

MEMORANDUM

CRIMINAL JUSTICE BILL

Purpose

1. This memorandum has two purposes. Firstly, to provide an update, where this is necessary, with regard to those provisions within devolved competence which were detailed in the memorandum submitted by the Scottish Executive in November 2002, when the Bill was introduced (attached as an annex to this memorandum for reference), and which the Scottish Parliament agreed on 5 December should be considered by the UK Parliament. Secondly, to provide details of new provisions in the Bill which are within the competence of the Scottish Parliament.

2. The memorandum is in four Parts. Part 1 gives general background on the Bill, Part 2 provides update information, where this is required, on those matters covered in the original memorandum and Part 3 describes those provisions where consideration is required for matters within devolved competence which have (a) been added since introduction, or (b) where there are implications which were not clear at the point of introduction and which were therefore not detailed in the original memorandum. Part 4 contains the Executive's consideration of the matters discussed in the memorandum.

PART 1

The Bill: background and contents

3. The Criminal Justice Bill, which was introduced in the House of Commons on 21 November 2002, is the legislation which has emerged from the consultation which took place through the White Paper 'Justice for All', published in July 2002. (CM 5563) The White Paper set out the options which the UK Government had in mind with regard to reforms to the criminal justice system in England and Wales. It took account of Lord Auld's report into the practices and procedures of the criminal courts in England and Wales and also the Halliday report into sentencing framework, but also covered a wider spectrum of criminal justice issues, including police reform.

4. The Bill consists of a package of reforms to the criminal trials process from charge to verdict, including a package of reforms to the sentencing framework providing new sentencing options, provisions addressing drug-related offending, and juvenile sentencing. The Bill is a mix of new provision and re-enactments of previous legislation. The provisions of the Criminal Justice Bill, relating as they do to reforms to the criminal justice system in England and Wales (with limited application to Northern Ireland), do not therefore generally apply in Scotland. The limited exceptions to this were detailed in the Sewel memorandum submitted by the Executive in November 2002. These were in relation to search warrants in serious fraud investigations, certain reporting restrictions where it was desirable to have UK wide application and provision in relation to the situation where suspended sentences given out by the courts in England and Wales were breached while the individual concerned was in Scotland. The Scottish Parliament agreed on 5 December 2002 that, although it would have been within their competence to legislate on these matters, in this instance it was appropriate for the necessary provision to be included in the Criminal Justice Bill.

PART 2

Update information

Part 9 - Reporting restrictions in relation to prosecution rights of appeal

5. The memorandum submitted by the Executive in November 2002 described the provisions in Part 9 of the Bill which were to give the prosecution a right of appeal against judicial rulings that terminate the case early, before the jury had been given the opportunity to consider the evidence, and the reporting restrictions associated with certain parts of the procedure. It was explained that, in order to preserve the integrity of the trial process and ensure that if the appeal was successful matters prejudicial to the continuing or fresh trial were not reported, it was proposed to restrict press and media reporting of the procedures relating to the appeal application and the appeal itself. Other matters relating to the trial would continue to be able to be reported, subject to any normal reporting restrictions which may apply. Details of the appeal would be able to be reported at the conclusion of the trial. Where there is one defendant, the trial judge, the Court of Appeal and the House of Lords would all have the power to vary the restrictions after taking into account any objections from the defendant. In order to make them effective, the Scottish Parliament agreed that the provisions in relation to reporting restrictions contained in Part 9 of the Bill would apply in Scotland as in the rest of the UK.

6. It has since been proposed that a further category of appeal should be added. The original appeal scheme in the Bill applied only to judicial rulings which would terminate the case before the jury had considered the evidence. The further category applies to non-terminating evidential rulings, made up to the end of the prosecution case, which would result in prosecution evidence being excluded and so significantly undermine the prosecution case. This category will apply both to single rulings and to a series of rulings which are together significantly undermining. Given that the principle behind the reporting restrictions remains the same, that is, to preserve the integrity of the trial process by ensuring that matters prejudicial to the trial are not reported before it is appropriate, it is proposed that the reporting restrictions which apply to appeals against terminating rulings should apply equally to the non-terminating category.

Part 10 - Reporting restrictions in relation to retrial for serious offences

7. The Bill also makes provision, in Part 10, to enable a fresh prosecution to be pursued for certain serious offences where new evidence may cast doubt on an acquittal. Reporting restrictions were proposed in these instances to combat the risk of prejudicing the subsequent proceedings, so that the press and media would be prevented from reporting an application for a retrial or the details of the application. These were to last until the application was dismissed or the retrial finished. The purpose of the restrictions was to try to ensure that a fair trial could take place and in particular to ensure that any potential jury was not prejudiced. As with the reporting restrictions on prosecution appeals, in order to make them effective it was proposed, and the Scottish Parliament agreed, that they should apply in Scotland as in the rest of the UK.

8. However, as the Bill has proceeded the reporting restrictions regime has been modified so that the restrictions no longer apply automatically, but instead apply at the discretion of the Court of Appeal. This is because Ministers considered that it may be

necessary in the interests of justice for the Court to apply reporting restrictions at an earlier stage in a re-investigation than could readily be specified on the face of the Bill. The Court will decide whether such restrictions are required, and their content and duration, according to what is necessary in the interests of justice. Any such orders are to be enforceable in the same way as any other court order, by exercise of the court's contempt jurisdiction. However, given that the jurisdiction of the Court of Appeal does not extend to Scotland, there would be no basis for contempt proceedings in relation to a breach of an order occurring in Scotland. It is considered, therefore, that further provision in relation to the enforcement of such orders is required for the restrictions to continue to apply in Scotland, as already agreed by the Executive and the Scottish Parliament. It is proposed, therefore, to introduce an offence relating to breach of the order, which will be enforceable in the jurisdiction in which the breach occurred. Thus, any breach of an order in Scotland would be an offence in Scots law and would allow prosecution in the Scottish courts. These provisions will, therefore, have the same practical effect as those contained in the Bill at introduction and are in fact similar to the enforcement provisions in respect of reporting restrictions in the Youth Justice and Criminal Evidence Act 1999.

Part 12 - Transfer of Suspended Sentence Orders

9. The previous memorandum described the provisions in Part 12 of the Bill for suspended sentence orders. The suspended sentence is a custodial sentence, which is suspended for a specified period while the offender undertakes certain community requirements imposed by the court, for example requirements to perform unpaid work or comply with a curfew. The suspended sentence order contains these community requirements. The suspended custodial sentence will not be activated unless, during the supervision period, he fails to comply with a community requirement or he commits another offence.

10. A new Schedule makes provision so that if the offender is, or will be, living in Scotland at the point of sentence or while he is subject to the community requirements, the England and Wales court may not make a suspended sentence order unless it is satisfied that arrangements exist for those community requirements to be complied with in the area in which the offender lives or intends to live in Scotland. Where the England and Wales court makes or amends an order in order for it to be complied with in Scotland, supervision of the requirements becomes the responsibility of a local authority in Scotland.

11. The Scottish courts are also given power to amend the community requirements of a suspended sentence order if, during the period of supervision in Scotland, the offender or supervising officer makes application to the court. Additionally, if the offender breaches the requirements of the order, the court in Scotland will be able to consider and determine the breach and, where necessary, require the offender to appear before the court in England and Wales to determine whether there has been a breach and send a report to that court. The England and Wales court retains responsibility for implications of the breach and activating the suspended custodial sentence. This avoids the need for the local authority supervising officer and the offender to travel to courts in England and Wales for hearings in relation to breach or amendment and gives the courts in Scotland similar powers to those which they already have in relation to the transfer of community orders (previously probation and community service orders) from England and Wales to Scotland, except that Scottish courts can deal with the consequences of a breach of a community sentence.

PART 3

New provisions

Part 6 - Reporting restrictions in relation to allocation and sending of offences

12. Part 6 of the Bill amends the procedure to be followed by Magistrates' Courts in determining whether cases triable either way should be tried summarily or on indictment, and provides for the sending to the Crown Court of those cases which need to go there. The new procedures are designed to enable cases to be dealt with in the level of court which is appropriate to their seriousness, and to ensure that they reach that court as quickly as possible. Certain UK wide reporting restrictions already apply to the current arrangements. These are, section 8 of the Magistrates' Court Act 1980, section 11 of the Criminal Justice Act 1987, paragraph 6 of Schedule 6 to the Criminal Justice Act 1991 and paragraph 3 of Schedule 3 to the Crime and Disorder Act 1998. The purpose of these reporting restrictions is to prevent the publication of information disclosed in pre-trial proceedings which might prejudice the subsequent trial.

13. Under the new arrangements, the reporting restrictions in section 8 of the Magistrates' Court Act 1980 will be replaced by a similar provision to cover the proceedings in the Magistrates' Court up to the point where a case is sent to the Crown Court, and the provisions in Schedule 3 to the Crime and Disorder Act 1998 will be amended so that they will apply to any application for dismissal. This latter measure will replace the reporting restrictions in the Criminal Justice Act 1987 and the Criminal Justice Act 1991, although those in the 1987 Act will not be repealed, but will be retained insofar as they apply to preparatory hearings in serious fraud cases. It is proposed that these amended provisions apply UK wide, as with their predecessors, and thus to retain the status quo in that respect. The provisions in the Bill relating to allocation were included at introduction, but the detail relating to reporting restrictions has been included only as the Bill has proceeded.

Part 12 - Transfer of Adult Mandatory Life Prisoners from England and Wales to Scotland

14. Schedule 1 to the Crime (Sentences) Act 1997 ("the 1997 Act") makes provision for the transfer of prisoners, including life prisoners, between different jurisdictions in the UK. Broadly, there are two types of transfer: those requested by the prisoner, which involve the transfer of a period of custody and/or post-release supervision (usually on a permanent basis), and those at the discretion of the responsible Minister, which will typically be temporary and include transfers to face trial, to attend court as a witness or to take part in a public inquiry. We are here concerned only with the former type.

15. Transfers may be made on a *restricted* basis (under which the prisoner remains subject to law of the sending/sentencing jurisdiction for the purposes of release and/or supervision) or on an *unrestricted* basis (under which the prisoner becomes subject to law of the receiving jurisdiction for all purposes, being treated as if he or she had been sentenced to an equivalent sentence by a court in that jurisdiction). The decision as to whether a transfer should be restricted or unrestricted is at the discretion of the Minister making the transfer, namely, the responsible Minister in the sending jurisdiction. A policy statement was agreed by Ministers in October 1997, which states that where there is no effect on the sentence or on any post-

release supervision requirement (i.e. no increase or reduction), a transfer will normally be granted on an unrestricted basis. Further, although the legislation does not require the consent of the Minister in the receiving jurisdiction, the policy statement provides that a transfer should not be made unless the agreement of the receiving jurisdiction has been obtained.

16. At present, in English law, those sentenced to mandatory life imprisonment for a crime committed when aged 18 or over are subject to release at the discretion of the Home Secretary. Following the House of Lords' decision in *R v Secretary of State for the Home Department ex parte Anderson* [2002] 4 All ER 1089, which ruled that the Home Secretary's involvement in the early release of adult mandatory life sentence prisoners was incompatible with such prisoners' rights under article 6 ECHR, the Home Secretary has announced various changes to the law. The essential effect of the relevant provisions in Part 12 of the Bill and in Schedules 17 and 18 is to remove the Home Secretary from sentencing matters (i.e. fixing the tariff) and to give this role to the courts, who will set a "minimum term" which prisoners must serve before being eligible for release on licence. In addition, the Home Secretary's discretion as to whether or not to accept a release recommendation from the Parole Board will be removed and a direction from the Board will be binding on him.

17. The result of these provisions is, broadly, to bring English law into line with the changes to Scots law made by the Convention Rights (Compliance) (Scotland) Act 2001. Section 1(3) of that Act amended section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") so as to require a court which sentenced an adult to a mandatory life sentence to specify the "punishment part" of the sentence. When the punishment part has expired, the case must be reviewed by the Parole Board, whose direction for release is binding on the Scottish Ministers.

18. Once the Bill's provisions come into force, those prisoners affected by them will, as with any other prisoner sentenced under English law, be eligible for transfer to Scotland under the transfer provisions set out in Schedule 1 to the 1997 Act. They will, under the existing legislation, be able to transfer on a restricted basis, but the policy intention is that, in appropriate cases, there should also be the option of an unrestricted transfer. In order to provide for this we need to make some modifications to section 10 of the 1993 Act (which deals with life prisoners transferred to Scotland from other jurisdictions). Essentially, we require to provide a legislative mechanism for the minimum term given to prisoners under the new sentencing proposals to be treated, on an unrestricted transfer, as a punishment part. That will then permit the Scots early release law to apply to such prisoners. We also need to make changes so that those who fall within the transitional cases dealt with in Schedule 18 are appropriately provided for and may transfer on an unrestricted basis.

19. An exception to this is those life prisoners in respect of whom a whole life minimum term is set. For them there can be no *unrestricted* transfer. This is because there is no "equivalent sentence" which can be passed by a Scottish court, as section 2 of the 1993 Act requires a court in Scotland to specify the punishment part in terms of years and months and not as an indeterminate period. For this reason, we consider that those with a whole life order will only be able to transfer on a *restricted* basis. (It is not considered that any change to legislation is needed to provide for this, as it follows from the terms of the 1997 Act.)

Part 12 – Transfer of Prison Sentences

20. This provision is a minor addition to the package of measures in the Bill dealing with transfers of prisoners within the UK. The provision will repeal paragraph 15(5) of Schedule 1 (*Unrestricted transfers: general*) to the Crime (Sentences) Act 1997 (“the 1997 Act”).

21. Paragraph 15(5) of Schedule 1 to the 1997 Act relates to the treatment of prisoners who will be transferring to Scotland on an unrestricted basis and provides that where the transfer is to include supervision in the community, the person to whom the transfer relates shall be treated as if a supervised release order had been made in respect of him by a court in Scotland specified by Scottish Ministers. (The reference in paragraph 15(5) to the Secretary of State is to be construed as a reference to the Scottish Ministers by virtue of the Scotland Act 1998 (Consequential Modifications) (No.2) Order 1999, Schedule 2, paragraph 130(10)(b) (S.I. 1999/1820)).

22. A supervised release order is a court order provided for by section 209 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), which comprises a period of imprisonment followed by a period of supervision in the community not exceeding the term of the prison sentence nor 12 months, whichever is the shorter. A supervised release order can be imposed "where the court considers that it is necessary to do so to protect the public from serious harm".

23. It appears that provision in paragraph 15(5) covering transfers into Scotland was introduced in the 1997 Act as part of the package of measures surrounding the introduction of Release Supervision Orders in England and Wales. The RSO provisions were similar to those of a supervised release order. In the event, the RSO provisions were never brought into force and the provision was later repealed. However, paragraph 15(5) survives in force.

24. The continued existence of this paragraph is considered undesirable and poses a number of legal, policy and practical difficulties for the Scottish Ministers in its operation. Thus, the opportunity is being taken now to repeal the provision and the repeal will form part of the wider changes to the regime for the transfer of prisoners to be made in the Bill. For that reason, the Bill provides a suitable early opportunity to make the repeal and this is considered preferable to waiting for an opportunity in the Scottish Parliament, which is unlikely to arise in the near future.

25. The repeal of the provision does not significantly affect the powers of the Scottish Ministers, who may still deal with prisoners transferred to Scotland from England and Wales in accordance with provision elsewhere in Schedule 1 to the 1997 Act.

Part 12 - Transfer of Community Sentences

26. Part 12 of the Bill contains provisions for the introduction in England and Wales of the new community order, which replaces the current range of community sentences in operation there. Essentially, the courts, in imposing a community order, will have the ability to impose a range of supervision requirements including, for example, unpaid work, drug rehabilitation, curfew and electronic monitoring requirements. The equivalent community disposals in Scotland are principally probation and community service orders.

27. Schedule 8 makes provision to allow courts to impose a community order on an offender, who is or will be living in Scotland, subject to being satisfied that arrangements exist for those community requirements to be complied with in the area to which the offender lives or intends to live in Scotland. The range of requirements which may be imposed in transfer cases is more restricted than can be applied in England and Wales because some of the options for supervision requirements, such as attendance centres, do not exist in Scotland. Where an order is made by a court in England and Wales together with a requirement that it be complied with in Scotland, the appropriate Scottish local authority assumes responsibility for supervision of the requirements.

28. Community orders which transfer to Scotland are to be treated as if they are corresponding orders of the Scottish courts and the Scottish legislation in relation to such orders is to apply. Subject to certain exceptions, Scottish courts may exercise any power in respect of the transferred order which they could exercise in relation to the corresponding order in Scotland. This means that the Scottish court may not only amend where required the supervision requirements of the order, but may also deal with the consequences of a breach of any of the community requirements.

29. The powers available to Scottish courts in respect of community orders remain as hitherto in dealing with transferred probation orders and community service orders (known more recently as community rehabilitation and community punishment orders) from England and Wales.

30. The Bill also gives rise to minor consequential amendments for the transfer of community sentences from Scotland to England and Wales. Specifically, provision will be needed for the Scottish court to specify what are the corresponding requirements for any probation order, which transfers to England and Wales.

Part 12 - Transfer of Custody Plus Orders to Scotland

31. Part 12 of the Bill makes provision for custody plus orders, which are sentences consisting of between 14 and 90 days in custody within an overall sentence length of between 28 and 51 weeks. All of the time not spent in custody is spent on licence. The licence will have conditions set by the court. If the licence conditions need to be altered an application has to be made by the court. Failure to comply with a licence condition leads to an administrative recall to prison. The Parole Board will scrutinise the recall and determine the date of release. The court is not involved.

32. Custody plus is a prison sentence and as such the Secretary of State must have the final say as to whether it transfers or not. The Bill provides that when the court is imposing a custody plus order and the offender is to reside in Scotland the court may ascertain whether the requirements it wishes to include can be complied with in the area of Scotland in which the offender wishes to reside. This is done in consultation with the Scottish local authority in the area in which the offender resides or wishes to reside. If the Secretary of State decides not to transfer the offender, he must return the offender to court to amend the order so that the licence conditions can be served in England and Wales.

33. If the offender applies for a transfer after the sentence is imposed, the Secretary of State will first indicate whether he would be willing to transfer the offender if the licence conditions can be amended to allow them to be complied with in Scotland. The court can

then amend the order. The Secretary of State still has the final decision as to whether the offender will transfer. This decision is made, as currently, in consultation with the Scottish Prison Service.

34. Provision is also made for further amendment or revocation of a transferred custody plus order to be dealt with by application in writing to the England and Wales court. In cases where the offender contests the proposed amendment to the licence requirements the court in Scotland will be given the power to consider the application, therefore limiting the necessity for supervising officers and offenders to travel to courts in England and Wales.

35. The provisions in this part of the Bill relating to custody plus also refer to intermittent custody orders. Intermittent custody orders will be transferred and treated on the same basis as custody plus orders, with only the licence period following the last custodial period being transferred to Scotland.

PART 4

Summary and consideration

36. The Executive considers that the provisions within devolved competence in the Criminal Justice Bill agreed to by the Scottish Parliament on 5 December 2002 should continue to be dealt with by the UK Parliament. This is the case with the reporting restrictions in prosecution appeals and in re-trial for serious offences, where no new issues of substance are raised by the changes which have been made in the Bill as it has progressed. The provisions in relation to transfer of the suspended sentence order are similar to the regime already in place (by virtue of Schedule 4 to the Powers of Criminal Courts (Sentencing) Act 2000, to be repealed and replaced by Schedule 8 to the Bill) for the transfer of community orders, which provides that the court in Scotland can deal with amendment or breach of the order, and no new issues of substance are raised by the changes.

37. The Executive also believes that those aspects which are within devolved competence in respect of the new matters detailed in this memorandum should be considered by the UK Parliament as well. With regard to UK wide reporting restrictions in the allocation and sending of offences, the proposed new arrangements are similar in effect to those they replace and no major issues of principle are raised for Scotland. As far as the transfer of adult mandatory life prisoners from England and Wales to Scotland is concerned, the modifications that would be made in the Bill to section 10 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 would enable the desired policy governing the transfer of such prisoners to be maintained. In addition, the transfer arrangements can be seen as part of the package containing the new sentencing provisions, and so it is considered appropriate that they are also included in the Bill. The repeal of paragraph 15(5) of Schedule 1 to the Crime (Sentences) Act 1997, as part of the package containing the new arrangements for transfer of prisoners, removes a provision which is considered now to be unnecessary and removes the difficulties which the continued operation of that provision would pose for the Scottish Ministers. It is considered appropriate that the repeal is included in the Bill. In relation to the transfer of community orders to Scotland, the provisions in Schedule 8 to the Bill are necessary to reflect the changes to the nature of community orders in England and Wales provided for in Part 12 of the Bill. It is therefore considered appropriate that they are included in the Bill. The powers of the Scottish courts under the new arrangements in the Bill are similar to those that they already have currently in relation to the transfer of the

community sentences under existing arrangements. As with suspended sentences, the courts will have the power to deal with amendment of the requirements of custody plus and intermittent custody orders, where the proposed amendment is contested by the offender, and this is similar to the regime already in place.

38. Finally, these provisions are not expected to have substantive financial implications for Scotland. The use of suspended sentences and custody plus orders will be determined by the courts in England and Wales. Both are new sentences and where transfer to Scotland takes place will place a supervision requirement on Scottish local authorities for the first time. At this stage it is not possible to give definitive projections of likely numbers and costs, but the number of transfers is likely to be small and the average cost of supervision is around £2,000 per case per annum.

**Scottish Executive
September 2003**

ANNEX – SEWEL MEMORANDUM CRIMINAL JUSTICE BILL, NOVEMBER 2002

Purpose

1. To provide details of the Criminal Justice Bill and to highlight those provisions which are within the competence of the Scottish Parliament and which the Parliament is invited to agree should be considered by the UK Parliament.

The Bill: background and contents

2. The Criminal Justice Bill, which was introduced in the House of Commons on 21 November, is the legislation which has emerged from the consultation which took place through the White Paper 'Justice for All', published in July 2002. (CM 5563) The White Paper set out the options which the UK Government had in mind with regard to reforms to the criminal justice system in England and Wales. The White Paper took account of Lord Auld's report into the practices and procedures of the criminal courts in England and Wales and also the Halliday report into sentencing framework, but also covered a wider spectrum of criminal justice issues, including police reform.

3. The Bill consists of a package of reforms to the criminal trials process from charge to verdict, including a package of reforms to the sentencing framework providing new sentencing options, provisions addressing drug-related offending, and juvenile sentencing. The Bill is a mix of new provision and re-enactments of previous legislation. It is in 14 Parts as follows:

- Part 1 – makes amendment to the Police and Criminal Evidence Act 1984 such as extension of powers to stop and search.
- Part 2 - makes certain provision in relation to bail, such as grant and conditions.
- Part 3 – contains measures in connection with conditional cautions given by the police.
- Part 4 – deals with the charging and release of persons in police detention and introduces a new method of instituting proceedings.
- Part 5 – makes various provision with regard to disclosure, including initial duties of disclosure by the prosecutor, defence disclosure and contents of defence statement.
- Part 6 – makes provision related to the allocation and transfer of offences, for instance, the transfer of cases to the Crown Court.
- Part 7 – makes certain arrangements in connection with trial procedure, including application by the prosecution for complex or lengthy trials, or where there is danger of jury tampering, to be conducted without a jury.
- Part 8 – deals with the provisions necessary to enable live links to be used in criminal proceedings, including matters relating to rules of court.
- Part 9 – is about prosecution appeals and includes restrictions on reporting and offences where this is contravened.

- Part 10 – makes provision for retrial for serious offences and covers matters such as new evidence, the interests of justice, restrictions on reporting and offences where this is contravened.
- Part 11 – on evidence, consists of three Chapters, the first in relation to evidence of “bad character”, the second dealing with hearsay evidence and its admissibility, and the third is supplementary.
- Part 12 – on sentencing, consists of 8 Chapters. Chapter 1 makes certain general provisions about sentencing, such as its purpose, reductions in sentences for guilty pleas, increases for racial or religious aggravation, definition of community sentence, etc. Chapter 2 deals with community orders and Chapter 3 with prison sentences of less than 12 months. Chapter 4 makes further provision about orders given under Chapters 2 and 3, such as the duties of a responsible officer, unpaid work requirement, drug rehabilitation requirement, etc. Chapter 5 makes provision in connection with dangerous offenders and, for example, specifies relevant offences. Chapter 6 deals with the release of prisoners on licence and includes provision for recall. Chapter 7 makes other provision about sentencing, such as deferment, and Chapter 8 is supplementary.
- Part 13 – miscellaneous, contains various provision such as guilty pleas and non-attendance at court, jury service, etc.
- Part 14 – general, deals with matters such as orders and rules, commencement, etc.

Matters within devolved competence

4. The provisions of the Criminal Justice Bill, relating as they do to reforms to the criminal justice system in England and Wales (with limited application to Northern Ireland), are almost entirely outwith the competence of the Scottish Parliament. There are, however, a few exceptions to this as explained in paragraphs 5 to 12 below.

Certain provision in relation to search warrants

5. The purpose of the proposed amendment, in Part 1 of the Bill, to section 2 of the Criminal Justice Act 1987, is to enable an “appropriate person” (either a member of the Serious Fraud Office or some other person authorised by the Director) accompanying a constable who is executing a search warrant under that section to exercise certain powers. These are the same powers that are currently available to the constable and amount to entering and searching premises and taking possession of or preserving documents. The appropriate person will only be able to exercise these powers in the company, and under the supervision, of a constable. Section 2 of the 1987 Act already extends to Scotland and it is proposed that this amendment will have similar extent. This will mean that where a fraud investigation is being undertaken by the Director of the Serious Fraud Office in England and Wales and Northern Ireland, the powers available to investigators acting on his behalf are consistent across the UK. As a matter of practice such warrants would not be executed without the involvement of Scottish police officers.

Reporting restrictions

6. The Bill makes provision, in Part 9, to give the prosecution a right of appeal against judicial rulings that terminate the case early, before the jury has been given the opportunity to consider the evidence. The prosecution will be able to appeal such rulings made either at the pre-trial hearing or during the trial up to the conclusion of the prosecution case. It is proposed that there will be an interlocutory appeal system, which means that, depending on the circumstances of the case, either the trial will be adjourned or the jury will be discharged pending the outcome of the appeal. If the appeal is successful either the original trial will resume or a fresh trial will take place. Unsuccessful appeals will result in the acquittal of the defendant.

7. In order to preserve the integrity of the trial process and ensure that, if the appeal is successful, matters prejudicial to the continuing or fresh trial are not reported, it is proposed to restrict press and media reporting of the procedures relating to the appeal application and the appeal itself. Other matters relating to the trial would continue to be able to be reported. Details of the appeal would be able to be reported either at the conclusion of the appeal, if this resulted in the acquittal of the defendant, or at the conclusion of the trial, if the appeal was successful. Both the trial judge and the Court of Appeal will have power to vary the restriction after taking into account any objections from the defendant. Provisions in relation to such reporting restrictions are contained in Part 9 of the Bill and, in order to make them effective, it is proposed that these would apply also in Scotland.

8. The Bill also makes provision, in Part 10, to enable a fresh prosecution to be pursued for certain serious offences where new evidence may cast doubt on an acquittal. It is also proposed to bring in reporting restrictions in these instances to combat the risk of prejudicing the subsequent proceedings, so that the press and media would be prevented from reporting an application for a retrial or the details of the application. This would last until the application was dismissed or the retrial finished. Provisions in relation to such reporting restrictions are contained in Part 10 of the Bill and it is proposed that they apply to Scotland.

9. Finally, Part 13 makes certain changes in relation to reporting restrictions for preparatory hearings held in long and complex fraud cases so that these extend to Northern Ireland, which is not covered in the present legislation. The current legislation does extend to Scotland and it is proposed that this will continue to be the case in this re-enactment.

Certain provisions in relation to breach of sentence

10. Part 12 of the Bill makes provision in relation to sentencing. In particular, Chapter 3 makes certain arrangements in relation to prison sentences of less than 12 months and, *inter alia*, certain provision in relation to breach, revocation or amendment of suspended sentence order, and the effect of a further conviction. Where an offender is convicted in Scotland of an offence, and the court is informed that the offence was committed during the operational period of a suspended sentence passed in England and Wales, then it is proposed that the court must intimate the notice of the conviction to the court where the suspended sentence was passed. This is, in fact, a re-enactment of current provision in this respect.

Other sentencing matters

11. Chapter 7 of Part 12 makes certain miscellaneous changes to sentencing provision. Within these changes there are provisions made in relation to the alteration of maximum penalties for summary and either way offences, including amendment of paragraph 1 of schedule 2 of the European Communities Act 1972, which extends to Scotland. However the changes to that paragraph only alter the maximum penalties in relation to England and Wales.

Amendments

12. Finally, there are minor and consequential amendments to the Criminal Procedure (Scotland) Act 1995 and the Social Work (Scotland) Act 1968 to take account of the new definition of community order in England and Wales.

Consideration and proposal

13. The Executive considers that the matters within the Criminal Justice Bill that are within devolved competence should be considered by the UK Parliament. The Bill itself is concerned with changes to the criminal justice system in England and Wales, and there are no substantive changes to Scots law. In the interests of justice there is, however, a good argument that reporting restrictions should apply to the new procedures identified above across the UK and on a consistent timescale. It would be undesirable for gaps to be left in reporting restrictions, for example, after the legislation is passed and pending future legislative opportunities in the Scottish Parliament. The Executive therefore considers that the Sewel route is appropriate to cover reporting restrictions. On grounds of consistency and also in the interests of justice it is also proposed to extend to Scotland the provisions on search warrants. The provisions with regard to sentencing maintain the status quo as far as Scotland is concerned and other amendments are minor and consequential.

Scottish Executive
November 2002