Although this stance was initially proposed by the SLC itself in the Discussion Paper, the SLC decided in their report that leave should be required.

290. There were a number of additional recommendations where not all respondents were in agreement, for example in relation to the extension of a Crown right of appeal to evidential rulings. However, in general the SLC's other proposals were broadly accepted.

291. A summary of the SLC's principal recommendations were included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

292. There is no alternative approach that can achieve the policy objective. Continuing with the status quo would not pose great difficulty, and criminal cases would proceed in the same way as at present; without a Crown right's of appeal as described above. However, the reforms are intended to improve the law at a low overall cost.

²⁰ <http://www.scotlawcom.gov.uk/downloads/dp137.pdf>

²¹ <http://www.scotlawcom.gov.uk/downloads/reps/rep212.pdf>

Sections 58-60 – Retention and use of samples etc.

Policy objectives

293. To enhance public protection and improve the law in relation to the retention and use of DNA, fingerprints and other physical data.

Key information

294. Forensic evidence obtained from DNA, fingerprints and other physical data ('forensic data') plays an important and increasing role in the investigation of crime. It is standard practice in Scotland, as in many other countries, for the police to take forensic data from someone who is arrested or detained on suspicion of having committed criminal offences and such samples are routinely added to forensic databases. If that person is subsequently convicted, his or her forensic data may be retained indefinitely, subject to periodic weeding of records relating to old or minor offences.

295. Forensic evidence has played a key role in securing convictions in a number of serious and high profile crimes, including some which remained unsolved for a number of years. Being able to positively identify an offender at an early stage can prevent further offences being committed. Forensic evidence is, therefore, an important tool in terms of protecting the public and communities. Not only does forensic evidence play a role in establishing guilt, it can also eliminate the innocent from investigations and, in homicides, terrorist incidents and civil disasters, plays a vital role in the identification of bodies and body parts.

296. The present statutory framework in Scotland in respect of the retention of forensic data from those who have not been convicted (section 18A of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act")), which has been in place since 1 January 2007, seeks to strike a balance between the undoubted benefits of retaining forensic data for future criminal investigations and the civil liberties implications of retaining forensic data (specifically DNA samples and profiles) taken from persons arrested on suspicion of having committed an offence but who are not ultimately convicted of that offence. There are some gaps in the current arrangements in Scotland: for example there are limited powers for the retention of DNA samples and profiles from persons proceeded against but not convicted of sexual or violent offences, but none in respect of fingerprint data. Against this background, Professor James Fraser, the Director of the Centre for Forensic Science at Strathclyde University and Chair of the European Academy of Forensic Science, was asked to review the operation and effectiveness of the legislative regime governing police powers regarding the acquisition, use and destruction of forensic data. In September 2008, we consulted on proposals stemming from Professor Fraser's review²². This work formed the basis of the provisions that have been introduced in this Bill.

297. The recent judgement from the European Court of Human Rights (ECHR) in the case of *S and Marper v UK* (application Nos: 30562/04 and 30566/04) has highlighted the importance of achieving striking this balance and having measures which are proportionate for retaining forensic data which is taken. The judgement highlighted that the present arrangements in Scotland contained in section 18A of the 1995 Act, strike a balance between the public

²² <http://www.scotland.gov.uk/Publications/2008/09/22154244/0>

protection benefits of retaining DNA for future criminal investigations and the rights of those who have had DNA taken under suspicion of having committed an offence, but are not ultimately convicted. The current statutory framework only allows DNA which is taken from those who are not convicted, to be retained for a limited period of time. Furthermore, such material can only be retained if a person is proceeded against for a violent or sexual offence. The measures only apply to those suspected of committing serious offences.

298. With the introduction of the new powers proposed, it is the intention to ensure that this balance is maintained and, in particular, that power to retain forensic data indefinitely is only available if a person has been convicted of an offence in a court of law.

299. In Scotland, power already exists to take forensic data (DNA, fingerprints and other physical data - palm prints, prints or impressions of another external part of the body, and records of skin on an external part of the body) from any individual who is arrested and is in custody or detained under section 18 of the Criminal Procedure (Scotland) Act 1995. Therefore, there are no proposals to extend powers to take forensic data, only to retain it.

300. Where a person has been convicted in court of any offence, there is currently a power to retain his or her forensic data indefinitely. Where a person has been proceeded against but not convicted in court of a sexual or violent crime, DNA can currently be retained for a period of three years, with discretion for the chief constable to apply to a sheriff for extensions of up to 2 years at a time. The proposals outlined below seek to extend this latter arrangement to the retention of fingerprints; and to certain cases within the Children's Hearings System.

Section 58 – Retention of samples etc.

301. This section authorises the retention of fingerprints and any other forensic data already taken from persons proceeded against but not convicted of a serious sexual or violent offence. Data does not have to be destroyed for at least 3 years, and the relevant chief constable would have discretion to apply to a sheriff for extensions of up to 2 years at a time. This would bring the law on the retention of fingerprints and other forensic data into line with current law on DNA retention. The Marper judgement comments favourably on the current Scottish position on retention of DNA in such cases. Strasbourg also recognised that DNA is classed as more sensitive personal information than fingerprints and other relevant physical data. So, if DNA can already be retained, for the reasons set out above, it is logical to retain any fingerprints and other material, which is taken upon the arrest or detention of a person, provided they meet the criteria for retention.

Section 59 – Retention of samples etc. from children referred to children's hearings

302. This section authorises the retention for three years forensic data taken under existing powers where a child accepts or is found by a Sheriff to have committed one of certain serious violent and sexual offences, with discretion for the chief constable to apply to a sheriff for extensions of up to 2 years at a time to provide a means of managing high risk cases. This would align with current arrangements under section 18A of the 1995 Act for retention of DNA from individuals proceeded against for violent and sexual offences, but not convicted and aims to strike a balance between the need to manage risk and protect the public with regard to offending behaviour; and maintaining the core ethos of the Children's Hearings System – to address the

needs of the child. The list of applicable violent and sexual offences would be developed in consultation with interested parties and prescribed in secondary legislation, with the resulting order subject to affirmative procedure. This approach will enable full consultation on the offences to be included, ensure links into other policy developments relating to children and provide an opportunity to review arrangements at a later date if this was considered appropriate.

Section 60 – Use of samples etc.

303. This section sets in statute the purposes for which forensic data can be used. The purposes are the prevention or detection of crime; the investigation of an offence or the conduct of a prosecution; and purposes related to the identification of a deceased person or of the person from whom the material came. This is intended to provide clarity to the public as to what forensic data can be used for in light of remarks about transparency made by Professor Fraser in his report.

Consultation

304. We published our consultation paper responding to the recommendations in Professor Fraser's review on 23 September 2008²³. The consultation closed on Friday 21 November 2008.

Alternative approaches

305. A range of options were considered following receipt of Professor Fraser's review, which culminated in the options set out in our consultation paper. The proposals outlined above either reflect or strike the best balance between the views received in response to the consultation.

Section 61 – Referrals from Scottish Criminal Cases Review Commission: grounds for appeal

Policy objectives

306. To ensure a more streamlined appeals procedure to assist courts in making the best use of their time in dealing with cases referred by the SCCRC.

Key information

307. The Scottish Criminal Cases Review Commission (SCCRC) was established in 1999 by section 194A of the Criminal Procedure (Scotland) Act 1995. It is an independent public body which impartially reviews cases submitted by applicants convicted of a crime in a Scottish court where there may be possible grounds for considering a miscarriage of justice has occurred. The Act enables the SCCRC, if it thinks fit, to refer any conviction or sentence passed on a person to the High Court for further consideration. This covers cases where an appeal against such conviction or sentence has been heard and determined already by the High Court, but can also include cases where no appeal has been heard.

308. The grounds upon which the SCCRC may refer cases is set out at section 194C of the Act and are as follows:

²³ <http://www.scotland.gov.uk/Publications/2008/09/22154244/0>

- that a miscarriage of justice may have occurred; and
- that it is considered in the interests of justice that a reference should be made.

309. The SCCRC is required by section 194D(4) to provide the Court with a statement of their reasons for making the reference. The practice of the SCCRC is to consider the possible grounds for a miscarriage of justice submitted by the applicant, and any other grounds that the SCCRC may itself identify during their consideration of the case. The SCCRC's statement of reasons is submitted which sets out the grounds on which the case is being referred alongside a referral. In practice, difficulties have emerged in that the appellant, in pursuing his appeal, can depart from the grounds on which the SCCRC has made the referral. This can include seeking to make a case on grounds that have already been discounted or rejected by the SCCRC, which in turn, can potentially have a significantly negative impact with regard to the use of court time.

310. The provisions establish a process whereby an appeal, following a reference made by the SCCRC, can only be based on the statement of reasons given in the SCCRC referral, subject to the power of the court to allow other grounds to be argued.

Consultation

311. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approach

312. There are none that meet the policy objective.

PART 4 – EVIDENCE

Section 63 – Spouse or civil partner of accused a compellable witness

Policy objectives

313. To improve the operation of the justice system and ensure the non-diverse nature of the current law is removed.

Key information

314. The provisions amend the law in order that a spouse or civil partner of an accused is treated no differently to any other witness. This will involve replacing section 264 of the Criminal Procedure (Scotland) Act 1995 and repealing section 130 of the Civil Partnership Act 2004.

315. Under the current law, in criminal proceedings in Scotland, any person who has information about a crime may be cited as witness by either the Crown or by the accused. A witness who is permitted by law to give evidence is known as a competent witness, and any witness who can be required to attend court to give evidence is known as a compellable witness. A competent and compellable witness who fails to give evidence may be guilty of contempt of court. There is, however, an exception to this rule which can lead to a witness not giving evidence and that is where the witness is a spouse or civil partner of the accused.

316. Under section 264 of the Criminal Procedure (Scotland) Act 1995, a spouse is a competent witness in all circumstances. However, s/he is a compellable witness for the prosecution or for a co-accused only where s/he is compellable at common law. In terms of the common law, a spouse is only compellable where the accused is charged with an offence against him or her. It is only where a spouse is not the victim that he or she can decline to give evidence for the prosecution. So, for example, when the victim is a child of the couple, the spouse of the accused may be an important witness. However, s/he is not a compellable witness, whereas an unmarried partner would be.

317. The rules regarding compellability of a civil partner under section 130 of the Civil Partnership Act 2004 are similar to those for a spouse.

318. The current rules have caused difficulty, particularly where the crime libelled is a crime against a child and there is important and material evidence to be obtained from a spouse in relation to that crime. It is capable of exploitation and causing abuse of the institution of marriage and of civil partnerships. There have been cases where an accused has married their partner who is a main witness in order that the partner cannot be compelled to give evidence against them. This may result in the court being unable to consider all of the material evidence in the case.

Consultation

319. A consultation paper (*“Consultation Paper on Proposals to Amend the Law on Compellability of Spousal Witnesses”*²⁴) was published in June 2006. An analysis of responses to the consultation was published in November 2006²⁵.

320. We announced plans to repeal section 264 of the Criminal Procedure (Scotland) Act 1995 and section 130 of the Civil Partnership Act 2004 on 5 May 2008²⁶. This will result in a spouse or civil partner of an accused being treated no differently to any other witness. This proposal stems from a desire to amend the non-diverse nature of the current provisions and to help protect children.

Section 64 – Special measures for child witnesses and other vulnerable witnesses

Policy objectives

321. To ensure that vulnerable witnesses benefit from “special measures” and are able to give their best evidence in all criminal proceedings (except in JP courts).

²⁴ <http://www.scotland.gov.uk/Publications/2006/06/21135942/0>

²⁵ <http://openscotland.gov.uk/Publications/2006/11/spousalwitnessreport/Q/Page/3>

²⁶ <http://www.scotland.gov.uk/News/Releases/2008/05/02150833>

Key information

322. The provisions extend the applicability of sections 271-271M of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) to all hearings in criminal courts (except in JP courts) where a witness could be called to give evidence. The proposed change will allow special measures to be applied to all relevant criminal proceedings, and will not be restricted to trials.

323. This approach follows the one taken by section 15A of the Criminal Justice (Scotland) Act 2003 regarding proofs in relation to victim statements. Consequently, section 15A of the Criminal Justice (Scotland) Act 2003 will be repealed, because the general amendment to sections 271-271M covers proofs in relation to victim statements, since such proofs will be classed as “relevant proceedings”.

324. The amendment will replace references to “trial” or “trial diet” in sections 271-271M with references to “relevant hearing” where “relevant hearing” is to mean “a hearing in relevant criminal proceedings”.

325. This general textual amendment will be sufficient in operational terms and therefore will not require consequential amendment to the substantive provisions of section 271-271M, for example the time limit provisions contained in section 271(5A), or 271(13A).

Consultation

326. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

327. Maintaining the status quo would probably lead to continued inconsistency between different levels of support for vulnerable witnesses and resultant uncertainty and probably distress for witnesses who in a trial may well have benefited from special measures but who are then expected to give evidence in open court in related proceedings.

328. Only partly extending provision to certain non-trial proceedings as opposed to others would probably result in the same confusion and uncertainty for witnesses and practitioners alike. Specifying the types of additional proceeding, even if this was a non-exhaustive list may well end up being too restrictive in practice itself leading to confusion and uncertainty amongst witnesses and practitioners.

Section 66 – Witness anonymity orders

Policy objectives

329. To ensure the interests of justice are served in allowing courts, in appropriate cases, to permit witnesses to give evidence in court using measures designed to preserve their anonymity.

Key information

330. In the case of *R v Davis* issued on 18 June 2008 the House of Lords had to consider whether the Courts in England and Wales at common law enjoyed a power to permit witnesses to give evidence using measures that are designed to preserve their anonymity. The Appellate Committee, in overturning the judgement of the Court of Appeal, concluded that there was no such power at common law in England and Wales.

331. In response to the decision in the *Davis* case the UK Government introduced legislation (the Criminal Evidence (Witness Anonymity) Bill) in July 2008 on an emergency basis to confer a power on Courts in England and Wales to grant “Witness Anonymity Orders” in appropriate cases. The resulting Act does not modify or limit the Article 6 rights of an accused to receive a “fair” trial, rather it puts on a statutory footing what was always believed prior to the House of Lords decision in *Davis* to be the position at common law, namely that Courts have an inherent power to permit evidence to be given anonymously in appropriate cases.

332. In the *Davis* case the witnesses who were permitted to give evidence anonymously were the sole eye witnesses to the offence (the murder of two individuals). The following measures were permitted at the trial:

- (i) witnesses gave evidence under a pseudonym;
- (ii) the address and personal details, and any particulars which might identify the witnesses, were withheld from the appellant and his legal advisers;
- (iii) the appellant’s Counsel was permitted to ask witnesses no questions that might enable any of them to be identified;
- (iv) the witnesses were to give evidence behind a screen so that they could be seen by the Judge and jury but not by the appellant;
- (v) the witnesses’ natural voices were to be heard by the Judge and jury but were heard by the appellant and his Counsel subject to mechanical distortion to prevent recognition by the appellant.

333. Such a range and combination of measures have rarely, if ever, been used in Scotland to preserve a witness’s anonymity, however less comprehensive measures are used and there may be circumstances where the Crown or the accused might wish to make use of the same type and combination of measures used in cases such as *Davis*.

334. Until now the courts in Scotland have held that they have the power at common law to permit a witness to give evidence with the benefit of measures that conceal their identity. In addition, the Criminal Procedure (Scotland) Act 1995 makes provision for certain measures that modify recognised practice and procedure in order to protect the interests or identity of a witness. However, the result of *Davis*, although not applicable to Scotland, has introduced a degree of uncertainty to this position.

335. The provisions in this Bill broadly replicate in Scotland the effect of the 2008 Act in England and Wales.

336. The District, Justice of the Peace, Sheriff and High Courts will all have the power to grant such Orders in any criminal proceedings. The power to grant the Order will only be available where the Court is satisfied that it is appropriate to make a Witness Anonymity Order. In granting an order, the Court must be satisfied that the following conditions are met:

- (i) that the order is necessary to protect the safety of the witness or serious damage to property, or to prevent real harm to the public interest;
- (ii) the power must be exercised in a manner that is consistent with the rights of the accused receiving a fair trial in terms of Article 6 subject to, of course, the possibly conflicting rights of the witness under Article 8;
- (iii) that it is satisfied that it is in the interests of justice for this power to be exercised in the circumstances of the case before it.

337. There are likely to be two reasons why witness anonymity would be appropriate. Firstly, it may be granted on the basis that the witness's safety or property is threatened as a consequence of their giving evidence. Secondly, it may be that there are operational reasons why it would be undesirable for the identity of the witness to be disclosed. For example those situations where evidence is given by under cover police officers or other agents whose effectiveness would be severely compromised if their identity became known.

338. The provisions seek to ensure that before granting a Witness Anonymity Order the Court would have regard to all relevant factors including the following:

- (i) the generally recognised right of an accused to know the identity of a witness and to hear that witness' evidence;
- (ii) the extent to which the credibility of the witness is a relevant factor in assessing his or her evidence;
- (iii) whether the evidence of the witness might be the sole or decisive evidence implicating the accused;
- (iv) whether the witnesses' evidence can be tested properly without disclosure of his or her identity;
- (v) any reason to believe that the witness may be unreliable or dishonest; and
- (vi) whether it is reasonable for the witness to be protected by any means other than the granting of anonymity.

339. The provisions also enable a court that grants a Witness Anonymity Order to order the implementation of such measures as are necessary, in the court's view to give effect to the Order. It will be for the Court to determine which measures will be appropriate in any particular case.

340. Both the Crown and the accused will be able to apply for an Order for witnesses they intend to call to give evidence and both parties will have an opportunity to be heard when the court is considering an application.

341. The court will have the power to vary or discharge an Order, either in response to an application by one of the parties or at its own hand. In doing so the court will give both the Crown and the accused the opportunity to make representations.

Consultation

342. The possibility that these provisions might be included in the Bill was referred to in our “Revitalising Justice” document. No responses were received.

Alternative approaches

343. The UK Criminal Evidence (Witness Anonymity) Bill was introduced into the UK Houses of Parliament after the Scottish Parliament had risen for the 2008 summer recess. We concluded at the time that there was not sufficient urgency in Scotland in light of the *Davis* decision (which is not binding in Scottish law) to justify the recall of Parliament either to pass emergency legislation in Scotland or to pass a legislative consent motion that would have allowed the Westminster Bill to be extended to Scotland. Provisions have been included in this Bill as it represents the earliest suitable scheduled legislative opportunity.

344. Courts could continue to rely on Scots common law provision for witness anonymity, but with a risk that this would be subject to judicial review resulting in a similar outcome to the *Davis* case in England and Wales.

Section 67 – Television link evidence

Policy objectives

345. To lessen the distress, inconvenience and cost of requiring witnesses from outside Scotland, but within the United Kingdom to give their evidence in Scottish Courts.

Key information

346. The provisions will allow witnesses from outside Scotland, but within the United Kingdom to give evidence in criminal proceedings via a live television link in both solemn and summary cases (but not JP courts) from outwith Scotland. The current legislative position in Scotland regarding television link evidence is set out in section 273 of the Criminal Procedure (Scotland) Act 1995. This section, which applies to all witnesses, whether vulnerable or not, covers evidence which is given in any solemn proceedings in the High Court or the sheriff court by a witness from outside the UK. It does not cover witnesses who are outside Scotland but within the UK. Section 271(J) of the 1995 Act allows vulnerable witnesses to give evidence via a live television link; however, this power does not extend to witnesses who are within the UK but outwith Scotland.

347. Section 273(1) sets out three criteria that must be satisfied in order for a witness to be able to give evidence via a TV link:-

- the witness is outside the UK;
- an application under subsection (2) for the issue of a letter of request has been granted; and

- the court is satisfied as to the arrangements for the giving of evidence by that witness.

348. The prosecutor or defence may apply to a judge under subsection (2) for the issue of a letter of request to a court or tribunal exercising jurisdiction, or an appropriate authority, in a country or territory outside the UK where a witness is ordinarily resident. This letter of request asks for assistance in facilitating the giving of evidence by that witness through a live television link.

349. In order for a letter of request to be granted, the judge must be satisfied that the granting of the application is in the interests of justice and is not unfair to the accused.

350. The requirement to travel to a Scottish court from other UK jurisdictions can present a number of difficulties for certain witnesses, both vulnerable and non-vulnerable. Extending the current powers which exist under section 273 of the Criminal Procedure (Scotland) Act 1995 would enable witnesses to give evidence from a local court or other approved location elsewhere in the UK instead of having to travel to Scotland.

351. This provision will apply to both vulnerable and non-vulnerable witnesses and cover summary (except JP courts) and solemn proceedings. It is intended that the power might be used to cover such situations where, for example, a witness is too ill to travel, or has moved away from Scotland in order to escape an abusive or violent relationship.

352. In order for a witness to be allowed to give evidence in this way, the same criteria as are currently in place under section 273(2)-(3) of the 1995 Act will have to be met. This means that the witness must be outside Scotland but within the UK, an application for a letter of request has been granted and the court is satisfied as to the arrangements for the giving of evidence by that witness in that manner.

353. An application should only be granted where the court is satisfied that the granting of the application is in the interests of justice, or, in the case of an application by the prosecutor, that it is not unfair to the accused; and that the evidence of the witness in question is necessary for the proper adjudication of the trial.

Consultation

354. There has been no formal consultation on this proposal. The Scottish Court Service and the Crown Office and Procurator Fiscal Service are supportive of the proposal.

Alternative approaches

355. One alternative is the status quo where witnesses from within the UK but outwith Scotland continue to have to travel to Scotland to give evidence. However, this is likely to lead to significant inconvenience and disruption for witnesses which is likely to compound the distress of giving evidence and add to the costs of the Scottish criminal justice system. Another option would be to secure the evidence of a witness living in the UK, but outwith Scotland, by

conveying the judge, Crown and accused to a location more convenient to the witness. Again, this presents an expensive and inconvenient alternative.

PART 5 – CRIMINAL JUSTICE

Section 68 – Upper age limit for jurors

Section 69 – Persons excusable from jury service

Policy objectives

356. To improve the operation of the jury system in criminal cases.

Key information

357. We are legislating to increase the number of available jurors in Scotland. Over recent years the number of jury trials proceeding has increased and it has become increasingly difficult to ensure a sufficiently large group of potential jurors. In certain urban areas, the Scottish Court Service finds it increasingly challenging to maintain a sufficient juror pool. We are therefore legislating in two areas.

358. The provisions raise the upper age limit for sitting on a jury in criminal cases in Scotland from 65 to 70. Currently in Scotland individuals over the age of 65 are not eligible for jury duty. This present age limit fails to recognise the valuable contribution that over 65s can make to jury deliberations. The age limit for jurors in England, Wales and Northern Ireland is 70. Raising the age limit for Scottish jurors to 70 would achieve a common age limit for jurors throughout the UK. In addition, the change would ensure that, as the demographic profile of Scotland changes, juries are drawn from a wider age range. It will also bring operational benefits to the jury system, enlarging the pool of potential jurors by around 200,000.

359. The provisions also change the rules on exemption after citation to sit on a jury in a criminal case. Currently once an individual has attended court as a juror in answer to their jury citation for a criminal case, they are entitled to be excused as of right from jury duty for up to 5 years. This takes them out of the available juror pool for a substantial length of time therefore lowering the pool of available jurors which the court service may draw on. The current system makes no distinction between those jurors who attend at court as required but do not then get picked from the ballot to serve, and those who attend and are selected by ballot to form part of a jury in a criminal case. Those jurors who do not ultimately serve on a jury receive the same five year entitlement to excusal as of right as those who are selected to serve. This proposal will reduce the period of entitlement to excusal as of right from 5 years to 2 years for those jurors who attend at court but who are not selected by ballot to sit on a jury. It is not the intention that this would be a retrospective change; rather it would apply from an agreed date once appropriate legislative change was in place.

Consultation

360. Our “*Modern Jury in Criminal Trials*”²⁷ consultation document was launched on 18 September 2008. The consultation period ended on 11 December 2008.

Section 70 – Data matching for detection of fraud etc.

Policy objectives

361. To ensure Audit Scotland can continue their efforts to match data to prevent and detect fraud in the public sector.

Key information

362. The Serious Crime Act 2007 contains provisions that will place the National Fraud Initiative on a statutory footing in England, Wales and Northern Ireland. The National Fraud Initiative is a data matching exercise conducted for the purpose of assisting in the prevention and detection of fraud. Section 73 of, and Schedule 7 to, the 2007 Act contains the statutory framework within which data can be matched, but these provisions do not apply in Scotland. The National Fraud Initiative already operates on a non-statutory basis and has identified around £37m of fraud and error in Scotland and led to over 75 prosecutions.

363. The provisions broadly replicate the 2007 Act provisions for Scotland. Audit Scotland will be given the power to conduct data matching exercises on its own accord, or to arrange for such exercises to be conducted on its behalf.

Consultation

364. The proposal was included in our “*Revitalising Justice*” proposals document published in September 2008. No comments were received.

365. The Scottish Parliament Audit Committee took evidence from Audit Scotland on the National Fraud Initiative on 28 May 2008 and has indicated its support for legislation in this area.

Alternative approaches

366. The National Fraud Initiative could continue to operate on a non-statutory basis, as at present, but a statutory basis provides clearer powers, creates a unified system across the public sector and facilitates cross-border matching.

Section 71 – Sharing information with anti-fraud organisations

Policy objectives

367. To allow Scottish public authorities to play a leading role in tackling fraud by sharing information with each other and with anti-fraud organisations to detect fraudulent activity and help prevent future fraud.

²⁷ <http://www.scotland.gov.uk/News/Releases/2008/09/18102403>

Key information

368. The Serious Crime Act 2007 contains provisions that enable public authorities to share information with each other and with anti-fraud organisations to help prevent and detect fraud. However, these provisions do not have effect in Scotland for those public authorities insofar as they relate to their devolved functions.

369. The provisions will extend the operation of the 2007 Act to cover all of Scotland's public authorities, regardless of whether they operate in a reserved or a devolved area. They achieve this by repealing the restrictions in the 2007 Act.

370. The Serious Crime Act 2007 (Specified Anti-Fraud Organisations) Order 2008 (SI 2008/2353) specifies six anti-fraud organisations including CIFAS, Experian and the Insurance Fraud Bureau.

Consultation

371. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

372. Similar powers could have been conferred on individual public authorities on a case-by-case basis, or authorities could rely on common law or statutory powers where they already exist. The approach adopted is simpler and provides a unified regime throughout the UK.

Section 72 – Closure of premises associated with human exploitation etc.

Policy objectives

373. Will assist the police in tackling the misery of human trafficking and child sexual exploitation by providing explicit powers for the closure of premises associated with the commission of offences in relation to trafficking of human beings and child sexual exploitation.

Key information

374. Article 23 of the Council of Europe Convention on Action Against Trafficking in Human Beings requires measures necessary to enable the temporary or permanent closing of premises used to carry out trafficking in human beings.

375. Article 27 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse also requires measures necessary to enable the temporary or permanent closure of establishments used to carry out the offences of child abuse, child prostitution, child pornography, child pornographic performances, corruption of children and grooming.

376. The Antisocial Behaviour etc. (Scotland) Act 2004 provides for the service of closure notices and the making of closure orders in respect of premises. Section 26 of that Act which

provides for closure notices requires reasonable grounds for believing that the premises are associated with antisocial behaviour and the occurrence of relevant harm. Closure orders are provided for in section 30 and require that:

- a person has engaged in antisocial behaviour on the premises;
- the use of the premises is associated with the occurrence of relevant harm; and
- an order is necessary to prevent the occurrence of such relevant harm for the period specified in the order.

377. Relevant harm is defined in section 40 of the Act and section 143 provides that a person engages in antisocial behaviour if he/she acts in a manner or pursues a course of conduct that causes or is likely to cause alarm or distress to at least one person who is not a member of the household.

378. While it may be possible to demonstrate that a person is engaging in antisocial behaviour towards a victim through causing alarm and distress it is less likely to be able to demonstrate that the premises are associated with relevant harm as neighbours and the general public may be oblivious as to the use and occupants of the premises.

379. We make explicit provision within the Antisocial Behaviour etc. (Scotland) Act 2004 for the closure of premises used to carry out the offences specified in the Council of Europe Conventions by providing a new set of circumstances where notices and orders may be invoked for relevant offences in relation to trafficking and child sexual exploitation.

380. Closure notices would require senior police officers to have reasonable grounds for believing that the premises are associated with the commission of relevant offences while closure orders would require senior police officers to have reasonable grounds for believing that the use of the premises is associated with the commission of relevant offences.

Consultation

381. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approach

382. There are none that meet the policy objective.

Section 73 – Sexual offences prevention orders

Section 75 – Risk of sexual harm orders

Policy objectives

383. To ensure a robust criminal law in respect of the operation of Sexual Offences Prevention Orders (SOPOs) and Risk of Sexual Harm Orders (RSHOs).

Key information

384. A SOPO is a civil preventative order designed to protect the public from serious sexual harm. They were introduced in the Sexual Offences Act 2003 (the “2003 Act”) as a replacement, with some amendments, to sex offender orders.

385. A SOPO imposes prohibitions on a person who poses a risk of serious sexual harm. A SOPO could, for example, be used to prohibit a sex offender from being alone with children under the age of 16 and from loitering outside school playgrounds where his behaviour suggests that he is likely to re-offend. The granting of a SOPO makes the offender subject to the notification requirements set out in Part 2 of the 2003 Act. Breach of the prohibitions provided by a SOPO is punishable by a maximum of 5 years imprisonment.

386. Under existing arrangements, SOPOs can be imposed in the Scottish courts as set out in Part 2 of the 2003 Act. There are two ways to proceed; first, the court itself can make an order when dealing with a “defendant” for a range of specified offences. Second, the chief constable may make a summary application to the sheriff for the imposition of an order. Section 73(2)(d) of the Bill widens the application process, so that in addition to the existing power of the court to make an order, a power is given to the prosecutor to apply for a SOPO to be imposed at the point where he or she moves for sentence.

387. In reviewing the implementation of the 2003 Act, an anomaly in the law has been identified relating to the thresholds which apply in certain circumstances before a SOPO may be made. An offender who has been convicted of a sexual offence listed in Schedule 3 which is subject to age or sentence thresholds may not be made subject to a SOPO where the age or sentence thresholds are not satisfied. In contrast under paragraph 60 of Schedule 3 an offender who commits an offence which is not sexual in nature but which has a significant sexual aspect to his behaviour may be made subject to a SOPO.

388. The provisions disapply the age and sentence thresholds for the purposes of the making of a SOPO in respect of any person. This issue was very recently addressed for England, Wales and Northern Ireland by the Criminal Justice and Immigration Act 2008. The change will provide the court with the discretion to impose a SOPO in all cases where there is evidence of a real risk of serious sexual harm.

389. The provision also expands the content of a SOPO to allow for appropriate restrictions and obligations/requirements (e.g. a requirement to produce documentation or provide information) to be imposed by the order, rather than simply prohibitions which may only currently be imposed by such an order. This would place greater responsibility on offenders to comply with certain conditions.

390. At the moment the SOPO legislation does not place any responsibility on the offender to comply with the risk assessment process. Both the Irving Report and the Report of the Expert Panel on Sex Offending (the Cosgrove Report) commented on the “*lack of any requirement on individuals to comply with the risk assessment process and the potential for non-compliance to increase*”. This was seen as a major weakness.

391. Adjusting the SOPO regime requiring certain positive actions on the part of offenders would address that deficiency. It would also have the potential to extend the range of information certain relevant sex offenders are required to provide as part of the requirements of the sex offenders register. A SOPO with positive provisions could be useful to the police if they wanted to know more details about a specific offender's lifestyle, which in turn would mean that the police would have more information to assist in the investigation of offences. Accordingly, if the police wanted to know if a relevant offender was living in the same household as a child under the age of 18, or wanted to have details of their leisure activities, employment, telephone numbers, or vehicles (and/or access thereto) they could apply for a SOPO with a condition that the offender notify the police of such circumstances and/or details. If the police had concerns about a specific offender who claimed to be homeless, they could place a positive obligation on the offender to report more regularly, or at a specified time, to a prescribed police station. Again this would implement a recommendation of the Irving Report.

392. The 2003 Act also introduced RSHOs which are civil preventative orders used to protect children from the risks posed by individuals who do not necessarily have a previous conviction for a sexual or violent offence but who have, on at least two occasions, engaged in sexually explicit conduct or communication with a child or children and who pose a risk of further such harm. The provisions in this Bill bring in changes to the operation of RSHOs so that a court can when imposing a RSHO include appropriate restrictions and obligations/requirements in such an order. These changes mirror those made to SOPOs.

393. Some other minor inconsistencies in the 2003 Act are also addressed through the provisions.

Consultation

394. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

395. There are none that meet the policy objectives.

Section 74 – Foreign travel orders

Policy objectives

396. To ensure robust enforcement of the criminal law in respect of the operation of Foreign Travel Orders (FTOs).

Key information

397. A FTO is a civil preventative order designed to prevent sex offenders travelling overseas in order to commit sexual offences against children. They were introduced in the Sexual Offences Act 2003 (the "2003 Act").

398. A FTO prohibits an offender from travelling to a particular country or countries or from travelling to any country outside the UK. Breach of the prohibitions provided by a FTO is punishable by a maximum of 5 years imprisonment.

399. Under existing arrangements, FTOs can only be imposed for 6 months, following which an application has to be made for such an order to be renewed. It is proposed to increase the maximum period for which a FTO can take effect from 6 months to 5 years. It is also proposed to increase the age of a child, located outside the United Kingdom, who a sex offender is considered to pose a risk to, from 16 to 18. At present, for the purposes of obtaining an FTO, a court must be satisfied that a sex offender poses a risk to child, outside the UK, under 16.

400. Currently there is no provision in the 2003 Act for an offender subject to a FTO to surrender their passport. It is proposed that where a court makes a FTO under s117(2)(c) of the 2003 Act prohibiting the offender from any travel outside the UK, the FTO will contain a requirement that the person to whom it applies must surrender any passports which they hold at a police station specified in the order on or before the date when the prohibition takes effect or within a period specified in the order. The surrender of a passport will ensure that a FTO which imposes a travel ban outside the UK can be effectively enforced. Whilst, a sex offender holds their passport, there is nothing to stop him or her from travelling overseas, in contravention of the order. This measure will only apply to FTOs which impose a travel ban outside the United Kingdom, as if another type of FTO is issued, a sex offender will still be able to travel to some other countries and will need their passport to do so.

401. The strengthened provisions, which mirror separate provisions being brought forward in England, Wales, and Northern Ireland, will better protect vulnerable individuals against the risks which sex offenders pose to them. If a sex offender is considered to pose a risk against children outside the UK who are under the age of 18, a court has the discretion to impose an order for a maximum period of 5 years. This will mean a sex offender is prohibited from travelling outside the UK for a longer period of time which will act as a deterrent to offending overseas.

402. Since the legislation came into force in 2004 no police force in Scotland has applied for a FTO. Only 5 FTOs have been made elsewhere in the UK.

Consultation

403. The Child Exploitation and Online Protection Centre and the police have suggested a number of reasons why FTOs are not more widely used including the fact that they only last 6 months before they have to be renewed and that the police have limited time to obtain the orders as offenders only have to notify their travel arrangements 7 days before they travel.

Alternative approach

404. There are none that help meet the policy objective.

Section 76 – Obtaining information from outwith the United Kingdom

Policy objectives

405. To improve the powers of the SCCRC to investigate alleged miscarriages of justice, allowing swifter handling of complex applications.

Key information

406. The Crime (International Co-operation) Act 2003 (the “2003 Act”) enabled the United Kingdom to ratify the 2000 Convention on Mutual Assistance in Criminal Matters between member states of the European Union.

407. The 2003 Act was limited in scope to implementation of international obligations. It did not extend Mutual Legal Assistance powers to the Criminal Cases Review Commission or the Scottish Criminal Cases Review Commission (SCCRC).

408. In the absence of such a power, the SCCRC have faced problems in securing co-operation from overseas. While it is anticipated that there can be no guarantee that outgoing requests from the SCCRC would be subsequently executed by all countries, it is the case that many have confirmed that they would be able and willing to assist on the receipt of a request.

409. Section 53 provides a new power for the SCCRC to apply to the High Court to request information from other jurisdictions.

Consultation

410. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

411. The alternative approach would be to continue to rely on diplomatic channels to seek information from other jurisdictions. A clear power for the SCCRC, subject to the control of the Court, helps protect the independence of the SCCRC.

Section 77 – Grant of authorisations for directed and intrusive surveillance

Section 78 – Authorisations to interfere with property etc.

Policy objectives (both section 77 and 78)

412. To simplify procedures for obtaining authorisations for specific types of surveillance. The provisions streamline the procedures for the authorisation of joint surveillance operations generally and improve the effectiveness of the authorisation processes used by the Scottish Crime and Drug Enforcement Agency (SCDEA). These measures will improve the effectiveness of existing procedures, helping to prevent and detect crime in Scotland.

Key information

413. The Regulation of Investigatory Powers (Scotland) Act 2000 (the “2000 Act”) and Part III of the Police Act 1997 (the “1997 Act”) set out the legislative framework for authorising different forms of surveillance in Scotland. These provisions affect certain types of covert surveillance in Scottish police and SCDEA operations.

414. Currently, police forces are required to obtain authorisation for directed and intrusive surveillance under the 2000 Act and for property interference under the 1997 Act. Forces need to obtain authorisation from their own force command to carry out these forms of surveillance. Where an operation will involve 2 or more forces (one of which could be the SCDEA), 2 or more sets of authorisations are required (i.e. each force involved must seek their own authorisation).

415. The provisions will allow a lead force to be agreed between the participating forces who can grant a single set of authorisations which will be effective for any force (including SCDEA) involved in a joint operation. This authorisation would be limited jurisdictionally to the areas covered by the participating forces.

416. Provision is also made to allow the Deputy Director of the SCDEA to be able to routinely authorise applications for intrusive surveillance and property interference. The SCDEA is making increasing use of intrusive surveillance and property interference in a number of serious crime operations. As matters stand currently, these applications require to be authorised and reviewed by the Director General. The impact this is having on the Director General’s time is resulting in a disproportionate effect on other Agency business. It would prove helpful from an operational and practical perspective, therefore, to amend current legislation to allow both the Director General and the Deputy Director to authorise the aforementioned types of covert surveillance and the provisions achieve this.

Consultation

417. These provisions are included at the request of ACPOS and the SCDEA. The proposal to simplify the authorisation procedure for joint surveillance operations was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received. No formal consultation was considered necessary in respect of the proposal to allow the Deputy Director of SCDEA to authorise applications for intrusive surveillance and property interference as this is purely a technical change which will allow the SCDEA to operate in a more effective manner.

Alternative approaches

418. In relation to the authorisation process for joint surveillance operations it would be possible to achieve the same outcome using a collaborative arrangement under section 12 of the Police (Scotland) Act 1967. This may be explored further in conjunction with ACPOS in tandem with similar legislative developments for the Regulation of Investigatory Powers Act 2000 and the Police Act 1997 being considered currently by the Home Office.

419. The status quo is the only alternative option available in respect of the proposal to allow the Deputy Director of SCDEA to authorise applications for intrusive surveillance and property

interference. For the reasons mentioned above, this position is no longer considered to be sustainable.

Section 79 – Amendments of Part 5 of Police Act 1997

Policy objectives

420. To increase the ability of Scottish Ministers to gather information in response to applications for criminal record checks; and increase flexibility to the fee charging regime within section 120 of the Police Act 1997 (“the 1997 Act”).

Key information

421. Scottish Ministers carry out criminal record checks for employment and other purposes under the 1997 Act. The day-to-day work is carried out by Disclosure Scotland. At present, Disclosure Scotland can only include information held in records kept for the use of UK police forces when doing these checks (though for the enhanced disclosure only, relevant information from the Isle of Man and the Channel Islands police forces can be included at the discretion of the force’s chief officer). This is unhelpful as many people on whom the checks are done have previously lived outwith the UK. The effect of this is that relevant information could be missed.

422. In partnership with the UK Government, we are engaged in discussion with a number of countries, mainly EU Member States, about putting agreements in place for those countries to provide information to the UK for the criminal record checks under the 1997 Act. The first proposal provides Ministers with an order-making power to amend the meaning of certain definitions in the 1997 Act. This power would allow Ministers to respond to agreements with other jurisdictions and bring proposals to the Scottish Parliament to have information that results from the agreements to be regarded as relevant information for the 1997 Act.

423. Scottish Ministers currently charge a one-off fee for registration under section 120 of the 1997 Act and a separate one-off fee for nominees of the registered person. Persons listed in the register can countersign applications for standard and enhanced disclosures under the 1997 Act and will make declarations in relation to requests for disclosures under section 52 or 53 of the Protection of Vulnerable Groups (Scotland) Act 2007 once that Act is commenced. These fees are set in The Police Act 1997 (Criminal Records) (Registration) (Scotland) Regulations Scottish Statutory Instrument 2006 No 97.

424. We propose to amend the power in section 120ZB of the 1997 Act to enable Scottish Ministers to make further provision about registration fees to provide greater flexibility in the fee charging powers. This would assist Disclosure Scotland in managing the content of the register held under section 120; allow new services to be developed for registered persons that might not otherwise be cost-effective to pursue; and would enable arrangements to spread the cost of registration over the lifetime of registration rather having a one-off charge as is the case now.

Consultation

425. Both proposals were included in our “Revitalising Justice” document published in September 2008. No comments were received.

426. With regard to the provisions regarding registration fees, this proposal arose after different proposals with regard to managing the register held under the 1997 Act (which were in the consultation on the “*Protection of Vulnerable Groups (Scotland) Act 2007*”²⁸) were generally opposed by respondents. You can see the original proposal at chapter 2.5 paragraphs 90 to 94 of the consultation document.

427. The original proposal would have meant that low-volume users would have been removed from the register. The revised proposal will not have the effect of removing low-volume users and so responds to stakeholders’ objections. However it can be used to structure fees to provide an incentive to those listed in the register to de-register as soon as they no longer need to be in it.

Alternative approaches

428. An alternative to the first proposal would be to use secondary legislation powers under the European Communities Act 1972. But that would have been restrictive; it would only address information covered by European Directives and Regulations, and so that power could not be used in respect of non EU agreements.

429. The second proposal will help address problems with the management of the register held under the 1997 Act while not excluding low-volume users. The power will facilitate the register being used more effectively by providing an incentive, through the fee arrangements, to those no longer requiring to be registered to cancel their registration and so not incur any further charges. It is not an option to do nothing about the register as the current arrangements do not facilitate the register being used as effectively as it could be.

Section 80 – Assistance for victim support

Policy objectives

430. To increase the flexibility with which Scottish Ministers can fund victims’ organisations.

Key information

431. The provisions improve support for victims of crime by giving Scottish Ministers greater flexibility to fund a wider range of organisations or projects providing assistance to victims of crime, or to witnesses.

432. At present, grants to organisations providing support to victims of crime are generally made under section 10 of the Social Work (Scotland) Act 1968. This is usually sufficient, but it does limit grants to national organisations or to innovative projects and excludes grants to local authorities. There are occasions where more flexibility would be helpful, such as:-

- Payments to a local authority when it is providing services to victims. Victims of human trafficking often need emergency support once they are recovered. That support is sometimes provided by local authorities in the absence of any other

²⁸ <http://www.scotland.gov.uk/Resource/Doc/1124/0056475.pdf>

provider, but if the victim has no recourse to public funds the local authority may not be able to support the victims unless funded by central government;

- Support for local organisations if they meet a particular need, such as support for victims of murder in areas where murder is particularly prevalent; and
- Allowing initiatives such as that being developed in England and Wales where the Ministry of Justice allows Victim Support (the equivalent in England and Wales of Victim Support Scotland) to make small payments direct to victims in certain circumstances.

433. The examples above only show potential uses of a wider power to make grants to organisations that support victims and witnesses. Decisions to support any particular initiative would be taken on a case by case basis.

Consultation

434. This is a minor technical adjustment that brings our powers to give grant to victims' organisations in line with those available to the UK Government. Informal contacts with victims' organisations have indicated that they would welcome this provision.

Alternative approaches

435. We make *ad hoc* payments to appropriate organisations, but that is not a long term solution and it would be appropriate to regularise Scottish Ministers' powers through legislation.

Section 81 – Public defence solicitors

Policy objectives

436. To provide long term certainty for the operation of the Public Defence Solicitor's Office (PDSO) to offer criminal legal assistance in the future.

Key information

437. The PDSO was originally established in 1998 in order to test the feasibility of providing criminal legal assistance through solicitors directly employed by the Scottish Legal Aid Board. The legislation was subsequently amended to allow the feasibility study to continue after 1 October 2003.

438. A report on the feasibility study was laid before parliament in December 2008. The policy now is to put the PDSO on a more solid statutory footing to enable it to provide criminal legal advice, assistance and representation as a matter of course rather than for the purposes of the feasibility study.

Consultation

439. A number of stakeholders from the legal profession and the criminal justice system were interviewed as part of the preparation of the feasibility study but no formal consultation on the provisions in this section has been undertaken. The proposal was included in the "Revitalising Justice" document with no comments being received.

Alternative approaches

440. It would be possible for the PDSO to continue to function as a feasibility study or for publicly funded criminal defence services to be provided solely through solicitors in private practice. Establishing that the PDSO is to continue to provide criminal legal assistance as a matter of course is intended to enhance public confidence in the PDSO and to assist in the recruitment and retention of its staff. The number of solicitors employed by PDSO represents approximately 1% of the total number registered with the Scottish Legal Aid Board to provide such services.

Section 82 – Compensation for miscarriages of justice

Policy objectives

441. To establish a single statutory scheme that is more efficient and effective in consideration of claims for compensation arising out of miscarriages of justice and to tidy the law in this area and ensure there are no gaps in the legislation.

Key information

442. We operate two schemes for the payment of compensation as a result of a miscarriage of justice: the statutory scheme under section 133 of the Criminal Justice Act 1988 (“the 1988 Act”) and the *ex gratia* scheme.

443. Section 133 of the 1988 Act requires Scottish Ministers to pay compensation for a miscarriage of justice in certain circumstances. The statutory scheme allows compensation to be payable when a conviction is “reversed” by the High Court on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice.

444. In addition to the statutory scheme, there also operates an *ex gratia* scheme. This allows compensation to be paid to individuals who have spent a period in custody following a wrongful conviction or charge if that wrongful conviction or charge resulted from “serious default on the part of a member of the police force or of some other public authority”. Compensation may also be paid in “exceptional circumstances that justify compensation in cases outside these categories”. Compensation is not paid however merely because at the trial or on appeal the prosecution was unable to sustain the burden of proof beyond reasonable doubt.

445. No changes are proposed to the scope of the *ex gratia* scheme but the provisions places this *ex gratia* scheme on a statutory footing, combining it with the existing statutory scheme.

446. Schedule 12 to the 1988 Act contains a reference to the Criminal Injuries Compensation Board. This is a redundant provision as the Criminal Injuries Compensation Board no longer exists and the reference is therefore repealed.

447. Section 133 of the 1988 Act currently allows for compensation to be paid when an individual has been convicted of a criminal offence and subsequently had that conviction reversed or they are pardoned. The condition that has to be met is that the reversal or pardon is

on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice.

448. However, section 188 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) allows for a conviction and sentence or both to be set aside by way of a minute from the prosecutor to the court without an appeal being heard. The provisions amend section 133 of the 1988 Act in order to allow someone who has had their conviction set aside by way of section 188(1)(b) of the 1995 Act to receive compensation.

449. Section 133(6) of the 1988 Act states that “...for the purposes of this section a persons suffers punishment as a result of a conviction when sentenced is passed on him for the offence of which he was convicted.” Section 228 and section 246 of the 1995 Act allow the court to impose a probation order or order absolute discharge instead of sentence. As disposals such as probation order and orders of absolute discharge are “sentences”, section 133(6) of the 1988 Act would not recognise the person as having been punished and compensation would not be available.

450. The provisions ensures that convictions resulting in a disposal such as a probation order or absolute discharge can be taken into account for the purposes of section 133 of the 1988 Act.

451. An issue that has come to light with recent cases is the ability to deal with applications under section 133(2) of the 1988 Act which have been made a significant time after the conviction. This has lead to difficulties in obtaining evidence to substantiate claims as court records are destroyed after a period of time. Additionally, the absence of a time limit is at odds with civil litigation procedures.

452. The provisions will limit the time in which an application can be considered to 3 years from the date the appeal is finally disposed of by the High Court with the addition of a discretionary power for Scottish Ministers to waive that where it is in the interests of justice to do so, or that there are exceptional circumstances. This is in line with civil limitation periods for personal injury claims.

Consultation

453. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

454. The UK Government has adopted a different approach. Section 61 of the Criminal Justice and Immigration Act 2008 has placed a number of restrictions on compensation payments, and the *ex gratia* scheme has been abolished and not replaced. We consider it preferable to establish a statutory *ex gratia* scheme.

Section 83 – Financial reporting orders

Policy objectives

455. To encourage the use of Financial Reporting Orders (FROs).

Key information

456. The provisions clarify the right for a prosecutor to apply to the court to consider imposing a FRO.

457. The Serious Organised Crime and Police Act 2005 introduced the use of FROs which requires those subject to the order to report their financial dealings over a specified period of time as directed by the court. In Scotland they can be applied for when an individual has been convicted of the common law offence of fraud or an offence listed in Schedule 4 to the Proceeds of Crime Act 2002 and when the court believes that there is a sufficiently high risk that a similar offence will likely be committed in the future.

458. At present the number of FROs imposed in Scotland is limited. It is unclear whether it is for the court on its own initiative to make a FRO or whether prosecutors can ask the court to make such an order. The purpose of this provision is to make it explicit that either the prosecutor can bring to the court's attention its power to impose a FRO or the court can make such an order at its own instance. Section 77 of the Serious Organised Crime and Police Act is amended accordingly.

Consultation

459. This proposal has been drawn up in conjunction with the Crown Office and Prosecutor Fiscal Service. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

460. We could have decided not to amend the legislation and rely on the court to take account of the possibility of imposing Financial Reporting Orders. However, as there have been so few orders imposed we felt it necessary to put it beyond doubt that a prosecutor can bring the possibility of the imposition of these orders to the courts attention. This will hopefully result in more FROs.

Section 84 – Compensation orders

Policy objectives

461. To improve courts' flexibility to award compensation thus helping victims of crime achieve greater satisfaction.

Key information

462. The provisions widen the circumstances in which criminal courts may make compensation orders by making it more straightforward for the courts to award financial

compensation back to victims of crime for any personal injury, loss or damage caused directly or indirectly; or alarm or distress caused directly to the victim resulting from that offence or any other offence which is taken into consideration by the court in determining the sentence.

463. The provisions will:

- allow compensation orders to be made in respect of bereavement and the cost of funeral expenses and make compensation orders available against an offender if they have a traffic accident and are uninsured, including covering the expenses of the preferential insurance rates lost by the victim, if applicable;
- make it easier for courts to award compensation orders by decoupling them from civil proceedings (where existing legislation allows a compensation order to be discharged or reduced if there is a subsequent civil determination that the amount awarded in the criminal case was too high);
- allow the earnings of an offender (contingent on employment on release from custody) to be taken into account when deciding compensation; and
- allow courts to review an award of compensation in cases where an offender has had a substantial increase in means.

464. Furthermore, Sheriffs and stipendiary magistrates currently have powers to impose exceptionally high maximum fines for some offences, which exceed the standard limits set for summary courts. Compensation orders are however currently restricted to standard limits and we intend to remove that restriction.

Consultation

465. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

466. There are none that allow the policy objectives to be met.

PART 6 – DISCLOSURE

Sections 85-116 – Disclosure

Policy objectives

467. To provide certainty in statute as regards how the disclosure of evidence regime should operate.

Key information

468. Effective disclosure of information to the accused in criminal proceedings by the prosecutor to the defence is recognised as necessary to ensure trials are conducted fairly.

469. In the Scottish legal system it is a fundamental principle that an accused is entitled to a fair trial. To help achieve this the Crown has an obligation to give the accused notice of the charge against him and to make available information/evidence which the Crown intends to bring to prove the charges. Any *exculpatory* material should be identified and given/disclosed to the defence. A series of decisions of the Judicial Committee of the Privy Council including the cases of *Holland and Sinclair*, have refined that duty but have also given rise to uncertainty about the exact requirements of the duty of disclosure.

470. Although disclosure is presently carried out on a common law basis, it is clear that there are shortcomings in the current regime and that disclosure would benefit from having a statutory framework.

471. The provisions in the Bill clarify what requires to be disclosed and establishes a statutory regime for material to be disclosed. They are based on the recommendations contained in Lord Coulsfield's 'Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland' which was published in August 2007²⁹.

472. We consulted publicly³⁰ on Lord Coulsfield's recommendations and, subsequently, published the responses received in relation to that consultation³¹. We also published an analysis of those responses and a statement of our intended next steps, which were committing to bringing forward legislation and to develop a statutory Code of Practice to accompany the legislation – the "Next Steps" paper.³²

473. Lord Coulsfield's recommendations have, largely, been accepted for the reasons put forward in his report and in the "Next Steps" paper. Certain recommendations have not been accepted, as explained in the "Next Steps" paper, and below.

474. The Bill is designed to establish a statutory system of disclosure which, broadly, sets out:-

- A continuing duty on the Crown to disclose material and relevant information for and against the accused to the defence;
- A statutory definition of that duty and provision for how and when the duty is complied with;
- A duty on the police and other agencies or organisations who investigate crimes and submit reports to the prosecutor to provide the prosecutor with schedules listing all the information which may be relevant to the case obtained during the course of the

²⁹ Lord Coulsfield's 'Review of the Law and Practice of Disclosure in Criminal proceedings in Scotland' - August 2007 <http://www.scotland.gov.uk/Publications/2007/09/11092728/0>

³⁰ <http://www.scotland.gov.uk/Publications/2007/11/09145246/0> Scottish Government Consultation Paper

³¹ Responses to the consultation into proposals for legislation to implement the recommendations in the report of the Independent Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland by the Rt Hon Lord Coulsfield – March 2008 <http://www.scotland.gov.uk/Publications/2008/03/12145347/0>

³² A Statutory Basis for Disclosure in Criminal Proceedings in Scotland Analysis of responses to Consultation and Next Steps – April 2008 <http://www.scotland.gov.uk/Resource/Doc/221066/0059469.pdf>

investigation; and a duty on the prosecutor to disclose to the defence in solemn cases a schedule listing all the information that may be relevant that is categorised as non-sensitive;

- Provision for defence statements;
- Provision for applications to the court for orders restricting disclosure. In other jurisdictions, these are sometimes referred to as Public Interest Immunity (PII) procedures, designed to allow material which falls within the definition of what requires to be disclosed to be withheld on public interest grounds;
- A new offence of misuse of disclosed information; and
- Provision for a statutory Code of Practice to support the legislative provisions

Duty of Disclosure

475. The Bill seeks to re-state and clarify the duty of the prosecutor to disclose information and the definition of what requires to be disclosed.

476. The prosecutor will be under a duty to review all relevant and material information for or against the accused of which he is aware (i.e. all information that has been submitted to him by the police or other investigating agency). Such information will require to be disclosed if it materially weakens or undermines the prosecution case, it materially strengthens the accused's case or it is information which is likely to form part of the prosecution case – i.e. is likely to be led at any trial. (Information that is material is, by definition, also relevant). The provisions give non-exhaustive examples of the types of information, which are designed to include the types of information set out by Lord Coulsfield in recommendation 7 of his report.

477. That duty is one that is proactive and continues, throughout the life of the case until proceedings have concluded. After the accused has been convicted, however, the duty changes and the prosecutor will not be required to disclose information which forms part of the prosecution case.

478. The prosecutor will be able to disclose information by any means. This will include providing a narrative containing the information, providing copies of documents containing the information or allowing the accused or his solicitor or advocate to inspect the information at a reasonable time and in a reasonable place. Some documents might contain information that does require to be disclosed and other information that does not. The prosecutor will be able to edit, redact or otherwise obscure any information that does not require to be disclosed in any such document.

479. Information contained in criminal history records relating to witnesses, sometimes referred to as “previous convictions and outstanding charges” will require to be disclosed only if it meets the test for disclosure.

480. In solemn proceedings, witness statements of those witnesses whom the prosecutor intends to call to give evidence at trial, as a class of documents, will require to be disclosed. The prosecutor may, however, edit, redact or otherwise obscure any part or parts of a witness statement for information that does not require to be disclosed.

481. In summary proceedings, witness statements as a class of documents will not always require to be disclosed, even where the witness is likely to give evidence. In practice, in summary proceedings, the Crown will continue to prepare a narrative containing the information that the prosecutor is aware of (sometimes referred to as a “summary of evidence”). If there is additional information, whether contained in witness statements or elsewhere, that has not previously been disclosed, the prosecutor will provide the information.

482. There will for solemn cases be a duty on the police (and other agencies or organisations who investigate crimes and submit reports to the prosecutor in relation to those investigations) to provide the prosecutor with schedules listing all the information which may be relevant to the case obtained during the course of the investigation. The schedules will list the information ingathered which may be relevant to the case for or against the accused – which schedule information is listed on will depend on the sensitivity of the information. There will be three separate schedules (sensitive, highly sensitive or non-sensitive) dependant upon the nature of the information. On each schedule there will be an entry in respect of each piece of information held, together with a brief description of the information. If the prosecutor disagrees with the categorisation of any piece of information, he will be able to direct that the schedules are amended and re-submitted.

483. In solemn cases there will be a duty on the prosecutor to disclose to the defence a schedule listing all the information that may be relevant that is categorised as non-sensitive. This is in addition to their duty to disclose all material (and therefore relevant) information for and against the accused.

484. Although it is essential that the accused receives material and relevant information for or against him in connection with his case, it is equally essential that some balance is struck to protect the privacy of witnesses. To achieve that balance, the accused will only be able to use information disclosed to him by the prosecutor for the purposes of preparing or presenting his defence, whether in the trial or at (or in deciding whether to) appeal – including any application to the SCCRC or reference by the SCCRC to the High Court of Justiciary. It will be a criminal offence for the accused, or by any other person whom the accused passes the information to, to use the information for any other purpose.

485. The accused will be able to apply to the court to seek permission to pass on the information to a third party (but, clearly, need not do so if the reason for passing the information on is for the purposes of preparing or presenting his defence), whether in the trial or at (or in deciding whether to) appeal. If the court makes an order allowing the accused to pass on information to a particular person for a particular purpose, and the accused passes information to a different person or for a different purpose, he will commit an offence.

Non-disclosure – “Public Interest immunity”

486. There will be cases where the information which the prosecutor requires to disclose is sensitive and the disclosure of it would create a risk of substantial prejudice to an important public interest. In those circumstances, and only in such circumstances, the prosecutor will apply to the court for an order prohibiting disclosure. If, and only if, the court makes a non-disclosure order, the prosecutor will be able to withhold from the accused an item or items of information

specified in the order which would otherwise require to be disclosed (the prosecutor will retain, however, his discretion to discontinue proceedings).

487. This is not entirely novel; but as Lord Coulsfield recommended, there is a need to put in place a statutory system for such decisions to be made.

488. There is a difficult balance to be struck here between protecting the public interest at stake and the private interests of the accused. To achieve that, Lord Coulsfield envisaged there being three types of procedure, broadly described as type 1, type 2 and type 3:-

- **Non-Disclosure application only** - Crown and defence (and special counsel if appointed by the court) represented at hearing and have opportunity to make representations;
- **Exclusion with non disclosure applications** - Crown represented at hearing and special counsel if appointed by Court. Defence may be represented only to allow them to be heard on the procedure, thereafter they are to be excluded from the hearing to decide whether the non-disclosure order is to be made; and
- **Non-notification with exclusion and non disclosure applications** - Crown represented at hearing and special counsel if appointed by Court. Accused and his/her legal representative are not present and are not notified of any of the hearings.

The provisions are designed to give effect to this.

489. It will be possible, therefore, where the prosecutor applies for a non-disclosure order, for the prosecutor to apply to the court for a non-notification order and/or an exclusion order, also. A non-notification order will be an order prohibiting notice being given to the accused of the making of the applications for non-notification, exclusion and non-disclosure orders and also the decisions of the court in relation to any of those applications. An exclusion order will be an order prohibiting the accused from attending or making representations in proceedings relating to the application for a non-disclosure order.

490. The court will be able to appoint special counsel to represent the interests of the accused in respect of the applications at a hearing on any or all of the applications. Unlike the accused, special counsel will be able to see the applications and the information that is the subject of the application – ensuring that the accused's interests are represented.

491. The tests that the court will apply in deciding whether to grant any of these orders are necessarily high, particularly so for non-notification orders and exclusion orders. It is anticipated that the number of applications for non-disclosure order will be small, relative to the overall number of cases prosecuted and, of those, the number of applications for non-notification will be few; but however small the number, it is vital that there are clear procedures to allow applications to be made and to make clear the procedures for their consideration.

492. In considering whether to make a non-disclosure order, even if the court is of the view that the information in question cannot be disclosed, the court will require to consider whether disclosure of the information could be made to any extent. If it considers that information could

be disclosed to any extent the court will be able to specify that. This is another safeguard to ensure that only that information which absolutely must be withheld, is withheld.

493. The prosecutor will be able to appeal against a court decision to refuse an application for a non-notification order and an exclusion order, or against a decision for an exclusion order or a non-disclosure order.

494. The accused will be able to appeal against a court decision to make an exclusion order or a non-disclosure order. As the accused will not know that a non-notification order has been made, he will not be able to appeal.

495. Any special counsel appointed will, however, be able to appeal against a court decision to make a non-notification order and an exclusion order, or against a decision making an exclusion order or a non-disclosure order. This is to ensure that the accused's interests are represented.

496. The prosecutor and the accused will be able to apply for a review of a non-disclosure order on the basis that new information has come to light which was unavailable to the court at the time when the order was made. Notwithstanding that, the trial judge will be under a duty to keep under review the appropriateness of any non-disclosure order made and, if he considers that the non-disclosure order may no longer be appropriate then he will appoint a hearing. This is critical to ensuring that, throughout the proceedings, the reasons for non-disclosure remain and, if not, information is disclosed to the accused (whether in whole or to a specified extent).

Code of Practice

497. As Lord Coulsfield recommended, there will be a statutory code of practice which will set out in more detail how the scheme will work in practice. The code will apply only to prosecutors, police forces and any other investigating agency that is specified by Scottish Ministers. The code will not apply to the accused or the defence and as such will not impose any obligations on the accused or his legal representative.

498. The code will be prepared by and laid before Parliament by the Lord Advocate; as the code will direct prosecutors, police forces and investigating agencies in relation to the exercise of their functions, it is proper that the Lord Advocate has this function. If, in future, the Lord Advocate were to revise the code, any revised code will also be laid before Parliament.

Departures from Lord Coulsfield's report

499. The "Next Steps" paper outlined those recommendations made by Lord Coulsfield that were not being adopted, or not being fully adopted.

500. Subsequent to publication of that paper, of those recommendations that were adopted, one has been reconsidered and departed from. It was proposed that there should be a standard format for voluntary defence statements. It was proposed, also, that where, following disclosure by the Crown in accordance with the requirements, the defence wishes to request further consideration to be given to disclosure issues, it should be mandatory for a defence statement in the standard form to be submitted. That is still the intention in relation to summary proceedings.

501. In solemn proceedings it became apparent that the nature and scale of such cases are such that the prosecutor's task in assessing what requires to be disclosed would be almost impossible without knowing some information regarding the accused's line of defence. That risks essential information not being disclosed inadvertently and through no fault on either the prosecutor or the accused. It has been concluded, therefore, that the provision of a mandatory defence statement in all solemn proceedings by which the accused shall advise the prosecutor of the position he intends to take at trial is the only way to confidently secure disclosure to the accused of all the information which needs to be disclosed to him was for him to advise the prosecutor of the position he intended to take at trial.

502. The timing of when this requirement should be carried out is crucial: if it is required at too early a stage, the line of defence may not have become sufficiently clear, or might then change as the defence preparations develop. A balance was struck by requiring the accused to intimate and lodge his defence statement in solemn proceedings only 14 days before the Preliminary Hearing (in High Court cases) or First Diet (in Sheriff and Jury cases) and an updated statement (or where there is no update, a statement confirming that fact) 7 days before the trial diet).

503. The effect of the defence statement will be the same, regardless. On receiving it the prosecutor will require to review all of the information that may be relevant to the case for or against the accused of which it is aware. If anything further requires to be disclosed, the prosecutor will disclose it. If, and only if, the accused has sent the prosecutor a defence statement and nothing further is disclosed following that defence statement or if the accused believes that not all of the information that should have been given to him, has been disclosed, he can apply to the court (as he would at present).

Consultation

504. In November 2007, we published a consultation paper³³ on proposals for legislation based on Lord Coulsfield's recommendations and, following consideration and publication of the responses received, published an analysis of the responses and a statement setting out our next steps³⁴ for legislation.

Alternative approaches

505. There is no alternative approach that can achieve the policy objective. Although criminal cases would still proceed, continuing with the status quo would leave the uncertainty that which Lord Coulsfield's report was designed to address.

PART 7 – MENTAL DISORDER AND UNFITNESS FOR TRIAL

Sections 117-120 – Mental disorder and unfitness for trial

Policy objectives

506. To modernise the law in the area of mental disorders in criminal proceedings.

³³ <http://www.scotland.gov.uk/Publications/2007/11/09145246/0> Scottish Government Consultation Paper

³⁴ <http://www.scotland.gov.uk/Publications/2008/04/24084456/0> - Scottish Government Next Steps paper

Key information

507. We are taking forward legislative changes recommended by the Scottish Law Commission (SLC) in their “*Report on Insanity and Diminished Responsibility*”³⁵ report published in 2004. Their report was drafted following Scottish Ministers giving the SLC the following remit:

“To consider-

- the tests to establish insanity (either as a defence or as a plea in bar of trial) and the plea of diminished responsibility; and
- issues of the law of evidence and procedure involved in raising and establishing insanity and diminished responsibility; and
- To make recommendations for reform, if so advised; and
- Consequent upon any recommendations for reform, to consider what changes, if any, should be made to the powers of the courts to deal with persons in respect of whom insanity (either as a defence or as a plea in bar of trial) or diminished responsibility has been established.”

508. We welcome the recommendations contained in the report and consider them to be an important modernisation of the law in this important area.

509. We accept all of their recommendations and they are included within the Bill for the reasons outlined in the SLC report.

PART 8 – LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

Policy objectives

510. To modernise licensing provisions within the Civic Government (Scotland) Act 1982 in line with the Task Group report’s recommendations.

Key information

511. A Task Group was set up by the previous administration to review the licensing provisions contained in the 1982 Act. The Group reported in December 2004³⁶ and made a number of recommendations for reform. The then Scottish Executive responded to the report in August 2005³⁷ agreeing with the broad thrust of the recommendations, but indicated that those requiring primary legislation would be for a new administration to introduce following the 2007 elections, in light of competing priorities. We now consider it correct to take forward the relevant recommendations within this Bill.

512. The Task Group report’s recommendations cover the general licensing provisions of the 1982 Act, and include specific provisions on metal dealers, market operators, public

³⁵ <http://www.scotlawcom.gov.uk/downloads/rep195.pdf>

³⁶ <http://www.scotland.gov.uk/Publications/2004/12/20391/48542>

³⁷ <http://www.scotland.gov.uk/News/Releases/2005/08/02134157>

entertainment and late hours catering, taxis and private hire cars. The amendments to the 1982 Act are largely of a technical nature (affecting procedural aspects of the current licensing regime generally), though they also include some measures aimed at specific activities - the main amendments are listed below. The aim of the amendments is to make the 1982 Act licensing provisions fit for the 21st century in line with the Task Group report's recommendations.

Section 121 – Conditions to which licences under 1982 Act are to be subject

513. Where the licensing authority has failed to reach a final decision on a grant application before the expiry of the statutory period under the 1982 Act, the licence is statutorily deemed to have been granted unconditionally on the date of expiry and remains in force for one year. The Bill retains the existing “deemed grant” provisions, but amends the Act to permit the application of standard conditions to any such licence.

514. In the interests of public safety, a regulation-making power in the Bill will be used to make it a mandatory condition of a licence that the licence (or a copy) be displayed on premises, vehicles (or a plate) and vessels, and where this is not practical for the licence to be carried at all times by the day-to-day manager. In the case of other activities (such as window cleaners), the regulations will require individuals to carry the licence (or a copy) on their person unless the licensing authority, under its discretionary powers, has made it a condition of licence that an identification badge be displayed or shown on demand.

Section 122 – Licensing: powers of entry and inspection for civilian employees

515. Constables have rights of entry and inspection under the 1982 Act for specified purposes (such as checking compliance with the terms of the licence). The Bill extends these rights to include civilian staff employed by the police under the provisions of section 9 of the Police (Scotland) Act 1967.

Section 123 – Licensing of metal dealers

516. The Bill replaces the current mandatory licensing scheme for metal dealers with an optional licensing scheme, i.e. it will be open to local licensing authorities to determine whether or not licences are required in their areas. The Bill repeals the current exemption from the licensing provisions (where annual turnover is over £100,000) and enables authorities to determine whether there should be any exemptions for larger businesses.

Section 124 – Licensing of taxis and private hire cars

Policy objectives

517. To modernise the taxi and private hire car licensing regime within the Civic Government (Scotland) Act 1982 in line with the Task Group report's recommendations.

Key information

518. The provisions amend the 1982 Act in relation to the way in which licensing authorities fix the scales for taxi fares. The provisions provide details of how the licensing authority should carry out their review of the scales including the consultation and notification procedures. The

new provisions require that the review mechanism must be completed and the fares fixed within 18 months of the date on which the scales came into effect.

519. The provisions amend the 1982 Act to extend the right of appeal to the Traffic Commissioner (TC) against taxi fares fixed by a licensing authority to bodies representative of taxi operators operating in the council area as well as individual taxi operators.

520. The Task Group reported that the TC had called for extension of the existing appeal provisions under section 18. The TC considered it appropriate that representative bodies consulted under section 17 and that are required to be notified of an authority's decision on the fixing of taxi fare scales or review should have the right of appeal. The proposal was widely supported during the Task Group's consultation.

521. The provisions also amend the 1982 Act to clarify that a licensing authority shall not grant a taxi or private hire car driver's licence to any applicant unless that person has held for the 12 month period immediately prior to that application a licence authorising them to drive a motor car under Part III of the Road Traffic Act 1988.

522. The Task Group took the view that the provisions as presently worded allowed a driving licence to be provided where an applicant had held a driving licence for any continuous 12 month period prior to submission of their application. The proposed amendment clarifies the original intention of the policy and was widely supported during the consultation on the Task Group review.

523. The provisions amend the 1982 Act to extend the period within which an authority is required to serve notice of its decision with regard to the fixing of taxi fare scales or of a review from 5 days to 7 days.

524. The Task Group considered that the 5 day period presently prescribed was unnecessarily tight particularly where broken by a weekend and/or public holiday. The proposed extension received almost unanimous support in consultee responses.

Section 126 – Licensing of public entertainment

525. The provisions amend the 1982 Act to remove the existing exemption for free events. The Task Group viewed it as unsatisfactory that licensing authorities are not able to control large scale public entertainments that are free to enter. It noted that authorities may not wish to license certain types of free event, such as gala days and school fetes, but considered that the decision on whether to license these events should rest with the authority.

Section 127 – Licensing of late night catering

526. The provisions extend the part of the 1982 Act covering late hours catering to ensure that licensing authorities have the power to license any premises selling food or drink at late hours. The Task Group report states that "the principal justification for licensing such premises related to the potential for large numbers of people leaving pubs, night clubs etc. late at night to cause a disturbance, and that this potential exists regardless of whether the food or drink being sold has

been cooked or pre-prepared in any way”. This amendment will give licensing authorities the option of licensing all such premises if they consider it necessary to do so.

Section 128 – Applications for licences

527. The provisions makes a number of amendments to Schedules to the 1982 Act, which include: extending the time allowed for making representations on any application for the grant or renewal of a licence from 21 days to 28 days; increasing the period of notice which licensing authorities must give for attendance at a hearing from 7 days to 14 days; and allowing licensing authorities to consider licence renewal applications received after the expiry date as renewals rather than applications for a new licence for up to 28 days after the expiry of the previous licence.

Consultation

528. Given the diverse range and technical nature of the licensing activities covered by the 1982 Act, the Task Group decided to draw up emerging findings first and then test these through wide consultation. The Group thus consulted very widely on its preliminary findings before firming up its recommendations. Over 70 responses were received from local authorities, the police, affected traders, legal interests, trade associations, individuals, consumer interests and trading standards officers.

Alternative approaches

529. The alternative would have been to do nothing in respect of the Task Group’s report and leave the 1982 Act unchanged. This was disregarded as there was a broad consensus that the Act would benefit from some updating and the Bill provides a legislative opportunity to do so.

PART 9 – ALCOHOL LICENSING

Section 129 – Sale of alcohol to persons under 21 etc.

Policy objectives

530. To require Licensing Boards to actively consider the detrimental effect of off-sales purchases of alcohol to people under the age of 21 within their area, or part of their area and to provide Licensing Boards with a power to impose licensing conditions restricting off-sales of alcohol to people under the age of 21. This is part of our efforts to tackle alcohol misuse and reduce alcohol-related harm.

Key information

531. Our discussion document “*Changing Scotland’s Relationship with Alcohol*³⁸”, issued in June 2008, set out Ministers’ strategic approach to tackle alcohol misuse and reduce alcohol-related harm. This included a proposal to raise the minimum legal age for purchasing alcoholic drinks in off-sales to 21 across Scotland, on which views were sought.

³⁸ <http://www.scotland.gov.uk/Topics/Health/health/Alcohol/strategy>

532. The discussion document set out the key arguments in support of this approach:
- alcohol is much cheaper and more widely accessible in off-sales than on-sales and, therefore, the measure would be likely to generally reduce the amount of alcohol purchased by young people;
 - on-sales premises offer a more controlled drinking environment than off-sales, therefore, the behaviour of 18-21 year olds is more likely to be moderated;
 - it could act as a particular deterrent for drinkers under 18 who are significantly more likely to purchase their alcohol from off-sales rather than on-sales. It would also reduce the opportunity for those aged under 18 to purchase alcohol by proxy through 18-21 year olds; and
 - pilot projects in Cupar, Stenhousemuir and Armadale have shown a positive impact of raising the age for off sales. All three of these local pilots have shown a significant reduction in anti-social behaviour and offending as a result of raising the age of off-sales purchases to 21 on Friday and Saturday evenings.

533. However, there was limited support for the proposal amongst those who responded to the consultation. Amongst individuals 62% were against this proposal and 38% were in favour. Of the organisations that responded to this question, 63% were against and 27% in favour.

534. In light of the consultation responses and the difficulties of carrying such a measure through Parliament, we have decided not to pursue a blanket approach across Scotland. However, we are persuaded that there are clear arguments in support of local approaches where appropriate, as shown by the positive impact of the pilots in Cupar, Stenhousemuir and Armadale. The proposed amendments to the Licensing (Scotland) Act 2005 will, therefore, encourage the development of local solutions to address local problems.

535. It will do this by requiring every Licensing Board to undertake an assessment as to whether off sales of alcohol to people under 21 is having a detrimental impact on one or more of the licensing objectives (i.e. crime and disorder, public safety, public nuisance, public health and on children), within their Board area or any part of it. Boards will be required to undertake this assessment as part of their regular review of their policy statement, at least every 3 years. In addition the Police or the Local Licensing Forum will be able to ask a Board to conduct additional assessments outwith the 3 year cycle. The conclusions drawn by the Board do not have to relate to the whole geographical area covered by the Board. For example, a Board could decide that there was a detrimental impact for only certain communities.

536. The Bill will also create an enabling power for Scottish Ministers to set out in regulations specific circumstances in which Licensing Boards would be able to apply new conditions to more than one licensed premise at a time. Ministers intend to bring forward regulations which would enable Licensing Boards to impose a block restriction on all or certain premises (e.g. in a particular geographical area) from providing off-sales to those under 21, at all or at certain times. This would remove the need for Licensing Boards to hold a hearing for each individual premise to which they wish to apply this condition.

Consultation

537. As described above, we consulted on the proposal to raise the minimum legal age to 21 across Scotland between June and September 2008.

Alternative approaches

538. As described above, following consideration of the responses received, we have decided not to pursue a blanket approach to raising the minimum legal age for purchasing alcoholic drinks in off-sales to 21 across Scotland. Instead we have agreed to provide for locally flexible solutions by requiring all Local Licensing Boards to actively consider raising the age of off-sales purchases to 21 in all or part of their Board area and providing the Police and Local Licensing Forum with the powers to request the Board to review their policy.

Sections 130-139 – Alcohol licensing

Policy objectives

539. To improve the operation of the Licensing (Scotland) Act 2005 through modifying a number of the provisions to reduce costs, shorten process times, remove unintended barriers and close loopholes, while ensuring Licensing Boards receive sufficient information on which to base their decisions concerning licences to sell alcohol.

Key information

540. The Licensing (Scotland) Act 2005 (the "2005 Act") will replace the Licensing (Scotland) Act 1976 in its entirety. The 2005 Act and the new licences under it come fully into force on 1 September 2009 at the end of a transition period that began in February 2008. It replaces the 1976 Act system of separate licences for pubs, restaurants etc with a single all-purpose premises licence, and a personal licence.

Section 130 - Premises licence applications: notification requirements

541. The provisions remove the need for Licensing Boards, when notifying the range of interested parties as required by the 2005 Act, to include with that notification a copy of the application, except in respect of the Chief Constable. This does not prevent the application being available for public inspection but reduces the cost and burden of notification. Similar provisions have been in use during the licensing transition period, having been put in place by Scottish Ministers using regulatory powers to make transitional modifications.

Section 131 - Premises licence applications: modification of layout plans

542. The provisions enable a Licensing Board to consider that where they would refuse an application as made, but would grant it if a modification to the layout plan, proposed by it, was made, they would be able to grant the application. The Board must, if the applicant accepts the proposed modification, grant the application as modified. Previously the Board would be required to reject the application and the applicant would need to reapply with all the associated costs that would entail.

Section 132 - Premises licence applications: antisocial behaviour reports

543. The provisions reduce the requirement for the Chief Constable to provide within 21 days a report detailing all cases of antisocial behaviour identified within the relevant period by constables as having taken place on, or in the vicinity of, the premises, and all complaints or other representations made within the relevant period to constables concerning antisocial behaviour on, or in the vicinity of, the premises.

544. The provisions state that these such reports should be required only if the Licensing Board requests one (which they may do following public objections or representations concerning a premises) or if the Chief Constable chooses to provide one. As consideration was being given to the implementation of the 2005 Act, it became clear that the 2005 Act procedure was unnecessarily onerous and bureaucratic. Using regulatory powers, Scottish Ministers made transitional modifications that reduced the requirement for the Chief Constable to provide a report on antisocial behaviour and these provisions will establish a similar situation after transition. This will ensure unnecessary costs are not entailed for the production of reports which are not required.

Section 133 - Sale of alcohol to trade

545. The provisions amend the provision in the 2005 Act whereby it is an offence for a licensed premises to sell to the trade. This is a common sense measure that corrects an unintended consequence of the 2005 Act. For example if a restaurant owner wished to buy alcohol for the restaurant from a supermarket instead of the wholesaler, the restaurant owner would under the 2005 Act be committing an offence.

Section 134 - Occasional licences

546. The provisions will enable the fast tracking of some occasional licences where there is very limited notice of the need for such a licence e.g. a funeral. At present the statutory time requirements of the 2005 Act would prevent such functions or events from taking place.

Section 135 - Extended hours applications: variation of conditions

547. The provisions will allow Licensing Boards the flexibility to apply additional conditions when granting extended hours applications. For example where a licensed premises has listed one of its activities as showing televised sport, a Licensing Board may see no reason to apply specific conditions. However if there was a request for extended hours to enable the screening of certain football matches during a major competition (for example the World Cup), the Licensing Board may wish to see additional conditions applied to the premises, e.g. extra door staff and the use of plastic glasses while those extended hours apply (and earlier in the day).

Section 136 - Personal licences

Section 138 - False statements in applications: offence

548. The provisions in section 136 will allow the Licensing Board to refuse to process or issue a personal licence if the applicant already holds a valid personal licence. Section 138 would also

make it an offence to apply for a second personal licence under the Licensing (Scotland) Act 2005 if the applicant already held a personal licence. This prevents a person from avoiding any sanctions a Licensing Board had wished to impose for actions in relation to an existing licence which were not in accordance with the licensing objectives.

Section 137 - Emergency closure orders

549. While maintaining the need for a senior officer to take decisions about prohibiting the sale of alcohol, the provisions will amend the definition of a senior officer from being a constable of or above the rank of Superintendent to the rank of Inspector or above. These changes will accord better with the practicalities of day to day policing by making the rank of officer required to take these decisions more appropriate.

Section 139 – Further modifications of 2005 Act

550. The provisions ensure the police are able to bring a wider range of information to the attention of the Licensing Board at the time of application. The 2005 Act limits the chief constable so that he can only object on the ground that he has reason to believe that the applicant is involved in serious organised crime and that refusal of the application is necessary for the purpose of the crime prevention objective. This provision will ensure that the police have the same ability as anyone else to object to a licence on any or all of the grounds offered by the Licensing Objectives including prevention of crime and public nuisance, securing public safety and protecting children from harm.

Consultation

551. These provisions have arisen as stakeholders have considered the day to day operation of the system after implementation and following encouragement from Scottish Ministers to highlight areas of concern. Suggestions were forwarded by trade organisations, their legal representatives, Clerks to the Licensing Boards and the police.

552. The proposal was included in our “Revitalising Justice” proposals document published in September 2008 and were generally welcomed by those who responded.

Alternative approaches

553. The alternative would have been to do nothing in respect of stakeholders requests for changes and to leave the 2005 Act unchanged. This was disregarded as there was a broad consensus that the operation of the Act would be improved to the benefit of the local community and the trade and the Bill provides a legislative opportunity to do so.

PART 10 – MISCELLANEOUS

Section 140 – Licensed premises: social responsibility levy

Policy objectives

554. To ensure alcohol retailers and licensed premises whose activities can impact negatively on the wider community contribute towards the cost of this impact.

Key information

555. We are proposing that a levy should be applied to some alcohol retailers and certain licence holders under the Civic Government (Scotland) Act 1982 to help offset the costs of dealing with the adverse impact of these businesses or their customers. The principle that the costs associated with the wider impacts of a commercial activity should be borne by those who benefit from it is well established and already applied, for example, in respect of environmental impacts.

556. For example, alcohol misuse and overconsumption and subsequent disorder and harm places a heavy burden on our public services from policing city centres at night, treating alcohol related injuries in Emergency Departments, and providing other services to respond to the consequences of alcohol misuse. We are aware that many town and city centres face their own unique problems with regard to the effects of alcohol misuse. Licensed premises – for example, pubs, nightclubs, off-sales and takeaways – play a vital part in the night-time economy but large numbers of people using these facilities within relatively compact districts can lead to anti-social behaviour and disorder.

557. We consider it is wrong for the full burden of providing these services to continue to be met by the tax payer. Money available to Government is limited, and while businesses already pay business rates, we consider that some of the additional cost of providing services (for example, policing the night-time economy) should be met by those who profit from the sale of alcohol and profit from other types of licensed premises. The objective of a Social Responsibility Levy would be for alcohol retailers and other licensed premises to contribute financially to the furtherance of the Licensing Objectives set out in the Licensing (Scotland) Act 2005.

558. We do not consider that the uses to which a Social Responsibility Levy should be put should be set out nationally. Rather, local authorities should be able to determine priorities in their areas and identify new or enhanced services, initiatives or projects where the use of additional money could best contribute to the achievement of the Licensing Objectives. The levy should not become a direct alternative to established sources of funding but should provide an opportunity for local authorities and other public bodies to be innovative and creative in finding new ways of promoting the licensing objectives.

Consultation

559. The proposal for a Social Responsibility Levy was set out in “*Changing Scotland’s Relationship with Alcohol*”³⁹ published in June 2008. This document sought comments on the levy. The evaluation of the consultation process was published in February 2009.

560. Although the provisions in the Bill are for an enabling power, we will work with key stakeholders including ACPOS, COSLA, the alcohol industry and other business interests to

³⁹ <http://www.scotland.gov.uk/Publications/2008/06/16084348/0>

develop the detail of the Social Responsibility Levy before considering whether to bring any regulations before Parliament.

Alternative approaches

561. In the absence of a Social Responsibility Levy, the full cost of dealing with the adverse impact of licensed premises would continue to be met fully by local authorities, health boards, the police and other agencies.

Section 141 – Annual report on Criminal Justice (Terrorism and Conspiracy) Act 1998

Policy objectives

562. To tidy up the law, reducing the risk of error and confusion.

Key information

563. The Criminal Justice (Terrorism and Conspiracy) Act 1998 (the “1998 Act”) was introduced as emergency legislation following the Omagh bombing. The Act contained a package of measures designed to tackle terrorism. It also introduced section 11A of the Criminal Procedure (Scotland) Act 1995, which deals with the jurisdiction of the Scottish Courts to deal with conspiracies in Scotland to commit offences outside the United Kingdom (see also description of section 37 of the Bill within this memo).

564. Section 8 of the 1998 Act introduced the requirement for a statutory report on the working of the Act to be laid before both Houses of Parliament not less than once a year. Section 121 of the Scotland Act 1998 widened these reporting arrangements so that the requirement to lay the report became a requirement to lay the report in the Scottish Parliament too, so far as any report related to the provisions on conspiracy.

565. The UK Government considers this part of the Act to be redundant and this section has been repealed for England, Wales and Northern Ireland by the Criminal Justice and Immigration Act 2008. The reporting requirements to Parliament on the operation of terrorism provisions is now provided for by section 36 of the Terrorism Act 2006. The majority of provisions, including section 36, of this Act apply on a UK wide basis. The reporting requirement at section 8 now relates only to the provisions on conspiracy.

566. Section 11A of the 1995 Act has never been used in practice since its enactment and there has, therefore, been nothing to report. The provisions therefore repeal section 8 of the 1998 Act as it applies to Scotland.

Consultation

567. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

568. There are none that meet the policy objective.

Section 142 – Corruption in public bodies

Policy objectives

569. To improve the operation of courts.

Key information

570. This section extends the jurisdiction of district/justice of the peace courts so that they can deal with cases involving offences under the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906. In simple terms, the 1889 Act provides that a person in public office who is involved in any form of corrupt practice in connection with their work is guilty of an offence. The 1906 Act provides that any employee who carries out activity in a corrupt manner is guilty of an offence.

571. The antiquated terms of the 1889 and 1906 Acts exclude jurisdiction of the district/justice of the peace courts, unlike the vast majority of other statutory offences that can be tried either summarily or on indictment. The provisions repeals these provisions so that the normal jurisdiction provisions in the Criminal Procedures (Scotland) Act 1995 can operate.

572. The choice of forum for prosecutors will remain with the prosecutor and, in practice, it is unlikely that significant numbers of cases will be dealt with in the district/justice of the peace court.

573. The provisions will remove an unnecessary restriction on which courts can deal with corruption offences.

Consultation

574. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

575. There are none that meet the policy objective.

SCHEDULE 5 – MODIFICATION OF ENACTMENTS

Paragraphs 1, 4, 45 and 51

Policy objectives

576. To tidy up the law, reducing the risk of confusion and error.

Key information

577. A major consolidation exercise of Scottish criminal law and procedure was carried out in 1995. The then existing law was consolidated by the combined effect of the Criminal Procedure (Scotland) Act 1995, the Criminal Law (Consolidation) (Scotland) Act 1995, the Criminal

Procedure (Consequential Provisions) (Scotland) Act 1995, and the Proceeds of Crime (Scotland) Act 1995.

578. The Criminal Law (Consolidation) (Scotland) Act 1995 consolidated certain enactments creating offences and relating to the criminal law in Scotland.

579. This consolidation exercise included consolidation of the False Oaths (Scotland) Act 1933 to create sections 44-46 of the Criminal Law (Consolidation) (Scotland) Act 1995. Consequential provisions required as a result of this exercise were provided for in the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995. It has emerged that a minor error occurred during this consolidation exercise. Schedule 5 to the Criminal Procedure (Consequential Provisions) (Scotland) Act, containing the list of repeals, should have included a reference to the False Oaths (Scotland) Act 1933. This was however omitted, and the 1933 Act remains in force alongside its intended replacement. The provisions therefore repeal the 1933 Act in full. Appropriate consequential amendments are also made where reference has been made to the 1933 Act in other legislation.

Consultation

580. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

581. There are none that meet the policy objective.

Paragraphs 9-11

Policy objectives

582. To tidy up the law, reducing the risk of confusion and error.

Key information

583. A major consolidation exercise of Scottish criminal law and procedure was carried out in 1995. The then existing law was consolidated by the combined effect of the Criminal Procedure (Scotland) Act 1995, the Criminal Law (Consolidation) (Scotland) Act 1995, the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995, and the Proceeds of Crime (Scotland) Act 1995.

584. The Criminal Law (Consolidation) (Scotland) Act 1995 consolidated certain enactments creating offences and relating to the criminal law in Scotland. In essence, this was a tidying up exercise, which made no changes to existing law and covered a wide range of subject matters.

585. Sections 27 to 30 of the Criminal Law (Consolidation) (Scotland) Act 1995 provide the Lord Advocate with special investigatory powers to deal with serious or complex fraud. They re-enact sections 51 to 54 of the Criminal Justice (Scotland) Act 1987, as amended by the Criminal Justice and Public Order Act 1994.

586. However, the provisions of the 1987 Act were not repealed, so they continue to exist in parallel with the 1995 Act replacements. The provisions correct this error by repealing the provisions of the 1987 Act and two later amendments to that Act.

Consultation

587. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

588. There are none that meet the policy objective.

Paragraph 13

Policy objectives

589. To tidy up the law, removing an archaic section.

Key information

590. Section 16 of the Criminal Law (Consolidation) (Scotland) Act 1995 provides a power of search or entry in respect of brothels. The section allows any parent, relative, guardian or person acting in the best interests of a woman or girl to ask for a warrant to be issued. This warrant will authorise a named constable to enter a specified place and search for that woman or girl where they believe she is unlawfully being held for immoral purposes. If the woman or girl is found, she will be delivered to her parents or guardians. There is also a right afforded to the person requesting the warrant to accompany the constable when the warrant is executed.

591. This provision was first to be found in section 10 of the Criminal Law Amendment Act 1885, which has been consolidated twice.

592. This appears to be a rather outmoded provision. In practical terms, the police already have the power to request warrants for circumstances such as this, so the power is redundant.

593. There is no need to retain this provision, as a constable has the common law power to apply for a warrant to enter and search any premises if he or she suspects that a criminal offence is being carried out. The English equivalent was repealed in 2003. The provisions therefore repeal section 16.

Consultation

594. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

595. There are none that meet the policy objective.

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

Equal opportunities

596. The Bill's provisions do not discriminate on the basis of gender, race, religion, disability or sexual orientation. Given the multitude of topics contained with the Bill, an overall summary of the equalities impact of the Bill will be published on the Scottish Government website (on the day of publication of the Bill). Two sections below (section 23 and section 129 of the Bill) are considered to have the most significant equalities impact.

Section 23 – Offences aggravated by racial or religious prejudice

597. There are statutory aggravations in place to require courts to consider increasing a sentence when it has been shown that a crime was racially or religiously motivated. The amendments to that legislation will ensure that it is made explicit at the point of sentence that the offence was racially and/or religiously aggravated and the impact that the aggravation has had on the sentence. These measures will harmonise the application of hate crimes legislation across the statute book in Scotland and improve the recording and application of race and religion aggravations. Evidence suggests that certain groups of people in society are much more likely to have been offended against simply because of who they are. These measures will help to ensure visible justice for the victims of crimes motivated by prejudice.

Section 129 – Sale of alcohol to persons under 21 etc.

598. Discrimination on grounds of age in relation to the purchase of alcohol in off sales is considered to be justifiable in terms of the greater good. Age restrictions currently apply to the purchase of a number of products including alcohol, tobacco and DVDs. The underlying rationale for such restrictions is the need to balance the need to protect young people and the wider community with the right of young people to purchase a legal product.

599. Alcohol is a dangerous drug when consumed irresponsibly. The impacts of misusing alcohol can be significant for both an individual's health, well-being and life chances as well as for society more widely in terms of the costs of dealing with any health or criminal justice consequences.⁴⁰ For this reason there are existing restrictions on the sale of alcohol to those aged under 18.⁴¹

600. However, evidence from other countries suggests that increasing the legal drinking age from 18 to 21 can have substantial effects on youth drinking and alcohol-related harm, often for

⁴⁰ The costs of alcohol misuse in Scotland are estimated to be £2.25 billion per annum, *Costs of Alcohol Use and Misuse*, Scottish Government, May 2008.

⁴¹ Section 68(1)-(3) of the Licensing (Scotland) Act 1976 prohibits the selling alcohol on licensed premises to under 18s, these provisions will be further strengthened when the Licensing (Scotland) Act 2005 comes fully into force on 1 September 2009, when it will be an offence to sell alcohol to a person aged under 18 anywhere (not just on licensed premises).

well after young people reached the legal drinking age.⁴² There is also evidence that delaying the onset of drinking may be important in reducing the risk of harmful drinking.⁴³

601. Research evidence also suggests that young people who drink are more likely to be the both the perpetrators and victims of violence.⁴⁴ In addition experience from three local pilots in Stenhousemuir, Cupar and Armadale - under which shopkeepers voluntarily raised the age of off-sales purchases to 21 on Friday and Saturday evenings - suggests that such restrictions can significantly reduce anti-social behaviour and offending.

602. It is considered that Licensing Boards should have the opportunity to thoroughly consider whether there is justification for increasing the age for off-sales purchases to 21 in all or part of their Board area, taking into account the interests both of young people themselves and the wider community.

Human rights

603. We are satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights.

Part 1 - Sentencing

604. The provisions of Part 1 concerning the purposes and principles of sentencing and the creation of sentencing guidelines could give rise to issues under Article 6. The Scottish Sentencing Council will be responsible for preparing and publishing sentencing guidelines and will operate independently of Scottish Ministers. Although the Court will be required to have regard to sentencing guidelines it may in any individual case depart from the guidelines where it considers that there are reasons to do so. Consequently the guidelines will not prevent the Court dealing with an individual case in the most appropriate, ECHR compliant, manner. As a public authority the Courts are required to exercise their functions in an ECHR compliant manner and the establishment of the Scottish Sentencing Council and sentencing guidelines will not impact on that obligation.

605. The provisions regarding community payback orders could raise questions under Articles 4, 5 and 8. However, the provisions of Article 4 are not engaged as any community payback order will usually be imposed where the offender has expressed a willingness to comply with the requirements. Although the imposition of such an order may interfere with an individual's liberty the fact that the restriction, if any, is imposed in accordance with a procedure prescribed by law and the deprivation, if there is such, is at the instigation of a Court, will ensure there is no incompatibility with Article 5. Any interference with an offender's private and family life is in accordance with the law and necessary for the prevention of disorder or crime, consequently bringing the provisions within the scope of Article 8.2.

⁴² Wagenaar A.C. and Toomey T.L. (2000) *Alcohol policy: gaps between legislative action and current research*. Contemporary Drug Problems 37

⁴³ Newbury-Birch et al , *Impact of Alcohol consumption on Young People: A Review of Reviews*, UK Government Department for Children, Schools and Families, January 2009

⁴⁴ Ibid.

606. The proposals for revocation of licences of offenders by Scottish Ministers are to be considered to be compatible with ECHR notwithstanding that there is a deprivation of liberty. Although the licences revoked at the instance of Scottish Ministers the case must be referred to the Parole Board, as at present, and the Board has the power in appropriate cases to direct re-release on licence. The Board is, by virtue of its constitution, an independent and impartial tribunal and consequently no issues under ECHR arise.

Part 2 - Criminal law

607. The Bill provides for “personal communication devices” to be banned in prisons. This could give rise to issues under Article 8 and Article 1 of Protocol 1. It is considered, however, that any interference is necessary in a democratic society and consequently the provisions of Article 8.2 apply. Deprivation of such property is in the public interest and consequently there is no infringement of Article 1 of Protocol 1.

608. The Bill also makes provision for creating offences of possession of extreme pornography. This could give rise to issues under Article 8 and Article 10. Any interference with rights protected by these Articles must be in accordance with and prescribed by law, for a legitimate aim and must be necessary and proportionate. Each of these tests is met as regards possession of extreme pornography.

Part 3 - Criminal procedure

609. The power to retain DNA and fingerprints from individuals not convicted of an offence raises issues under Article 8 ECHR. The issue was considered recently in the case of *S and Marper v UK* by the Court of Human Rights in Strasbourg. The Court in that case was considering the provisions of section 64 of the Police and Criminal Evidence Act 1984. The Court concluded that retention of forensic data was justified under Article 8(2) for the prevention and detection of crime. However, the Court considered that there were difficulties regarding the indefinite retention of such material. The proposals for retention of DNA and fingerprints under the Bill are considered to be compatible with ECHR on the grounds that they pursue the legitimate aim of prevention and detection of crime and protection of the health and morals of others. Measures have been put in place to ensure that the proposals are proportionate to the aims pursued. DNA and fingerprints will only be retained for an initial period of 3 years. Any extension of that period would require the authority of a Court. Forensic data taken from a child may only be retained if the child accepts that they have committed, or have been found by a Sheriff to have committed, a serious offence (a violent or sexual offence). Separate and more stringent arrangements, therefore, apply as regards DNA and fingerprints taken from children than from adults. This is considered to be compatible with the provisions of Article 8.

Part 4 – Evidence

610. Provision to permit the granting of a witness anonymity order by a Court is considered to be compatible with Article 6 ECHR notwithstanding the decision of the House of Lords in the case of *R v Davis* (2008) UK HL 36. Under Article 6 ECHR everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Permitting evidence to be led under a witness anonymity order is not *per se* incompatible with Article 6. The obligation on a Court to ensure that any criminal proceedings are “fair” will ensure that the provisions are exercised in an Article 6 compliant manner. Under Article 8

everyone has the right to respect for his or her private and family life. Consequently a witness is entitled to protection of his or her Article 8 rights. In determining whether to grant a witness anonymity order a Court will need to balance the Article 6 rights of the accused with the Article 8 rights of a witness. There is nothing in the Bill that requires a Court to grant an order in any individual case. It is considered, therefore, that the provisions of the Bill are not *per se* incompatible with the Convention and the obligation will be on the Court to apply them in an ECHR compliant manner.

Part 5 - Criminal justice

611. The power to permit Audit Scotland to undertake data matching for the purpose of protection of fraud and other purposes may give rise to Article 8 issues. It is considered that any interference with the individual's rights under Article 8 are justified and would not be disproportionate to the achievement of a legitimate aim. The onus will be on Audit Scotland as a public authority to exercise its powers in an ECHR compliant manner.

612. Provision dealing with the granting of foreign travel orders under the Sexual Offences Act 2003 may raise issues under Article 8. The maximum duration for which an FTO may be imposed is being increased but it is considered that the period specified, which is a maximum period, does not necessarily interfere disproportionately with the individual's rights under Article 8. It is considered that the measures that would need to be exercised by a Court in an ECHR compliant manner are proportionate and necessary for the reasons set out in Article 8.2.

613. Police forces currently have the power to exercise surveillance measures and it is considered that the new proposals under the Bill, while extending these powers, will not do so in a manner that necessarily would be exercised incompatibly with ECHR. The police will be required to exercise any powers conferred on them in an ECHR compliant manner and consequently the proposals are not *per se* incompatible with ECHR.

Part 6 – Disclosure

614. These provisions are designed to place the Crown's obligations to disclose information relevant to the accused's defence on a statutory footing. The provisions requiring the accused to lodge a Defence Statement may give rise to issues under Article 6 particularly with regard to the right not to self-incriminate. It is considered however that the requirement to lodge a Defence Statement is a procedural measure designed to assist the court to identify the real issues in dispute. It does not amount to self incrimination.

615. The provisions relating to the conduct of Public Interest Immunity Hearings and the granting of Non-Disclosure Orders, Exclusion Orders and Non Notification Orders could give rise to issues under Article 6, specifically the right of an accused to receive a fair trial in the context of certain parts of the trial process being conducted in the absence of the accused. It is noted however that the requirement in terms of Article 6 is to ensure that any trial is conducted in a manner that is "fair". The Court as a public authority is required to have regard to that duty. In assessing whether the proceedings are "fair" the Court has to balance the interests of the accused with the interests of third parties and the general public interest in ensuring that justice is achieved by the Court. The provisions contain a series of checks and balances that give the Court the necessary power to ensure that in any individual case these interests, which may be

conflicting, are given due weight. These include provision requiring the Court to determine the appropriate procedure and to keep that under review and the power to appoint independent “special counsel” in appropriate cases to represent the interests of the accused in circumstances where the accused is neither present nor represented by his or her own legal representative.

Part 7 – Mental disorder and unfitness for trial

616. The provisions dealing with mentally disordered persons raise issues under Article 5 of ECHR. The new defence is concerned with a question of criminal responsibility. Such provisions do not in themselves deprive an individual of his or her personal liberty. Instead they identify a category of persons who cannot be regarded as criminally liable for the acts in question. It is the disposal of such people within the criminal justice system, if convicted, that would give rise to issues under Article 5. Article 5(1)(a) permits the lawful detention of a person following conviction by a competent court. Any order imposed on an individual would be imposed by an Article 6 compliant court and consequently it is considered that the detention is lawful. The Court will be under a duty to exercise its powers in an ECHR compliant manner having regard to the competing demands imposed by *inter alia* Articles 5, 6 and 8.

Part 8 - Licensing under the Civic Government (Scotland) Act 1982

617. The application of new conditions to be attached to existing licences could give rise to an interference with the licence holder’s rights under Article 1 of Protocol 1. The Scottish Government considers that the rights can be exercised in a manner that is compatible with the licence holder’s rights and the provisions are consequently compatible with the ECHR.

Part 9 - Alcohol Licensing

618. The power to impose variations in licensing conditions under the Licensing (Scotland) Act 2005 could give rise to issues under Article 1 of Protocol 1 of ECHR. That is on the basis that the licence constitutes a “right” or “property”. However, the rights under Article 1 of Protocol 1 are not absolute and they may be interfered with in the public interest and in accordance with the law. It is considered that the “in accordance with the law” test is met and any decision to vary a licence would be undertaken by a Licensing Board. The Board would need to ensure that any interference is in the public interest and is proportionate. Consequently it would be in accordance with ECHR. The provisions are, therefore, not in themselves incompatible with ECHR but will need to be exercised in a manner that is so compatible.

Island communities

619. The Bill has no differential impact upon island communities. The provisions of the Bill apply equally to all communities in Scotland.

Local government

620. CoSLA and local authorities have been consulted on the provisions of the Bill that directly impact on them. We are satisfied that the Bill has no detrimental impact on local authorities.

This document relates to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

Sustainable development

621. The Bill will have no negative impact on sustainable development.

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CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL

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